

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

DR. B. DAVID RIDPATH,

Plaintiff,

v.

**CASE NO. 3:03-02037
(Judge: Robert C. Chambers)**

**BOARD OF GOVERNORS
MARSHALL UNIVERSITY
and DAN ANGEL and BOB PRUETT
and F. LAYTON COTTRILL, ESQ.
and K. EDWARD GROSE,**

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANT BOARD OF GOVERNORS
MARSHALL UNIVERSITY, DAN ANGEL, ED GROSE, and LAYTON COTTRILL'S
MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendants, Defendants Board of Governors of Marshall University ("MU"); Dan Angel; F. Layton Cottrill, Esq.; and K. Edward Grose and move this Court for summary judgment. In support of this Motion, these Defendants state as follows:

I. INTRODUCTION

The Plaintiff's claims include federal and state claims. In terms of the federal claims, due process deprivation and infringement of his First Amendment rights, Defendants are entitled to summary judgment because they did not act under the color of state law in characterizing Plaintiff's transfer from the position of compliance director as a "corrective action" to the NCAA, and even though they were not required to, Defendants provided due process to Plaintiff when he was transferred out of athletic compliance. Plaintiff's due process claim also fails because he did not prove that his liberty interest in his reputation was implicated: the "corrective action" label was not so harsh as to accuse Plaintiff of dishonesty, immorality, or lack of integrity; the label was not made during the

termination of his employment; the comments about his employment were not made public; and the reasons given for the characterization were not false. At most, the “corrective action” label is a defamation claim, which will not implicate a constitutional liberty interest. As Plaintiff cannot prove any of these with regard to his employment, he also cannot prove that the characterization to the NCAA violated a clearly established constitutional right, or that Defendants were reasonably aware of it. Plaintiff’s First Amendment infringement claims also fail because his speech was not protected, his interests in his expression did not outweigh MU’s interests as an educational institution, and Defendants took no retaliatory action against Plaintiff. Finally, the individual Defendants are entitled to qualified immunity because they did not violate a well-established law that a reasonable person in their position would have known about, and did not act maliciously or oppressively in their dealings with Plaintiff.

In terms of the state claims, these Defendants are entitled to summary judgment on the Plaintiff’s alleged breach of contract because he is estopped from doing so and any promises made by Grose regarding Plaintiff’s employment were *ultra vires* and not binding on MU. Plaintiff’s fraud claim should be dismissed because he cannot show that Grose knew that the terms of his alleged oral contract were false at the time he made them. Plaintiff also cannot show that his the characterization of his transfer of duties because of comments made during the NCAA Infractions Hearing and the termination of his adjunct teaching position constituted extreme and outrageous behavior as these actions did not rise to the necessary level to amount to extreme and outrageous behavior. Finally, Plaintiff’s claim for attorney negligence and legal malpractice fail because this Court has ordered and the plaintiff admitted that he was never been personally represented by MU’s General Counsel, Cottrill. Thus, the state claims against Defendants, and all claims, should be dismissed as a matter of

law.

II. PROCEDURAL HISTORY

The Plaintiff filed his Complaint on August 4, 2003. These Defendants filed a Motion to Dismiss on September 15, 2003, and Pruett filed his on September 29, 2003. On December 19, 2003, the Plaintiff filed a Motion to Amend the Complaint. The Court granted this Motion on January 20, 2004 before it was served on these Defendants on January 26, 2004. The Amended Complaint included claims for a due process violation under 42 U.S.C. § 1983; First Amendment infringement under 42 U.S.C. § 1983; civil conspiracy under 42 U.S.C. § 1983; breach of contract; fraud; outrageous conduct; tortious interference with a contract; attorney negligence - legal malpractice; and violation of public policy. On February 4, 2004, Pruett filed a Motion to Dismiss the Amended Complaint, and these Defendants filed one on February 11, 2004.

This Court ruled on the Motions to Dismiss the original Complaint on February 17, 2004. In it, this Court dismissed the claims of civil conspiracy and violation of public policy on behalf of all Defendants; dismissed all claims for monetary relief, including those for punitive damages against MU and found that MU could only be liable for prospective injunctive relief. On September 23, 2004, this Court ruled on these Defendants' Motion to Dismiss regarding whether MU is an agent of the NCAA. This Court ruled that MU was not an agent of the NCAA. This Court then adopted its February 17, 2004 Order on the remaining issues.

