

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**DR. B. DAVID RIDPATH,
Plaintiff,**

**Case No. 3:03-cv-02037
Hon. Robert Chambers**

v.

**BOARD OF GOVERNORS
MARSHALL University,
DAN ANGEL, BOB PRUETT,
F. LAYTON COTRILL, ESQ.,
and EDWARD GROSE,**

Defendants.

**DR. RIDPATH'S RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT FILED
BY DEFENDANTS BOARD OF GOVERNORS MARSHALL UNIVERSITY, DAN
ANGEL, F. LAYTON COTRILL AND EDWARD GROSE**

Comes now the Plaintiff, B. David Ridpath, by counsel and responds to Defendants' Motion for Summary Judgment. The arguments in support of this response are listed below.¹

FACTS

In November 1997, David Ridpath was hired as the Compliance Director of Marshall University's Athletic Department. In this position, Dr. Ridpath took all the necessary measures to ensure that the athletic department was in compliance with NCAA regulations.² These measures included developing a policy manual for the compliance department, and establishing committees to integrate NCAA compliance within the missions of various university programs. In fact, Dr. Ridpath was praised by the associate commissioner of the Mid American Conference

¹Dr. Ridpath is filing a separate response to Defendant Pruett's Motion for Summary Judgment.

²See pgs. 52-54 of Ridpath's Deposition attached as Exhibit 1 and the NCAA Public Infraction Report for Marshall University, attached as Exhibit 2.

for his efforts in the area of compliance.³

Dr. Ridpath also held regular meetings with coaches, administrators, and student athletes, to educate them on NCAA rules and encouraged them to use him as a resource, and to ask questions when needed. Dr. Ridpath also kept in daily contact with the football program (the most high-profile division of the athletic department). This contact included monitoring the employment of student athletes and facilitating a dialogue between the football coaching staff and the compliance office, in order for them to be certain to report any student athlete employment and avoid any possible violations.⁴

Despite Dr. Ridpath's efforts to monitor the athletic department and encourage compliance, the football program was repeatedly entangled in problems. In July of 1999, it was discovered that football players were provided with advanced copies of tests, ostensibly to allow players with poor grades to raise their grade point averages. As soon as this was discovered, Dr. Ridpath and the university reported this issue to the NCAA, which in turn launched an investigation.

In the middle of this investigation, another problem was discovered with the football program. This time, it was discovered that, since 1992, the football program had been directing academically ineligible players (known as Proposition 48 athletes or "props") to seek employment with a major athletic booster, Marshall Reynolds. In turn, Mr. Reynolds would pay

³Specifically, in December of 1999 the Senior Associate Commissioner of the MAC wrote: "The work of David Ridpath has effectively coordinated many diverse functions within the University that must be directed with a compliance oversight. His organizational skills and personal style has greatly aided the compliance responsibilities of Marshall University." See also Dave Reed's letter to attorney , attached as Exhibit 3.

⁴ See pg. 5 of Cottrill's Deposition ; pgs. 113-114 of Pruettt's Deposition and pgs. 54-56 of Ridpath's Deposition, Cottrill attached as Exhibit 4 and Pruettt attached as Exhibit 5.

these athletes well-above the market rate to perform very low skill level jobs.⁵

As one can imagine, this “jobs program” (as it was referred to by Coach Pruett and Mr. Reynolds) was a major NCAA violation, in that it had the football program directing athletes to jobs that paid them special benefits.

Despite all of the efforts that Dr. Ridpath made to monitor these programs and encourage reporting of all student-athlete employment, neither Coach Pruett or anyone on the football staff ever reported this “jobs program” to the compliance office.

Once this violation was discovered, Dr. Ridpath was part of an effort to immediately report it to the NCAA and the Mid-American Conference. The NCAA, which was still in the process of investigating the academic fraud issue, then began an additional investigation into these prohibited employment practices.

At this point, Dr. Ridpath was in the unenviable position of having to defend the football program and the university against two potential NCAA sanctions for illicit practices that appeared to have been kept hidden from him.⁶

On top of that, the university further kept Dr. Ridpath in the dark by requiring him to participate in the NCAA investigation without giving him the tools to properly investigate.⁷ During the investigation, Dr. Ridpath was not allowed to personally interview witnesses or investigate facts related to the “jobs program.” Further, university administrators prohibited Dr. Ridpath from interviewing Marshall Reynolds, the booster whose companies were at the heart of

⁵ See pgs. 18 and 25 of Reynold’s Deposition, attached as Exhibit 6.

⁶See pgs. 271-273 of Ridpath’s Deposition, attached as Exhibit 1.

⁷ See pgs. 284,285 and 479 of Ridpath’s Deposition , attached as Exhibit 1.

the “jobs program.”⁸

After being kept in the dark during the investigation, the university again called on him to come to its aid, this time at the NCAA infractions hearing, which was held on September 22, 2001. Prior to this hearing, Dr. Ridpath was told to vigorously defend the university and did so through the course of a lengthy hearing where he was continually pounded with tough and pointed questions.⁹

At the conclusion of the hearing, Mr. Grose met with Dr. Ridpath and encouraged him to transfer to a position in judicial programs. At that meeting, the two negotiated terms of an agreement that included requiring Dr. Ridpath to transfer to the position of Judicial Programs Director, where he would be given an increase in salary (and be paid more money than his predecessor).¹⁰

Dr. Ridpath was reluctant to move out of his chosen field of intercollegiate athletics and was also worried that this transfer would reflect poorly on him and look like a remedial measure to address the NCAA infractions issue. Mr. Grose ensured Dr. Ridpath that he would be publicly praised for his actions and that the university would not tell the NCAA that the transfer was a result of any wrongdoing on his behalf.¹¹

Although the Defendants claim this transfer was offered out of sympathy for Dr. Ridpath, it appears that this transfer option was suggested in order to warehouse and silence Dr.

⁸See Ridpath Affidavit, attached as Exhibit 7.

⁹See Ridpath Deposition at pgs. 278-279.

¹⁰See pg. 47 of Grose’s Deposition, attached as Exhibit 8.

¹¹See pg. 65 of Grose’s Deposition, and pgs. 23, 201, 202 and 238 of Ridpath’s Deposition.

Ridpath, in order to discourage him from publicly denouncing the university. Despite his reluctance, Dr. Ridpath accepted the transfer and was reassigned to Judicial Programs on October 1, 2001.

Approximately two weeks later, Dr. Ridpath learned that the university had reneged on its promise and had informed the NCAA that Dr. Ridpath was reassigned because of his tone and tenor at the hearing and his failure to properly monitor the employment of student athletes. The university further characterized his reassignment as a “corrective action” taken in an effort to mitigate the penalties that they anticipated would be assessed against them.¹²

In other words, the university made Dr. Ridpath a sacrificial lamb, a person whom they could pin the blame on, in order to avoid greater sanctions.

Understandably, Dr. Ridpath was very upset at the university for breaking its contract and putting a blight on his reputation. Dr. Ridpath repeatedly went to various university officials to confront them about this “corrective action” label and to discuss with them a possible solution.¹³

In these discussions, Dr. Ridpath mentioned the possibility that he would go public to clear his name. At that point, he received multiple threats from university officials. President Angel told Dr. Ridpath that if he commented publicly on the corrective action issue that he would, “cut the dead limb from the tree” and “would have no problem firing [him] on the spot.”¹⁴ Mr. Grose further threatened: “If you do anything to resurrect this [NCAA issue] I will bury you

¹²See pgs. 25, 26 of the Ridpath Deposition.