These Defendants filed an interlocutory appeal with the Fourth Circuit Court of Appeals challenging the denial of qualified immunity at the 12(b)(6) stage of the proceedings. This appeal was argued on February 3, 2005. On May 11, 2006, the Fourth Circuit affirmed the decision of this Court. While the Fourth Circuit denied Defendants' Motion to Dismiss, it emphasized "that these proceedings

are at the 12(b)(6) stage, and that thus *we are required to accept as true* the facts alleged in the Amended Complaint and view them in the light most favorable to Ridpath.” *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292, 315 (4th Cir. 2006) (emphasis added). Defendants filed a petition for rehearing *en banc*, which was denied. The parties then commenced with discovery. Now that discovery has been completed, this Court is no longer required to accept the allegations in the Complaint as true. Discovery has shown that there is no material issue of fact, and that these Defendants are entitled to judgment as a matter of law, and thus should receive qualified immunity from this suit.

III. STATEMENT OF FACTS

The Plaintiff was hired by MU in November 1997 as an Assistant Athletic Director in charge of the Compliance Office (“Compliance Director”). *Ridpath* Dep. at 10, appropriate pages attached as Ex. A. On or about July 2, 1999, it was reported to Plaintiff that several MU football players were involved in academic fraud, having received an advance copy of a physical education test. *See Rid. Dep. at 84*. The Plaintiff, as the “Compliance Director,” reported these incidents to the NCAA. This prompted an investigation by both the NCAA and MU into MU’s athletic program. MU found that several students seeking academic eligibility to play sports were employed in violation of NCAA rules. *See id. at 91*.

After more than one hundred interviews (*see id. at 542*), the NCAA Committee on Infractions conducted a hearing on September 22, 2001. *See Cottrill Dep. at 46*, attached as Ex. B. During the hearing, Plaintiff was rude to members of the committee and his conduct was unsatisfactory as the compliance director at MU. *Cot. Dep. at 46*, *Angel Dep. at 144-145*, attached hereto as Ex. C. He lost his composure, became angry, and raised his voice to the committee. The NCAA lead investigator

stated, “I thought it evolved into Dave trying to rehabilitate himself in front of the committee. And the deeper he got into that, the more it perpetuated itself.” Humphrey Dep. at 21-22, attached hereto as Ex. D. During a break in the hearing, she approached MU representatives to inform him that Plaintiff was causing the university a great deal of damage. Cot. Dep. at 85, Ang. Dep. at 212. Ms. Humphrey said during a discussion with MU representatives, “I don't recall specifically, but I remember saying the words—these words I do recall saying—‘he's killing you.’” Humphrey Dep. at 22. Coach Pruett recalled the same words. *See* Pruett Dep. at 179, appropriate pages attached as Ex. E.

Before the hearing, President Angel had no intention to transfer the Plaintiff to a position outside athletics; he made the decision to terminate the Plaintiff after the Infractions Committee hearing. *See* Ang. Dep. at 208. He communicated this to Cottrill and Grose. *See id.* at 112-13; Grose Dep. at 47, attached hereto as Ex. F; Cot. Dep. at 50-52. They informed President Angel that Plaintiff had inquired into the position of Director of Judicial Affairs, and requested that he consider allowing the Plaintiff to transfer rather than terminating him. *See id.*; Rid. Dep. at 329. Dr. Angel agreed to allow this transfer. *See id.* The Plaintiff had a young family to support, and Cottrill and Grose wanted to ensure that he had the means to support them. *See* Ang. Dep. at 151; Cot. Dep. at 56. Dr. Grose was responsible for communicating Dr. Angel's decision to the Plaintiff. *See* Ang. Dep. at 112-13. Dr. Angel did not give Dr. Grose any authorization to make any other offers or representations to the Plaintiff in relation to this transfer. *See* Ang. Dep. at 156. The Plaintiff voluntarily accepted the transfer and assumed the duties of Director of Judicial Affairs on October 1, 2001. *See* Ang. Dep. at 209; Rid. Dep. at 622.