¹³See pgs. 317-319 of the Ridpath Deposition.

¹⁴See pgs. 315-316 of the Ridpath Deposition, and Kevin Klotz’s Affidavit, attached as Exhibit 9.

personally and professionally.”¹⁵ Senior Vice President Layton Cottrill added: “You have no say in this matter. You need to think about your family, young man.”^{16 17}

After his reassignment to Judicial Affairs, Dr. Ridpath continued teaching in the capacity of adjunct professor. In the Spring of 2002, Dr. Ridpath taught P696, a seminar concerning intercollegiate athletics. In teaching this class, Dr. Ridpath used examples from universities that had incurred NCAA infractions to illustrate different points on how to avoid these pitfalls. Specifically, Dr. Ridpath used Marshall University, among many other universities as examples.¹⁸ On July 14, 2003, Jeff Chandler, the department head, told Dr. Ridpath that he was not going to teach his class in the fall.¹⁹ It later became apparent that the Defendants terminated Dr. Ridpath’s teaching position because he was being critical of the university in his class.²⁰

ARGUMENT

a. Acting Under Color of Law

Defendants were acting under color of law when they violated Dr. Ridpath’s constitutional rights. The Defendants argue that, in characterizing Dr. Ridpath’s transfer as a corrective action to the NCAA, President Angel was not acting under color of state or federal law, but under color of NCAA regulation. Accordingly, they argue that this characterization relieves them of the duty to provide Dr. Ridpath with due process.

¹⁵See pg. 314 of Ridpath Deposition.

¹⁶*Id.*

¹⁷See Grose Deposition at 47-48.

¹⁸Level IV Grievance Transcript at 13-34, attached as Exhibit 10.

¹⁹*Id.*

²⁰Level IV Grievance Transcript at 93-94, and Level III Grievance Transcript at 74. (Exhibit 11) Dr. Chandler admits that he denied Dr. Ridpath the opportunity to teach the class because of the rumors that he had been critical of the university. And in Level IV Grievance Transcript at 132 John Kiger, an associate professor, testified that Dr. Chandler had concerns about Dr. Ridpath speaking critically of the university in class.

However, there is no doubt that Defendants acted under color of law. The Supreme Court has stated that “color of law includes misuse of power possessed by virtue of State law and made possible only because the wrongdoer is clothed with authority of State law.”²¹

In the present case, the Defendants were indeed acting under the power they were afforded by virtue of being clothed with state authority. The Defendants argue that they were acting under the NCAA’s authority in responding to its inquiry, but the actions taken by the Defendants (i.e., reassignment, removal from teaching position) were only possible because of their status as State actors. The NCAA did not have this power, nor did they have any way to grant this power to the Defendants. Thus, it is clear that the Defendants acted under color of law and are required to afford Dr. Ridpath constitutional protection.

b. Notice and Opportunity to be Heard

The Defendants did not afford Dr. Ridpath the due process rights of notice and opportunity to be heard. Indeed, the facts show that the Defendants completely severed Dr. Ridpath’s means for redress and threatened to terminate him and ruin his reputation both personally and professionally, if he tried to clear his name.

The Defendants argue that the essential requirements of due process are “notice and opportunity to be heard” and describe this as an “initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action”²²

The Defendants further claim that they provided Dr. Ridpath with notice and opportunity

²¹*Williams v. United States*, 341 U.S. 97(1951).

²²Defendants cite *Cleveland Bd. Of Educ. V. Loudermill* 470 U.S. 532, 546 (1985), and *Id* at 545-546 (citing *Bell v. Burson*, 402 U.S. 535, 540 (1971)).

to be heard. However, the evidence shows that the Defendants induced Dr. Ridpath to transfer by deception, made him a corrective action, and then threatened him when he tried to challenge their actions.

These disputed facts show that the Defendants did not give Dr. Ridpath notice and opportunity to be heard. More accurately, these facts show that the Defendants completely severed Dr. Ridpath's means for redress and threatened to terminate him and ruin his reputation both personally and professionally, if he attempted to clear his name.

c. Liberty Interest

The Defendants were required to provide Dr. Ridpath with procedural safeguards because the corrective action label implicated a protected liberty interest. In order to maintain this claim, Dr. Ridpath must show the following: (1) that the corrective action label constituted a charge of serious character defect; (2) that this label accompanied any damage to Ridpath's employment status; (3) that it was made public; and (4) that it was false. Each of these contentions are addressed below.

The corrective action label constituted a charge of serious character defect, not mere incompetence. A communication gives rise to a protected liberty interest if it implies "the existence of serious character defects such as dishonesty or immorality."²³ And this communication must not simply allege "incompetence."²⁴

In affirming this Court's denial of Defendant's Motion to Dismiss on this issue, the Fourth Circuit Court of Appeals (in accepting Dr. Ridpath's allegations as true) used the above

²³*Robertson v. Rogers*, 697 F.2d 1090, 1092 (4th Circuit 1982) (citing *Bd. of Regents v. Roth*, 408 U.S. 564 (1972)).

²⁴*Boston v. Webb*, 783 F.2d 1163, 1165-66 (4th Cir. 198), *Cox v. N. Va. Trasp. Comm'n*, 551 F.2d, 557-558 (4th Cir. 1976), *McNeill v. Butz*, 480 F.2d 314, 319-20, *Zepp v. Rehrmann*, 79 F.3d 381, 388 (4th Cir. 1996).

standard and found that the corrective action label did call into question his honesty and integrity, in addition to his professional competence.²⁵ Consider the following excerpt from the Fourth

Circuit's opinion:

[W]e agree with Ridpath: the administrators' use of the "corrective action" label lays blame on him for the University's NCAA rules violations – including academic fraud and impermissible employment of props at the Machine Shop – and thus insinuates "the existence of serious character defects such as dishonesty or immorality."²⁶

The Fourth Circuit's opinion is bolstered by the record that has developed through discovery in this case. Kathy Noble, who has worked in intercollegiate athletics administration for nearly twenty years, will offer her expert opinion concerning the implications of the corrective action label. Specifically, Ms. Noble will testify that this label creates "ethical and moral issues" and that the corrective action label "ruined" and "derailed" his career. Ms. Noble will further testify that the university's action of labeling Dr. Ridpath's reassignment as a corrective action does far more damage than the NCAA's findings alone, which do not specifically find against Dr. Ridpath.²⁷

By taking this action against him and not against many of the other individuals who were intimately involved in the conduct that resulted in the infractions, the Defendants are making the statement that Dr. Ridpath should take more of the blame than, for example, Coach Pruett, who had oversaw the jobs program for his entire tenure.

In addition to Ms. Noble, John Gerdy will also give his expert testimony concerning the

²⁵*Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (4th Cir. 2006).

²⁶*Ridpath* at 31, quoting *Robertson* at 1092.

²⁷Noble Report at 1-2, 7-8, and 11-12. Also see Noble CV, attached as Exhibit 12.

weight a corrective action label has. Mr. Gerdy, who has been involved with intercollegiate athletics since 1975 (as an athlete, author, and administrator), states in his report that, “as a compliance coordinator...your most important commodity is your integrity” and even being “rumored” as involved in infractions is damaging to one’s reputation and being labeled a corrective action “will, most likely, destroy any chance of a meaningful career in collegiate athletics.”²⁸

The testimony and reports of these experts, in addition to Dr. Ridpath’s testimony, show that the corrective action label implies a serious character defect. Thus, the Defendants motion for summary judgment should be denied as to this point.

When viewed in the light most favorable to Dr. Ridpath, the evidence shows that the Defendants’ corrective action label implicated a protected liberty interest in that it damaged Dr. Ridpath’s employment status.

On this point, the Fourth Circuit required that “a public employer’s stigmatizing remarks be ‘made in the course of a discharge or significant demotion.’”²⁹ In line with decisions from other circuits, the defined “significant demotion” to include the reassignment of an employee to a position outside of his field of choice.³⁰

In relation to the facts as stated in the Amended Complaint, the Fourth Circuit stated that “Ridpath’s reassignment was neither voluntary nor an innocuous transfer. Rather it was a

²⁸*Id.*

²⁹*Ridpath* at 32 quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 n. 5 (4th Cir. 1988) (citing *Lawson v. Sheriff of Tippecanoe County*, 725 F. 2d 1136, 1139 (7th Cir. 1984); *Mosrie v. Barry*, 231 U.S. App. D.C. 113, 718 F. 2d 1151, 1160-62 (D.C. Cir. 1983); *Moore v. Otero*, 557 F.2d 435, 438 (5th Cir. 1977)).

³⁰*Ridpath* at 32, citing *Lawson* at 1139 and *Moore* at 438 & n.11.

significant demotion to a position outside his chosen field, rendering it tantamount to an outright discharge.”³¹ The court went on to write, “as a key component to the scheme to make him a “scapegoat” for the University’s NCAA rules violations, Ridpath was banished from the Department of Athletics. He was then relegated to a position for which he lacked the necessary education and training – a position that may have been prized by others, but to Ridpath constituted, at best, a perilous detour on his career path and, at worst, a dead end.”³²

Indeed, the record, that has been developed through discovery, precisely illustrates the “dead end” created by the Defendants’ actions. In their expert reports, Mr. Gerdy and Ms. Noble both emphasize the competitive nature of NCAA athletics administration and that Dr. Ridpath was qualified for a career in this field and had a reasonable expectation of advancing his career in athletics administration, had he not been reassigned and labeled a corrective action.³³ In his report Mr. Gerdy states that “there is no question an individual who is ‘reassigned’ in the wake of a NCAA investigation as a corrective action” taken light of serious violations, will forever be followed by a black cloud of suspicion in the college athletic community.” He further states that this is particularly true of an individual in a lower-level administrative position, such as compliance director.³⁴

The Defendants argue that Dr. Ridpath’s reassignment was not a significant demotion

³¹*Ridpath* at 33.

³²*Id.*

³³Gerdy Report, attached as Exhibit 13, and Noble Report.

³⁴Gerdy Report at 4-5 and CV. In addition, please note that the Defendants charge that these experts were not familiar enough with the case to render an opinion. This, however, is a question for the jury to decide. Nevertheless, it is clear from Gerdy and Noble’s reports that they received first-hand account of the facts of the case, which they analyzed through the lens of their immense qualifications and experience.

because he was reassigned to a position where he was doing challenging and important work.³⁵

This is not the standard for determining whether a reassignment represents a significant demotion.

The standard is whether an individual has been reassigned to a position outside his chosen field or where a transfer constituted “such a change of status as to be regarded essentially as a loss of employment.”³⁶ Taking the facts in the Amended Complaint (which are now the facts in the record to be viewed in the light most favorably to Dr. Ridpath), the Fourth Circuit stated that the “circumstances of Ridpath’s reassignment fit neatly within [the aforementioned legal framework]....that would support a liberty interest.”³⁷

The Defendants also argue that Dr. Ridpath voluntarily accepted the reassignment, thus the characterization of the reassignment as a corrective action, and not the reassignment in itself, is the basis of Dr. Ridpath’s complaint. However, viewed in the light most favorable to Dr. Ridpath, the facts show that the reassignment is part of a larger web of deception, misrepresentation, and coercion.³⁸ The facts show that the Defendants lured Dr. Ridpath to accept

³⁵The Defendants further argue that a liberty interest is not implicated because Dr. Ridpath secured a interim position at Ohio University’s compliance department and did not submit an application for the position on a permanent basis. The Defendants, however, fail to contextualize Dr. Ridpath’s situation at OU, where the position had already been filled at the time he was filling in. Dr. Ridpath did not initially apply for this position because he was told they were only considering women and minority applicants, and he did not fit into either of those categories. Further, Dr. Ridpath has looked into positions in dozens of athlete departments to no avail. As a stunning contrast, prior to his corrective action label, Oregon State was actively recruiting Dr. Ridpath for a position in its athletic department (which he then turned down). After the corrective action label, Dr. Ridpath looked for a position with Oregon State and they were not interested.

³⁶*Lawson* at 1138-9 and *Moore* at 438., attached as Exhibit 14 and 15.

³⁷*Ridpath* at 35-36, citing *Lawson* at 1138-9 and *Moore* at 438.

³⁸The Defendants continue to argue that Dr. Ridpath’s reassignment/corrective action due process claim is more properly a defamation claim, in that it does not rise to the level of implicating a serious liberty interest. The Fourth Circuit, however, made clear that these facts do rise to the level of a due process violation and disputed the dissent’s mischaracterization of the claim as one for defamation analagous to the one in *Seigert v. Gilley*, 500 U.S.

the transfer, promising him a pay raise and exoneration of blame. The Defendants then broke this promise and characterized his transfer as a corrective action, then threatened him against publicly challenging these actions.³⁹

The corrective action label further implicated a liberty interest, in that it was publicly announced. In order to invoke due process protections, a charge of serious character defect must be disclosed to the public.⁴⁰ In *Sciolino v. City of Newport News*, the Fourth Circuit recently found (in a related context) that public disclosure means more than just having the serious character defect charge in a personnel file, there must be a likelihood that prospective employers or the public at large will inspect the file.⁴¹

In the present case, there is a likelihood of both. The Defendants made Dr. Ridpath a corrective action and disclosed that information to the NCAA. The purpose of the Defendants' disclosing this information to the NCAA was in order to offer Dr. Ridpath was a sacrificial lamb in order to entice the NCAA to lessen the penalties it was preparing to assess on the university. The Defendants then knew that this information would be included in the NCAA Infractions report which was made public in December of 2007 and has been public information ever since.

226 (1991). The Fourth Circuit said Siegert was "in stark contrast" to the instant case, noting that in Ridpath's case, the university's defamatory action, the use of the corrective action label, "occurred incident to Ridpath's involuntary and significant demotion." *Ridpath at 39 n.20*.