In his new position, the Plaintiff was paid a salary of \$54,000.00 per year, which was a

\$2,000.00 raise from his salary in the Athletic Department. *See* Rid. Dep. at 10 & 194. This raise was in compensation for the loss of the courtesy car provided to Athletic Department workers. *See* Rid. Dep. at 190. As Director of Judicial Affairs, his duties included administering and enforcing the student Code of Conduct, and coordinating and serving on the judicial boards of MU. *See* Rid. Dep. at 192.

MU appeared before the NCAA Committee on Infractions on September 22, 2001, to answer to three counts: academic fraud, issues surrounding the employment at Chapman Printing, and the failure to monitor such employment. *See* NCAA 00144, attached hereto as Ex. G. Based on the information provided during the hearing, the Committee increased the severity of the failure to monitor charge to an allegation of lack of institutional control. *See id.* In response to this charge, President Angel notified the NCAA on corrective actions that he had taken subsequent to the hearing. *See* Ang. Dep. at 152; NCAA 000145-47, attached hereto as Ex. H. Prior to sending this response, he never discussed how this transfer would be characterized to the NCAA with any of the other Defendants. *See* Ang. Dep. at 156-57; Gro. Dep. at 74-5; 95-6; Pru. Dep. at 190.

The NCAA released a Public Infractions Report on December 21, 2001. *See* Ang. Dep. at 9; Rid. Dep. at 20. It stated that MU, “[s]ubsequent to the September 22 hearing before the committee on infractions, transferred the compliance director from athletics to another department in the university” as a corrective action to address the finding of lack of institutional control. Rid. Dep. at 332; NCAA Public Infractions Report, attached as Ex. I. Plaintiff’s name was never mentioned in the NCAA’s public report, nor was he cited for “unethical conduct in the public report, or anything with the academic fraud.” Rid. Dep. at 168 & 241. The NCAA Public Infractions Report also specifically stated that Plaintiff had no role in the improper employment of student athletes at Chapman Printing.

See Rid. Dep. at 167-68. It did, however, find that Plaintiff had caused a violation of the rules based on an incorrect interpretation relating to the employment of non-qualifiers (“props”). *See* Rid. Dep. at 161; NCAA Public Infractions Report.

While serving as Director of Judicial Affairs, Plaintiff was also an adjunct professor. He taught a course in intercollegiate athletics titled Physical Education 696 (“PE 696”). *See* Rid. Dep. at 322. This course was taught on a semester-by-semester basis, and the adjunct professors’ appointments were for only one semester. In the summer of 2003, Jeffery Chandler informed Plaintiff that he would not receive an appointment to teach during the upcoming fall semester. *See* Rid. Dep. at 561; Ang. Dep. at 328. The course previously taught by the Plaintiff was not offered in the Fall 2003 semester. *See* Rid. Dep. at 562. None of the named Defendants played a role in this decision. *See* Gro. Dep. at 71-72; Ang. Dep. at 179; Cot. Dep. at 58-59. This decision was made by Dr. Jeffrey Chandler. *See* Level III grievance hearing transcript, Box I - 1189-96, attached hereto as Ex. J. This statement was made during Plaintiff’s Level III grievance, under oath, during cross examination by Plaintiff’s attorney. The reason for this decision was the Plaintiff’s improper use of another employee’s telephone code. *See id* at 1189. The Plaintiff admits that Dr. Chandler discussed this phone code violation with him as the reason for not renewing this position. *See* Rid. Dep. at 786.

The Plaintiff later resigned his position and left MU in Fall 2004. *See* Rid. Dep. at 562 & 660. None of the named Defendants terminated his employment. *See* Rid. Dep. at 692. As will be demonstrated below, summary judgment is appropriate when there is no material issue of fact and these Defendants are entitled to judgment as a matter of law, and qualified immunity from suit.

IV. STANDARD OF REVIEW

A party is entitled to summary judgment “if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.” *Fed. R. Civ. P. 56(c)*. Material facts are those necessary to establish the elements of a party’s cause of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the Court does not weigh the evidence and determine the truth of the matter. *Id.* at 249. Instead, the Court draws any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indust. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element.