³⁹The Fourth Circuit reasoned that the fact that the Defendants used misrepresentation, deception, duress, or coercion bolster Dr. Ridpath's proposition that he was subject to a significant demotion. Consider the following excerpt: "Ridpath was not simply transferred from one position to a slightly less desirable or even a better one (no matter what his salary as Director of Judicial Programs or how appealing that position might have been to others). Rather, in a dramatic change of status, equivalent to outright discharge, he was ousted from the University's Department of Athletics and completely excluded from his chosen field..."*Ridpath at 37*.

⁴⁰*Wooten v. Clifton Forge Sch. Bd.*, 655 F.2d 552, 55 (4th Cir. 1981); *Fuller v. Laurens County sch.. Dist. No. 56*, 563 F.2d 137, 141 (4th Cir. 1977); and *Ridpath at 39*.

⁴¹*Sciolino v. City of Newport News*, 480 F.3d 642 (4th Cir. 2007).

Moreover, this report has been the subject of stories in the local and national media.⁴² Most athletic directors are likely to have heard about this report and it has done significant damage to Dr. Ridpath's career.⁴³

Dr. Ridpath can further prove that the corrective action label implicated his liberty interest because it was false. No deprivation of liberty interest exists unless the stigmatizing charges are false.⁴⁴

In denying the Defendants' Motion to Dismiss on this issue, the Fourth Circuit stated that "Ridpath repeatedly disputes therein the central implication of the 'corrective action' label, i.e., that he was responsible for the University's NCAA rules violations. Indeed, the essence of Ridpath's due process claim is that he should have been provided notice and a hearing to prove his lack of culpability and to clear his name."⁴⁵

The Defendants' Motion for Summary Judgement should be denied on this issue for the same reasons. It is purely a question of fact concerning the falsity of the corrective action label. And, as the Fourth Circuit noted, Dr. Ridpath's due process claim is all about his attempt to prove that this label was false and unjustified and to clear his name. The university's football program was entangled in multiple incidents of improper behavior, including a long-standing jobs program where the head football coach referred athletes to do low-skill-level tasks for an

⁴²The Defendants may argue that Dr. Ridpath brought this attention on himself, by contacting the media in relation to this case. But Dr. Ridpath only contacted the media in an attempt to clear his name after the Defendants had already soiled it with their corrective action label.

⁴³See Gerdy and Noble's Reports.

⁴⁴*Stone* at 172 n.5.

⁴⁵*Ridpath* at 40.

athletic booster who paid these athletes twice the going rate for their work performed. And despite all of the individuals intricately involved in this improper activity, the Defendants decided to single out the compliance director, who had no knowledge of the behavior, to give the devastating label of a corrective action.⁴⁶ The falsity of this corrective action is purely a question of fact for a jury to decide and is the bedrock of Dr. Ridpath's due process claim.

d. Clearly Established Right

Dr. Ridpath can further prove that the Defendants violated a clearly established right or which a reasonable person would have been aware.⁴⁷

In denying the Defendants' Motion to Dismiss on this issue, the Fourth Circuit found there were several key events that give rise to a Fourteenth Amendment Right to Due Process. Those events include the Defendants' labeling of Dr. Ridpath's reassignment as a "corrective action" without giving him notice or opportunity to be heard.⁴⁸ The court reasoned that in 2001 (the time the aforementioned actions occurred) the state of the law was such that the Defendants were "on notice that their conduct infringed on a liberty interest held by Ridpath, rendering their failure to provide him with procedural safeguards, a violation of his Fourteenth Amendment right to due process."⁴⁹

⁴⁶ See Ridpath at 277-278.

⁴⁷ *Mellen v. Bunting*, 327 F. 3d. 355, 365 (4th Cir. 2003).

⁴⁸ *Ridpath* at 43, citing several cases in support, including *Roth* (Notice and opportunity to be heard are essential when a public employee's liberty interest is infringed by a charge implying such serious character defects as dishonesty or immorality lodged in the course of an injury such as failure to rehire), *Webb*, *Cox*, and *McNeil*. The court followed with, "Of course, none of these decisions involved the use of the "corrective action" label in the course of an NCAA investigation. However, there is no logical distinction between, for instance, linking an employee's discharge to an investigation of financial irregularities...and tying Ridpath's reassignment from the department of Athletics to the University's serious NCAA rules violations (as the "corrective action" label served to do). *Ridpath* at 45, citing *Cox* at 557-58.

⁴⁹ *Id.*

In their Motion for Summary Judgment, the Defendants make no additional argument concerning the issue of violating a clearly established right. Instead, the Defendants argue that Dr. Ridpath does not overcome the liberty-interest hurdles in order to make it to the second prong of the analysis. Dr. Ridpath's arguments concerning liberty interests have already been explained and will not be repeated at this point.

The law solidly states that a clearly established right existed. In its opinion, the Fourth Circuit concludes its discussion of this issue by noting, "because it is undisputed that Ridpath was not provided any procedural safeguards with respect to labeling of his reassignment as a "corrective action" it cannot be questioned that the Administrators contravened a clearly established Fourteenth Amendment procedural due process right of which a reasonable person would have known."⁵⁰

e. First Amendment Claims

Because Dr. Ridpath's speech was related to a matter of public concern and his interests outweigh those of the Defendants, his First Amendment claims should survive summary judgement. Dr. Ridpath has two free speech claims, a "retaliation" and a "chilling" claim.⁵¹ These claims are analyzed under the *McVey* case which fleshes out the *Pickering* balancing test. Under this analysis, the employee must prove: (1) that his speech addressed a matter of public concern; (2) his interest in speaking outweighed the employer's interest in the efficient provision of services; (3) he must demonstrate a sufficient nexus between the protected speech and the

⁵⁰*Ridpath* at 47-8

⁵¹The first claim is the retaliation claim (as labeled by the Fourth Circuit). Here, Dr. Ridpath claims he was relieved from adjunct teaching position for speaking out against the university and for retaining counsel and filing a lawsuit. The second claim is the chilling, where Dr. Ridpath alleges that his right of free speech to speak out against the Defendants was chilled by personal and professional threats.

employer's adverse action.⁵² The facts of each First Amendment claim will be separately analyzed below.

1. Retaliation

The Defendants terminated Dr. Ridpath's teaching position in retaliation for exercising his First Amendment rights. Applying the first prong of the *McVey* test, Dr. Ridpath's speech was as a private citizen on a matter of public concern. A "matter of public concern" is defined as speech that addresses "an issue of social, political, or other interest to the community."⁵³ It is also important to note that, "the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace."⁵⁴

In ruling against the Defendants' Motion to Dismiss on this issue, the Fourth Circuit noted that, while the Amended Complaint does not specifically enumerate the nature of Dr. Ridpath's remarks, that "[a]llegations of NCAA rules violations by a prominent sports program at a major public university, and the nature of the university's handling of such allegations, are matters of great 'social, political, or other interest to the community.'"⁵⁵

The developed record in this case shows that Dr. Ridpath's remarks fit neatly within the Fourth's Circuit's enumerated framework. In the course of teaching his class, Dr. Ridpath

⁵²*McVey v. Stacy*, 157 F.3d 271, 279 (4th Cir. 1998), *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Ranklin v. McPherson*, 483 U.S. 378, 384 (1987), and *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990).

⁵³*Urofsky v. Gilmore*, 216 F.3d 401-406-7 (4th Cir. 2000) (en banc).

⁵⁴*Id* at 407.

⁵⁵*Ridpath* at 54, quoting *Urofsky* at 406.

commented on two NCAA infractions cases that he was familiar with at Marshall University.⁵⁶ He also critiqued Marshall University's Athletic Department in the course of teaching his students about how to avoid NCAA pitfalls.⁵⁷

Further, Dr. Ridpath used an event, similar to what had happened to him at MU, as a hypothetical examination question. This exam question read: "An NCAA Division 1 university announced that it is transferring its current AD to another job on campus. You are the president and must hire the new athletic director. Name all the qualifications and experiences you desire in a new athletic director."⁶¹ In addition, Dr. Ridpath also referred to Marshall University in his class, in the course of discussions of what is wrong in college athletics.⁶² Accordingly, it is clear that Dr. Ridpath commented as a private citizen on a matter of public concern and creates a clear question of fact as to the first prong of *McVey*.

As to the second prong, referred to as *Pickering* balancing, Dr. Ridpath's interest in First Amendment expression outweighed the university's interest. The university describes its interest as "protecting its reputation with the NCAA so that it could continue to supply several student athletes with scholarships and educational opportunities." This is not a legitimate interest. The Defendants repeatedly state that the university is not an agent of the NCAA. Whether this is true or not, the university does not need the NCAA to award scholarships to athletes. The NCAA is a non-profit organization that universities join so that they can compete against other member

⁵⁶Level IV Grievance Transcript at 26-7.

⁶¹Level IV Grievance Transcript at 13-34, 45

⁶¹*Id* at 20.

⁶²*Id* at 28.

universities. There is no requirement that the university join the NCAA. Further, the university is free to award scholarships to whomever they please and can do so with or without being a member of the NCAA. Thus, the university's alleged interest in protecting its reputation with the NCAA in order to continue to supply students with scholarship is utterly without merit. Thus, it is outweighed by any free speech interest by Dr. Ridpath.

Even if the Defendants' interests were legitimate, protecting the university's reputation with the NCAA does not outweigh Dr. Ridpath's right to criticize the state university for spending its tax-payer dollars to run a football program that commits academic fraud and runs an illicit jobs program that allows a booster to pay players double the market rate to work menial tasks.

If the Defendants' interests of protecting its reputation with a non-profit organization were permitted to succeed, it could have devastating ramifications for Americans' constitutional rights. For example, if an individual was retaliated against for speaking out against the war in Iraq, the government could justify its actions by arguing that the individual's speech would damage its reputation in the world.

As to the third prong of *McVey*, Dr. Ridpath creates a clear question of fact that his adjunct teaching position was terminated because of his protected speech. As previously stated, Dr. Ridpath claims that the Department Head, Jeff Chandler, called him on July 14, 2003 and told him that he would not be teaching in the Fall of 2003 because of a problem.⁶³ Mr. Chandler later elaborated on this problem, saying that there were complaints from Dr. Ridpath's students, who claimed that Dr. Ridpath had been critical of the university. Dr. Chandler also said that Dr.

⁶³Level IV Grievance Transcript at 20-34.

Ridpath had mentioned in his class about his lawsuit against the university.⁶⁴ Dr. Chandler also referred to Dr. Ridpath's test question (described above) which involved a scenario similar to one at MU.⁶⁵

In its Motion for Summary Judgment Memorandum, the Defendants do not give a reason for the termination of Dr. Ridpath's class. Instead, they simply state that "[a]djunct professorships are determined on a semester-by-semester basis" and that the department head "informed the Plaintiff that he would no longer be teaching PE 696 on intercollegiate activities the following semester, the Fall of 2003."

Perhaps the Defendants do not currently proffer a reason for terminating the class because they have previously given so many different reasons for their actions, and because all of these reasons have now been discredited.

Initially, the department head, Jeff Chandler, alleged that Dr. Ridpath was removed from his teaching duties because of an improper use of a phone card. (What actually happened was that Dr. Ridpath used a university phone card to make calls to his lawyer, which he made clear that he would pay back to the university, and did pay back. Making personal calls on a university code and later reimbursing the university, was a common occurrence.)

Although Mr. Chandler initially claimed the phone code issue was a reason for Dr. Ridpath's removal, he eventually admitted that *but for* the rumors (about Dr. Ridpath being critical of MU in his classes) he would not have removed Dr. Ridpath from his teaching position. Consider the following excerpt from Dr. Ridpath's Level III Grievance Transcript:

⁶⁴Level IV Grievance Transcript at 23-34 and Level III Grievance Transcript at 17-18.

⁶⁵Level III Grievance Transcript at 17-18.

- “Q.Let me put it a different way, had you not heard any of these rumors, you wouldn’t have fired him just for the phone code, would you?”
- A. Not true.
- Q. You would have done it regardless?
- A. What my initial decision was to let him teach the class in the fall and then I denied that after that.
- Q. What changed that decision, the rumors?
- A. The rumors.”
- Q. So then, the answer to my question is yes, absent the rumors then –
- A. Whoa, whoa, whoa, don’t say what I’m saying.
- Q. No, I know, but my question to you was absence [sic] the rumors, all right, your decision was to allow him to go ahead and teach the class he was scheduled for and then not invite him back for the subsequents, am I correct?
- A. Yes.
- Q. And then once you heard these rumors you kind of upped the timetable a little bit and made the decision, in combination with the phone code to eliminate his teaching position immediately?
- A. Yes.⁶⁶

The above evidence clearly meets the causation requirement in the third prong of the *McVey* test and Defendants Motion for Summary Judgment, as to this point, should be denied accordingly.

2. Chilling Claim

As to the second part of Dr. Ridpath’s First Amendment claims, the evidence (viewed in the light most favorable to Dr. Ridpath) shows that the Defendants personally and professionally threaten him. if he exercised his free speech right to criticize the state university.

Utilizing the *McVey* analysis, under the first prong of the test, Dr. Ridpath was (as previously stated) speaking as a private citizen on a matter of public concern. As the Fourth Circuit noted, “the NCAA rules violations against the University, the University’s response to the violations, and the University’s treatment of Ridpath were matters of public concern.”⁶⁷

⁶⁶Level III Grievance Transcript at 74-75.

⁶⁷*Ridpath* at 61.

Under the second prong, as previously discussed, the University's interests are outweighed by Dr. Ridpath's interests, in that the University can award scholarships, regardless of their reputation or involvement with the NCAA and these interest are, nevertheless, outweighed by Dr. Ridpath's interest in criticizing a state institution concerning matters of public concern. Third, viewing the facts in the light most favorable to Dr. Ridpath, there is obvious causation between the protected speech and the Defendants' actions, in that the Defendants threatened him for his free speech activity.

3. *Garcetti's* Application

The Defendants allege that the United States Supreme Court case of *Garcetti v. Ceballos* insulates them from liability, in that it rules that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.⁶⁸ In particular, they argue that Dr. Ridpath's speech was pursuant to his official duties as Compliance Director, and later as adjunct professor.