V. ARGUMENT

- a. **This Court should grant Defendants’ Motion for Summary Judgment on the Plaintiff’s claims for relief under 42 U.S.C. § 1983 because there are no disputed material facts that show Defendants acted under the color of state law in characterizing the Plaintiff’s transfer from the position of Compliance Director as a “corrective action” to the NCAA.**

The First Count in the Plaintiff’s case alleges he is entitled to relief under 42 U.S.C. § 1983 based on a violation of his constitutionally protected due process rights. (*See* Am. Compl. ¶ 50). This section states:

Every person who, *under color of any statute, ordinance, regulation, custom, or usage*, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2000) (emphasis added). This section provides a judicial remedy for individuals whose federal constitutional rights are violated by state action. The Supreme Court has refused to craft

new remedies for the violation of constitutional rights, *see Bush v. Lucas*, 462 U.S. 367 (1983) ; or for the nonconstitutional claims of state employees, *Bishop v. Wood*, 426 U.S. 341 (1976).

On September 23, 2004, this Court ruled on these Defendants' February 12, 2004 Motion to Dismiss. In that Order, this Court discussed the United States Supreme Court's decision in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988). In *Tarkanian*, the Supreme Court held that the NCAA was not an agent of the university. *See* September 23, 2004 Order at 3 (citing *Tarkanian*, 488 U.S. at 197). Based on this decision, this Court ruled that MU was not an agent of the NCAA.; therefore, no agency relationship exists between the NCAA and MU.

Plaintiff's allegations of a due process violation are not based on his transfer to the position of Director of Judicial Affairs, but upon the characterization of this transfer to the NCAA in response to its inquiry. The official transfer occurred on October 1, 2001. *See* Ang. Dep. at 209; Rid. Dep. at 622. Dr. Angel did not notify the NCAA Chairman until October 17, 2001 that one of the corrective actions taken by Angel in response to the charge of lack of institutional control was Ridpath's transfer out of the Athletics Department. *See* Ang. Dep. at 152; NCAA 000145-47. The authority to respond to the NCAA inquiry is conferred upon university presidents under the legislation adopted by the NCAA. Dr. Angel submitted this response according to these rules. As such, the characterization of the Plaintiff's transfer as a "corrective action" to the NCAA was not acting under the color of state law.

- b. Even if this Court determines that Dr. Angel acted under the color of state law when he notified the NCAA that one of the corrective actions taken in response to the charge of "lack of institutional control" was transferring Plaintiff to a department outside the athletics department, these Defendants are still entitled to summary judgment because the Defendant provided him with due process prior to characterizing his transfer as a corrective action.**

To establish a due process violation, the Plaintiff "must demonstrate: (1) that [he] had a

property interest; (2) of which the [State] deprived [him]; (3) without due process of law.” *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 826 (4th Cir.1995). While these Defendants will establish that they did not deprive the Plaintiff of a constitutionally protected property interest, nonetheless, he did receive due process of law. The Supreme Court has ruled that the essential requirements of due process, are “notice and an opportunity to respond.” *Cleveland Bd. of Educ. v. Loudermill* 470 U.S. 532, 546 (1985). A formal adversarial hearing prior to a dismissal is typically not required. The opportunity to be heard only need serve 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. *Id.* at 545-46 (citing *Bell v. Burson*, 402 U.S. 535, 540 (1971)).

Plaintiff testified that he first learned that his transfer was going to be characterized as a corrective action by Kevin Klotz in mid-October, 2001, prior to Dr. Angel notifying the NCAA of the decision. *See* Rid. Dep. at 213-14. When Ridpath learned of this characterization, he spoke to Grose. *See id.* at 319-20. This meeting occurred more than two weeks after he accepted the transfer. Ridpath testified that during this second meeting with Grose he was assured him that “the corrective action would be because of conduct at the hearing. . . .” *Id.* After the Plaintiff had the opportunity to present his position to these Defendants, Dr. Angel responded to the new charge of lack of institutional control as follows:

Independent of your September 28 letter, I evaluated [Ridpath’s] conduct at the hearing, coupled with the tone and tenor of that conduct and concluded that his comments and statements were unwarranted. Additionally, the testimony by the Director of Compliance was contrary to the mindset I believe should be advanced by someone with compliance responsibilities at an NCAA member institution. Consequently, on September 27, I removed Mr. Ridpath from the University’s Department of Athletics.