Garcetti's holding, however, does not extend to the present cases. In *Garcetti*, the plaintiff was a deputy district attorney who wrote two intra-office memoranda concurring inaccuracies in an affidavit (that was used to obtain a search warrant in a criminal case). In this criminal case, the plaintiff was later called to testify about these memos. After his testimony, the plaintiff alleged that his employer retaliated against him for his speech. The Court reasoned that because the plaintiff spoke as a deputy district attorney fulfilling a job duty, and not as a public citizen on a matter of public concern, he should not be afforded constitutional protection.⁶⁹

⁶⁸*Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁶⁹*Id* at 421.

This same concern is not applicable in the present cases. Here, the speech in question was not communicated pursuant to official duties. Dr. Ridpath was voicing his concern that he was being made a scapegoat to appease the NCAA, when the actual individuals who were intricately involved and at fault (such as Coach Pruett) got off unscathed by the university. This matter concerned a major state university and the highest paid employee at that university, Coach Pruett, whose salary is funded by tax dollars. Dr. Ridpath was further concerned that he was being made a corrective action without being afforded the due process opportunity to clear his name.

This type of speech is precisely the type of speech that the Supreme Court wants to protect. In *Garcetti*, the Court, in limiting its holding to work product by officers in their official capacities, stated, “employees retain the prospect of constitutional protection for their contributions to the civic disclosure.”⁷⁰

With regard to the claim that the Defendants terminated Dr. Ridpath’s teaching duties because of his free speech exercise, the Court was careful to clarify that *Garcetti* did not extend to the academic arena, where there is a long line of cases upholding the First Amendment rights of professors at public universities.⁷¹

4. Clearly Established Right

⁷⁰*Id* at 422.

⁷¹ See Souter’s Dissent, *Garcetti* at 438, listing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”); *Keyishan v. Board of Regents of Univ. Of State N.Y.*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” (quoting *Shelton v. Tucker*, 364, U.S. 479, 487, (1960))); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (a governmental enquiry into the contents of a scholar’s lectures at a state university “unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread”).

Both the retaliation and chilling claims were, at the time, clearly established First Amendment rights. In denying the Defendants' Motion to Dismiss on this issue, the Fourth Circuit ruled there are a long line of decisions, both the Supreme Court's and the Fourth Circuit's, that establish that "a public employee could not be fired solely for making protected statements."⁷² Accordingly, the court ruled that "the prohibition against retaliation for protected speech was clearly established at the time Ridpath was relieved of his teaching position."⁷³

Furthermore, as previously described, the evidence shows that Dr. Ridpath was retaliated against for making protected statements that the University did not like. The Fourth Circuit described this kind of activity as "not merely implicating the gray edges of the right Ridpath asserts" but going "to its very core" and further noted that "a clearer violation of constitutionally protected free speech would be difficult to fathom."⁷⁴

With regard to the chilling claim, the Fourth Circuit further found that these rights were clearly established at the time. The court found that more than two years prior to the events in Ridpath's Amended Complaint, the court held that, "a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment."⁷⁵ Based on this precedent, the court found that the aforementioned law was clearly established of which a reasonable person would have known.⁷⁶

⁷²*Ridpath* at 62-64.

⁷³*Id.*

⁷⁴*Ridpath* at 65.

⁷⁵*Ridpath* at 66, quoting *Edwards v. City of Goldboro*, 178 F.3d 231, 246 (4th Cir. 1999).

⁷⁶Since the time of the Amended Complaint, a factual record has been developed that, when viewed in the light most favorable to Dr. Ridpath, proves the violation of his First Amendment rights. These facts are enumerated in previous portions of this memorandum.

f. Breach of Contract

The Defendants and Dr. Ridpath had a contract, wherein Dr. Ridpath agreed to accept a transfer out of his chosen field of intercollegiate athletics, in exchange for an increase in salary, and a promise by the Defendants not to publicly criticize his actions as compliance director. The Defendants breached this contract by communicating to the NCAA that Dr. Ridpath's transfer was the result of a corrective action.

The existence of this contract is evidenced not only by Dr. Ridpath's testimony, but also by the testimony of Defendant Ed Grose, the Senior Vice President for Operations at Marshall University. Mr. Grose admitted to many of the terms of the contract, which he called a "negotiated arrangement."⁷⁷ Consider the following excerpt from Mr. Grose's deposition:

- Q. What was the reasoning behind [offering Dr. Ridpath a higher salary than his predecessor at Judicial Affairs?
- A. I think it all went back to trying to match his salary that he was making and not penalize him. If we could have got him at the other salary, the transfer, we have done it. But it was a mutual agreement. And I think Dave will agree we had discussions about it and we talked about it. And he certainly wasn't going to accept it if he was going to be penalized a lot. So it was a give-and-take kind of negotiated arrangement.
- Q. So there were some negotiations [with Dr. Ridpath about this transfer]?
- A. Sure.⁷⁸

Really, the only disputed term of the contract is the agreement not to publicly implicate Dr. Ridpath for any wrongdoing in regards to the NCAA infractions. But even this term is somewhat admitted to by Mr. Grose, when he testified as follows:

"...I indicated that if [Dr. Ridpath] would accept the position then we would just do it internally and do the paperwork on it and that we wouldn't have any press release or publicity about the transfer. I made that promise to him. And we didn't .

⁷⁷Grose at 62

⁷⁸Grose at 61-2.

We didn't have any press release. We didn't do anything."⁷⁹

Although the terms of the contract are clearly a question of fact, the fact that the Defendants publicly implicated Dr. Ridpath for wrongdoing as compliance director is not. This disclosure, where the Defendants made Dr. Ridpath a corrective action, was a clear breach of the agreement made between the Defendants and Dr. Ridpath, wherein they agreed not to publicly implicate him for any wrongdoing with regard to the NCAA infractions.

The Defendants do not dispute the existence of a question of fact concerning the terms of a contract, instead they argue that the Court cannot rely on these terms because they are unwritten. The evidence is clear, however, that the Defendants made a representation to Dr. Ridpath that induced an expectation.⁸⁰

The Defendants argue that estoppel cannot be raised in this case because it concerns a complex public function and a public entity. In support of this proposition, the Defendants cite *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). In *Heckler*, a non-profit community health provider entered into an written agreement with the Secretary of the State Department of Health, Education and Welfare. This agreement called for the provision of home health care services to individuals eligible for benefits under medicare. In addition to this written agreement, the non-profit was told by a third-party insurance company that the state would reimburse it for certain other expenses (not enumerated in the written contract). The non-

⁷⁹*Id* at 68.

⁸⁰ Specifically, the Defendants promised that his name would not be linked to any wrongdoing if he accepted a transfer out of his chosen field. Dr. Ridpath, in turn, relied on this representation to his detriment, by accepting the transfer and then finding out that the Defendants had made him a corrective action. Accordingly, estoppel can be properly asserted See *Tuggle v. Sutherland*, 98 W. Va. 540 (W. Va. 1925)

profit relied on this second-hand information, and expanded its budget and services based on the expectation that they would receive more money from the reimbursements. Some time later, the non-profit learned that the insurance company had given them bad information and that they would not in fact be receiving the expected reimbursements. The non-profit then sued the insurance company and the government, asserting estoppel.⁸¹ The Court ultimately found that the government was not estopped, but refused to say that the government could never be estopped. Instead, the Court ruled that the non-profit did not even meet the minimum standards for estoppel, thus they did not even have to address the larger question of whether estoppel was ever proper against the government.⁸²

While the Court, in *Heckler*, reasoned that the Government cannot be estopped in the same manner as any other litigant. The Court, however, plainly stated that it is not making a “flat rule” that estoppel can never be asserted against the government, and left open the possibility of their being certain circumstances where estoppel may be properly asserted against the state. The court stated that, “we are hesitant, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency.”⁸³

In his concurrence, Justice Rehnquist expanded on what some of those countervailing interests might be. Specifically, Justice Rehnquist noted that in some future cases, ““affirmative

⁸¹*Id.*

⁸²*Id.*

⁸³*Heckler* at 60.

misconduct’ on the part of Government might be grounds for estoppel.”⁸⁴

The present case is one in which this “affirmative misconduct” exists. The Defendants misrepresented the terms of an agreement, inducing Dr. Ridpath to alter his career path and leave his chosen field. (The permanent effect of this misconduct further leaves open the possibility of the courts allowing estoppel claims against the government.)⁸⁵

Furthermore, one circuit court has been particularly critical of allowing the government to be absolutely immune from estoppel claims where routine transactions are at play. In *Azar v. United Postal Serv.*, the Seventh Circuit wrote, “The dubious privilege of not being bound by the representations of its employees in routine commercial transactions would seem to further reflect on the Service’s already tarnished reputation as a provider of regular and EXPRESS MAIL services.”⁸⁶ Similarly, in the present case, there is even less of a concern to grant immunity to the Government because this case concerns a contract with a single employee, not a large contract between a private business and a state agency.

While the foundation for the traditional rule disfavoring government estoppel is ” “Men must turn square corners when they deal with the Government,”⁸⁷ in *Federal Crop Ins. Corp. v. Merrill*, Justices Jackson and Douglas added a caveat. In their dissent, the Justices wrote, “It is very well to say that those who deal with the Government should turn square corners. But there is

⁸⁴*Heckler* at 67, quoting *INS v. Hibi*, 414 U.S. 5 (1973)..

⁸⁵*Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1338 (E.D. Ark. 1982). (Cited the Supreme Court case of *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam) as favorable to permitting equitable estoppel against the government when the government’s agent’s misrepresentation causes the claimant to take action or fail to take action that the claimant could not correct at any time.)

⁸⁶*Azar v. United States Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985).

⁸⁷*Id* at 62, quoting *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143.

no reason why the square corners should constitute a one-way street.”⁸⁸

This same principal has been evoked by many other federal appellate courts. The Eleventh Circuit found the FDIC could be equitably estopped, requiring the FDIC to deal fairly with its debtors as would any other private bank.⁸⁹ Further, the Seventh Circuit allowed equitable estoppel against the government because “the public has an interest in seeing its government deal carefully, honestly and fairly with its citizens.”⁹⁰ The Second Circuit has refused “to sanction a manifest injustice occasioned by the Government’s own failures.”⁹¹ The Ninth Circuit has found “some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped.”⁹²

The Defendants further argue that they are not bound by any representation of Ed Grose because he would have been acting *ultra vires* or outside of his authority. The Defendants are now trying to paint a picture of Ed Grose as a Rogue agent who acted outside of his authority in negotiating with Dr. Ridpath. Ed Grose, however, at the time was Senior Vice President for Operations and he at all times acted within his authority. There was never any indication in his deposition, nor in anywhere else, that the university ever reprimanded him in any way for his behavior. Further, this is the first time (in over eight years of litigation) that the Defendants have

⁸⁸*Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-8 (1947) (Jackson dissent).

⁸⁹*Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984).

⁹⁰*Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982).

⁹¹*Corneil-Rodriguez v. INS*, 532 F.2d 301, 307 (2d Cir. 1976).

⁹²*Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir. 1970), disapproved on another point of law by *Califano v. Sanders*, 430 U.S. 99 (U.S. 1977).

raised the *ultra vires* defense, and the West Virginia Supreme Court has ruled that this defense must be asserted promptly or equity will bar its assertion.⁹³

Moreover, Mr. Grose did not act alone. In his deposition, Mr. Grose testified that there were multiple meetings to discuss the terms of the reassignment and that Steve Hensley, Dean of Student Affairs, participated in these discussions.⁹⁴

The Defendants cite the *Heckler* case (which was discussed previously) to support their proposition that Mr. Grose acted outside of his authority. The *Heckler* case, however, presented a much different set of facts. In that case, the non-profit did not rely directly on the Government's assurances, but instead relied on the representations of an intermediary, an insurance company, which assured them that the government would make certain reimbursement. In the present case, there is no such third party.⁹⁵ Here a Senior Vice President is making the misrepresentation, and as previously discussed, the government has a duty to its citizens to conduct business in an honorable fashion and should be held accountable for not living up to that standard.

The Defendants further cite two cases where government officials acted outside the scope of their legal authority in making promises.⁹⁶ Ultra vires, however, cannot be asserted as a

⁹³*Berkeley County Court v. Martinsburg & Potomac Turnpike Co.*, 92 W. Va. 246, 252 (W. Va. 1922) (Equity will not allow a stockholder, with notice of a contract which he complains of as ultra vires, or with the means of becoming acquainted therewith, to wait an unreasonable length of time, with the view to ascertaining whether the contract will result profitably, and then repudiate it if he finds it will result in loss.), citing *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S.E. 501.

⁹⁴*Id* at 62 at 66-7.

⁹⁵*Heckler* 467 U.S. 51.

⁹⁶*Freeman v. Poling*, 338 S.E. 2d 415 (W.Va. 1985) and *City of Fairmont v. Hawkins*, 304 S.E.2d 824 (1983).

defense when the individual did not violate “statute, charter, or by-law.”⁹⁷ In the present case, there is no evidence that Senior Vice President Ed Grose did not have the legal authority to negotiate a contract with Dr. Ridpath. At Marshall University, as with any large government employer, contracts are negotiated all the time between management employees and other employees of the university. The university president is not involved, nor is he required to be involved, in every one of these discussions.

g. Fraud

There is a question of fact as to whether the Defendants committed fraud against Dr. Ridpath. The Defendants do not appear to dispute that the essential elements exist, except for arguing that Mr. Grose did not have the requisite mental state to defraud Dr. Ridpath.

The case law concerning fraud in West Virginia holds defendants (alleged to have committed fraud) to a high standard. On this issue, the West Virginia Supreme Court has held defendants to have the requisite intent, if they had a duty to know the veracity of the facts, even if they had no actual knowledge at the time.⁹⁸

In the present case, the Defendants were in a situation to realize the veracity of their representations. Defendant Grose was the Senior Vice President for Operations at Marshall

⁹⁷*Berkley County Court* at Syl Point 1 (Generally, when not inhibited by statute, charter or by-law, the Board of Directors of a Corporation has power to do all things that are proper to be done by the corporation).