NCAA 000146. Dr. Angel attached MU's Response to NCAA Committee of Infractions September 28th Letter, which was in addition to its previously filed Response. This lengthy report contained twenty-seven corrective actions. The only one dealing directly with the Plaintiff states, "Removal of the Director of Compliance. In light of the implementation of the zero tolerance policy, the information gleaned at the Hearing and the tenor and tone of the Director of Compliance, David Ridpath, at the Hearing, the University has removed Ridpath from the Department of Athletics." NCAA 000165, attached as Ex. K. Plaintiff received notice of the "corrective action" characterization before Angel submitted it to the NCAA, and he was provided the opportunity to be heard when he met with Grose. Angel's letter specifically states that the "corrective action" was because of Ridpath's behavior and testimony during the hearing, which is what Ridpath alleged that Grose stated during their meeting. Therefore, the Defendants are entitled to summary judgment on the Plaintiff's due process claims because they provided him with notice and the opportunity to be heard before the action was undertaken.

c. These Defendants are entitled to summary judgment because they did not deprive the Plaintiff of a constitutionally protected liberty interest in his reputation.

Before Plaintiff is entitled to the due process discussed above, he must establish that he had a constitutionally protected liberty or property interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972). To establish that he was entitled to the due process afforded him, the Plaintiff "must first establish that he had a property or liberty interest at stake." *Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002). The W. Va. Supreme Court found that "an accusation or label given the individual by his employer which belittles his worth and dignity as an individual, and, as a consequence, is likely to have severe repercussions outside his work world, infringes one's liberty

interest” *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164, 167-68 (W.Va. 1977).¹ Accusations “of incompetence or unsatisfactory job performance” are not sufficient to implicate constitutional liberty interests. *See Zepp v. Rehrmann*, 79 F.3d 381, 388 (4th Cir. 1996). *See also Robertson v. Rogers*, 679 F.3d 1090, 1091-92 (4th Cir. 1982).

Even if Ridpath believes that his reputation was tarnished, this damage did not implicate a liberty interest, and at most, he may have a state claim of defamation. But, nowhere in Ridpath’s complaint does he make this claim. In this case before the Fourth Circuit on the issue of qualified immunity, the concurring/dissenting opinion stated, at most, that Ridpath had a claim of defamation, and that *Siegert v. Lilly*, 500 U.S. 226 (1991) controlled. *See Ridpath*, 447 F.3d at 322 (J. Widener, concurring and dissenting). Siegert tried to get work at an army hospital in Germany, and his former supervisor wrote to the German hospital that Siegert was inept, unethical, and “perhaps the least trustworthy individual I have supervised in my thirteen years at [his former hospital].” *Siegert*, 500 U.S. at 228. With this letter, the German hospital did not give Siegert his credentials to practice immediately. *Id.* at 228-29.

The Supreme Court determined that while the letter “would undoubtedly damage the reputation of one in [Siegert’s] position, and impair his future employment prospects,” Siegert could make a state claim of defamation, which he did. *Id.* at 234. Thus, the U.S. Supreme Court did not find an implicated liberty interest. *Id.* As a matter of law, this court should follow Widener’s reasoning in the 12(b)(6) ruling and determine that, at the summary judgment stage, Ridpath’s claim is nothing more than a defamation claim. If Siegert’s employer can call him inept, unethical, and incredibly

¹ The West Virginia Supreme Court of Appeals adopted the rationale of the Fourth Circuit as it relates to a liberty interest in the Plaintiff’s reputation under the West Virginia Constitution, Article 3 §10.

untrustworthy without implicating his liberty interest, Ridpath should be content that he got off with only a “corrective action” label. Ridpath did not make a defamation claim. Ridpath’s claim for due process violation should be dismissed.

The characterization of the transfer as a corrective action is not a charge of serious character defect. The Plaintiff’s allegations about the “corrective action” characterization are based on the Public Report, authored by the NCAA, not by a MU publication. *Tarkanian* establishes that MU is not an agent of the NCAA. *See id.* at 197. While one of Plaintiff’s expert, Katherine Noble, opined that the “corrective action” characterization may call into question Ridpath’s ethics, she admitted her opinion was based on the Public Infractions Report and not Dr. Angel’s statement. *See Noble Deposition* at 28-29, attached as Ex. L. She further admitted that she had not reviewed any of the NCAA documents prior to issuing her opinion. *See id.* at 24. She also admitted that no findings were brought against Ridpath in the report that would impart any ethical concerns about him, and that the reader would have to make strong assumptions to determine that Plaintiff committed any ethical violations. *See id.* at 33.