⁹⁸[I]t is very uniformly held that if it is represented that a certain state of facts is true, and this representation is made for the purpose of inducing another to act thereon, or under such circumstances as that the party making it must know that the other is likely to act thereon, he will be entitled to recover the damages suffered by him, notwithstanding the party making the representation had no actual knowledge of the real conditions at the time. **He is under a duty to know that the things he represents as facts are in fact true at the time he makes the representation.** It is no excuse for him to say that he did not know they were false. *Osborne v. Holt*, 92 W. Va. 410, 415-416, 114 S.E. 801 (1922); See also Syl. Pt. 1, *Horton v. Tyree*, 104 W. Va. 238, 139 S.E. 737 (1927). Where one person induces another to enter into a contract by false representations **which he is in a situation to know, and which it is his duty to know**, are untrue, he, in contemplation of law, does know the statements to be untrue, and consequently they are held to be fraudulent, and the person injured has a remedy for the loss sustained by an action for damages. It is **not indispensable to a recovery that the defendant actually knew them to be false.**

University and the very fact that he held this high-ranking office suggests that he was in the position to know that Dr. Ridpath was going to be made a corrective action, in violation of their agreement. In addition, Defendant Grose testified to numerous occasions where he was in communication with President Angel and Defendant Cottrill concerning Dr. Ridpath.⁹⁹

The timing of the documentation in this case also supports the proposition that the Defendants had reason to know that they were going to make Dr. Ridpath a corrective action at the time they promised him otherwise. Days before the Defendants induced Dr. Ridpath to transfer, the NCAA Chair Thomas Yeager sent a letter to Marshall University President Angel. This letter, dated September 28, 2001 stated that the committee was concerned that the university had violated NCAA rules, and asked if the university would like to submit any additional information.¹⁰⁰ It stands to reason that at this time, the university made the decision to make Dr. Ridpath a corrective action, which they officially did in a letter to the NCAA dated October 17, 2001.¹⁰¹

g. Outrageous Conduct

Viewed in the light most favorable to Dr. Ridpath, the facts clearly show that the Defendants committed the tort of outrage. The elements of the tort of outrage (or intentional infliction of emotional distress) are as follows: (1) The wrongdoer had the specific purpose of inflicting emotional distress or intended his specific conduct and knew or should have known that emotional distress would likely result; (2) The conduct was outrageous and intolerable in that it offends against generally accepted standards of decency and morality (not just bad

⁹⁹Grose at p. 38-39, 42, 47-48, 54-55

¹⁰⁰September 28, 2001 letter to Angel from Yeager., attached as Exhibit 14.

¹⁰¹October 17, 2001 letter to Yeager from Angel, attached as Exhibit 15

manners or hurt feelings); (3) There was a causal connection between the wrongdoer's conduct and the emotional distress; and (4) The emotional distress was severe.¹⁰²

The Defendants only dispute the second element of this test, claiming that Dr. Ridpath cannot show any extreme and outrageous conduct on the part of the Defendants.¹⁰³

The first argument they make in this regard is that all of the Defendants did not commit outrageous conduct because Defendant Angel was solely involved in characterizing Dr. Ridpath's transfer as a corrective action, and this characterization was warranted. This, however, is a very myopic view of the facts and does not encompass the Defendants deceptively inducing Dr. Ridpath to transfer out of his chosen field, making him a corrective action, and threatening him personally and professionally.

These facts are truly the type that offend against generally accepted standards of decency and morality and have caused severe damage. Expert John Gerdy wrote that being made a corrective action "will, mostly likely, destroy any chance of a meaningful career in college athletics" and that this individual "will forever be followed by a black cloud of suspicion in the college athletic community."¹⁰⁴

The Defendants also argue that they had no involvement with the decision to remove Dr. Ridpath from his teaching position, thus they are not liable for any outrageous conduct that might have occurred. However, the evidence (as previously discussed) show that they were in a position to know, especially considering the Mr. Chandler's comment concerning the pressure he

¹⁰²*Johnson v. Hills dept. Stores, Inc.* 488 S.E. 2d 471,474 (W.Va 1997); *Travis v. Alcon Labratoires Inc.*, 504 S.E. 2d 419, 425 (W.Va. 1998).

¹⁰³Defendants' Memorandum in support of Motion for Summary Judgment page 30.

¹⁰⁴Gerdy Report at 4.

felt to terminate Dr. Ridpath's class.¹⁰⁵

These events have clearly caused Dr. Ridpath severe emotional distress. In Dr. Lawrence Kelly's psychological report, Dr. Kelly reports Dr. Ridpath complaining that the administration's "arrogance" still bothers him today and that he has become "increasingly depressed with decreased sleep, decreased appetite, decreased energy, decreased interests, and decreased concentration...." for which he takes medication.¹⁰⁶

h. Attorney Malpractice

The Defendants should not be granted summary judgment on the issue of Attorney Malpractice. The elements of attorney malpractice are as follows: (1) the attorney was employed by the plaintiff; (2) the attorney neglected a reasonable duty; (3) that such negligence resulted in and was the proximate cause of loss to the client.

As to the first element, as previously presented, the Defendants repeatedly represented that counsel represented Dr. Ridpath in his personal capacity.¹⁰⁷ Defendants argue that this Court previously issued an order finding that the attorneys for MU were not the personal representatives of Dr. Ridpath. This order, however, was not made pursuant to a motion for summary judgment and was made without any factual record having been developed and was made before discovery was complete in this case.

Defendant Cottrill, who was also counsel for Marshall University, had the duty to report to Dr. Ridpath when his and the university's interests diverged.¹⁰⁸ In his deposition, Defendant

¹⁰⁵Level IV Grievance Transcript at 24-25.

¹⁰⁶Kelly's Report at 2-3, attached as Exhibit 16.

¹⁰⁷Affidavit of Dr. Ridpath dated November 7, 2007, attached as Exhibit 17.

¹⁰⁸Rule 1.7 of the Rules of Professional Conduct

Cottrill was asked if he had a duty to disclose when an employee's personal interest diverge from the interests of the university. Defendant Cottrill's response was, "I think I probably do, but I don't know for sure." He further admitted that he can't recall ever consulting with Dr. Ridpath concerning any possible divergence of interest.¹⁰⁹ This inaction, in and of itself is evidence of legal malpractice.

Additionally, Defendant Cottrill facilitated a fraud and breach of contract (as previously described) and engaged in threats against Dr. Ridpath. When Dr. Ridpath attempted to clear his name of the corrective action, he received multiple threats from university officials and Senior Vice President Layton Cottrill added: "You have no say in this matter. You need to think about your family, young man."¹¹⁰

Finally, Defendant Cottrill's negligence and intentional actions harmed Dr. Ridpath immensely, pock-marking his reputation and disabling what would have otherwise been a very promising career in inter-collegiate athletics.¹¹¹

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¹⁰⁹Cottrill at 65-66.

¹¹⁰See Ridpath at 314.

¹¹¹See Gerdy and Noble Reports.

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

DR. B. DAVID RIDPATH,
Plaintiff,

**Case No. 3:03-cv-02037
Hon. Robert Chambers**

v.

**BOARD OF GOVERNORS
MARSHALL University,
DAN ANGEL, BOB PRUETT,
F. LAYTON COTRILL, ESQ.,
and EDWARD GROSE,**

Defendants.

CERTIFICATE OF SERVICE

The undersigned certifies that he electronically filed the foregoing *DR. RIDPATH'S RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS BOARD OF GOVERNORS MARSHALL UNIVERSITY, DAN ANGEL, F. LAYTON COTRILL AND EDWARD GROSE* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record, this day being August 15, 2008 to:

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