Plaintiff’s other proposed NCAA expert, John Gerdy, was as nebulous with his testimony as Noble as to how the “corrective action” label imparted any ethical or moral concern about Ridpath. While he stated that the “corrective action” characterization would have a severe impact on Ridpath’s ability to work in intercollegiate athletics in the future, he also stated that to find an ethical violation, one would have to “read between the lines” and that it would take “a bit of a leap” to find that the report called into question Plaintiff’s integrity. *See Ger. Depo.* at 31 & 70, Ex. M. Gerdy admitted that he did not “know the specifics of the case.” *Id.* at 108. The only document that he reviewed prior to rendering his opinion in this case was the Public Infractions Report. *See id.* at 6-7. He further did

not have any knowledge of Dr. Angel's response to the NCAA. *See id.* at 67-8. Thus, as in *Zepp* and *Robertson*, the "corrective action" label may allude to incompetence, if that, and accusations of incompetence or poor performance are not enough to implicate a liberty interest.

Under *Roth*, a liberty interest may also be implicated if the characterization forecloses the opportunity to take advantage of other job possibilities. *See Roth*, 408 U.S. at 573 (1972). The Plaintiff cannot establish this element. Even with the "corrective action" label, the Plaintiff filled an interim position at Ohio University's compliance program, a school noted for its excellent master's program in compliance. *See* Nob. Dep. at 35; Rid. Dep. at 6. He did not submit an application for the position on a permanent basis. *See id.* at 225-26. The characterization of the transfer as a corrective action did not foreclose his opportunity to take advantage of other job possibilities.

If Plaintiff were able to show that the "corrective action" characterization insulted his reputation by accusing him of dishonesty or immorality, or stigmatized him so much as to foreclose future employment opportunities, his liberty interest is still not implicated because he still must satisfy the remainder of the requirements which would entitle him to relief. As Plaintiff's "corrective action" label was not made in the course of the termination of his employment, *see Paul v. Davis*, 424 U.S. 693, 710 (1976); the reasons for the transfer were not made public, *see Bishop v. Wood*, 426 U.S. 341, 348 (1976); and the reasons given for the characterization were not false, *see Codd v. Velger*, 429 U.S. 624, 627 (1977); his liberty interest was not implicated. *See Boggess v. Housing Authority of the City of Charleston*, 273 F.Supp.2d 729, 747 (S.D. W. Va. 2003).

Plaintiff cannot demonstrate that Dr. Angel's letter to the NCAA that characterized his transfer as a "corrective action" was sent in the course of a termination. The Fourth Circuit, relying on other jurisdictions, found that a liberty interest can be implicated in "the course of a discharge or significant

demotion.” *Stone v. University of Maryland Medical System Corporation*, 855 F.2d 167, 173 (4th Cir. 1988) (citing *Lawson v. Sheriffs of Tippecanoe County, Indiana*, 725 F.2d 1136, 1139 (7th Cir. 1984); *Moore v. Otero*, 557 F.2d 435, 438 (5th Cir. 1977)). Plaintiff cannot establish that the “corrective action” characterization was during the course of a termination.

Based solely on the allegations in Plaintiff’s Amended Complaint, the Fourth Circuit ruled that his “reassignment was neither voluntary nor an innocuous transfer. Rather, it was a significant demotion to a position outside his chosen field, rendering it tantamount to an outright discharge.” *Ridpath*, 447 F.3d at 310. A state employer cannot avoid liability for offering employment far beneath the one that the employee originally had and the offered job cannot be “degradingly inferior.” *Lawson*, 725 F.2d at 1139. Also, an employee’s internal transfer does not implicate a liberty interest “unless it constitutes such a change of status as to be regarded essentially as a loss of employment.” *Moore v. Otero*, 557 F.2d at 438.

The characterization of the transfer as a “corrective action” is the basis for the Plaintiff’s claims. It is not based on the transfer itself. Contrary to the Allegations in the Plaintiff’s Amended Complaint, the decision to transfer Ridpath from the Compliance Director to the Director of Judicial Affairs was a voluntary transfer. Before there was any contemplation on the part of MU, the Plaintiff inquired about transferring to the position. *See* Rid. Dep. 329 & 698. After this inquiry, the Plaintiff brought up the potential transfer to President Angel during a meeting on September 11, 2001, about one-and-a-half-weeks before the NCAA hearing. *See id.* at 698. As Director of Judicial Affairs, Ridpath dealt with complex issues and never felt they were so difficult that he had to pass a task completely on to someone else. *Id.* at 330. Plaintiff was still doing challenging, director level work in his new position. He described the Director of Judicial Affairs as being a “pretty important

position.” *Id.* at 701. Plaintiff was not terminated or significantly demoted when he voluntarily accepted the transfer. It is further undisputable that the allegations in the Plaintiff’s Amended Complaint are based on the characterization of the transfer, and not the transfer itself. The corrective action statement occurred after the Plaintiff had assumed his new position. Therefore, this Court should grant summary judgment to these Defendants.

If the Plaintiff is able to overcome all of these hurdles, he still cannot establish that the “corrective action” characterization implicated his liberty interest because it was not announced publicly by MU. In *Wooten v. Clifton Forge School Board*, the Fourth Circuit found that a liberty interest was not implicated when the defendant “did not voluntarily disclose to the public the reasons for his reassignment prior to these proceedings.” 655 F.2d 552, 554 (4th Cir. 1981).

The NCAA Public Infractions Report was released to the public by the NCAA, not the Defendants. The report listed one of the corrective actions as, “[s]ubsequent to the September 22 hearing before the committee on infractions, [MU] transferred the compliance director from athletics to another department in the university.” NCAA Public Infractions Report, at 13. MU is not an agent of the NCAA. *Ridpath Memorandum Opinion*, Sept. 23, 2004. The NCAA is not an agent of MU. *See Tarkanian*, 488 U.S. at 197. The NCAA Report did not contain rationale for the characterization contained in President Angel’s October 17, 2001 letter and did not release Plaintiff’s name to the public. *See Rid. Dep.* at 168. Plaintiff claims that MU issued a press release showing that his transfer was a “corrective action.” *See Rid. Dep.* at 333. However, Plaintiff has nothing to substantiate this claim other than his testimony. Plaintiff never produced this press release even after taking confidential documents from MU.

Ridpath cannot prove that the “corrective action” label was false. To prove falsity, “there must

be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Codd*, 429 U.S. at 627. In *Cox v. Northern Virginia Transportation Commission*, the Court found that public comments linking the plaintiff's termination to the investigation of financial irregularities involving the defendant commission's expense accounts implicated a liberty interest because the plaintiff was not responsible for them, and thus committed no wrongdoing, and the accusations cast her as dishonest and immoral. 551 F.2d 555, 557-58 (4th Cir. 1976). Cox was entitled to notice and the opportunity to be heard. *See id.* at 558. Ridpath's claim is based on Dr. Angel's characterization of his transfer as a "corrective action," not on the transfer itself. Ridpath asks the court to draw a long line of conjectures about the "corrective action" label to determine that it implicates his liberty interest in his job, something Cox did not have to do as the charges implicated her honesty and integrity. Whatever Ridpath is disputing, it has nothing to do with the "corrective action" label on his transfer, because this label does not impart any unethical charge against him. If anything, the "corrective action" label may impart some level of incompetence or poor job performance, but this is not enough to implicate a liberty interest.

If Ridpath can prove the four elements of the first prong of the § 1983 test, that the comments made about him impugned his reputation severely, that the comments were made in the course of his termination, they were public, and they were false, he must still satisfy the second prong of the § 1983 test by showing that the violated right was clearly established and a reasonable person would have been aware of the right. *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003). As Ridpath undisputably cannot satisfy any of the elements of the first prong of the § 1983 test, Ridpath also cannot satisfy the second prong of the test. Thus, Defendants should be awarded summary judgment on Ridpath's due process claim. Therefore, assuming Plaintiff could establish that President Angel's characterization

was an action taken under the color of state law, and even if Defendants had not provided Plaintiff with due process, Plaintiff cannot establish a constitutionally protected liberty interest in his reputation because the “corrective action” label did not accuse Plaintiff of a serious character defect, it was not made in the course of his termination, the reasons given were not made public, and they were not false. Thus, the Defendants are entitled to summary judgment on Ridpath’s due process claim.

d. Summary judgment should be granted to Defendants on First Amendment claims because no material facts exists to show the Plaintiff’s speech was protected, that his interests in expression outweighed MU’s interests as an educational institution, and no retaliatory actions were taken by Defendants.

Plaintiff cannot sustain a claim of First Amendment Infringement because the speech was not related to a matter of public concern and the Plaintiff’s interests did not outweigh those of MU in efficient operation of the university. According to the United States Court of Appeals for the Fourth Circuit:

Retaliatory employment action violates a public employee's right to free speech under the following conditions. First, the speech must relate to a matter of public concern. *Id.* Second, the “employee's interest in First Amendment expression must outweigh the employer's interest in efficient operation of the workplace.” *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (4th Cir. 2000) (internal quotation marks omitted) (citing *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731). (This part of the inquiry is known as the *Pickering* balancing test.) Third, there must be a causal relationship between the protected speech and the retaliatory employment action; specifically, “the protected speech [must be] a ‘substantial factor’ in the decision to take the allegedly retaliatory action.” *Id.* (internal quotation marks and citation omitted). The first two elements involve questions of law. The third element, causation, can be decided on “summary judgment only in those instances when there are no causal facts in dispute.” *Id.*

Love-Lane v. Martin, 355 F.3d 766, 776 (4th Cir. 2004); *see also McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998). The Appellate court upheld the Plaintiff’s first amendment claims on appeal of the Defendants’ 12(b)(6) Motion to Dismiss. *Ridpath*, 447 F.3d at 317. However, the factual record has now been developed through the discovery process and there are no material facts that support the

Plaintiff's claim for infringement on his First Amendment rights and summary judgment should be granted under Rule 56.

The first prong of the *McVey* test is controlled by the Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Supreme Court established requirements for the constitutional protection of public employee speech. "The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Id.* at 418 (citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)). "If the answer is no, the employee has no First Amendment cause of action based on his or her reaction to the speech." *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)). However, "If the answer is yes, then the possibility of a First Amendment claim arises." *Id.*

When a First Amendment claim arises, the Court has noted:

"[T]he government as employer indeed has far broader powers than does the government as a sovereign." Government employers, like private employers, need a significant degree of control of their employees' words and actions; without it, there would be little chance for the efficient provision of public services. ... Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Id. (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994)). Although government employers may limit the speech of their employees only to the extent necessary to operate efficiently and effectively, this limit extends to statements made pursuant to the employee's official duties: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for first amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Thus, when an employee speaks pursuant to his official duties, the Constitution does not protect his statements from employer discipline.

Plaintiff was not prohibited from speech related to a matter of public concern. Under *Garcetti*, when a public employee speaks as part of his official duties, his speech is not protected, and a public employer has a right to discipline the employee for his or her statements. *Id.*; see also *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990). Plaintiff alleges that he was threatened with termination of his employment by the Defendants if he made public statements regarding his transfer to judicial affairs being labeled a corrective action. *Rid. Dep.* at 317. There were no threats by Cottrill or Grose preventing the Plaintiff from exercising his 1st Amendment rights. Cottrill merely expressed concern to the Plaintiff about his family. *Cot. Dep.* at 73. According to Grose, “[t]he only thing that I ever said to Mr. Ridpath was that, in this whole process, working our way through it and all, that he really needed to think about, he was a young person, he needed to think about his personal and professional future.” *Gro. Dep.* at 80-81. These concerns by Cottrill and Grose cannot be construed as threats regarding public statements by Plaintiff.

Plaintiff’s grievances were clearly expressions concerning the circumstances surrounding the transfer of his employment to another department at MU, and thus, were not a matter of public concern. If the employer may control what the employee says in the scope of his official duties, then no First Amendment right has been violated if an employee is ordered not to discuss a matter involving his official duties with the press. Plaintiff was the compliance director for MU. The NCAA found MU to be out of compliance. As compliance director, any statements he gave to the press regarding the investigation would have been within the scope of his duties as an employee. Any allegations that he was instructed not to speak about the investigation to the press would have likewise been an order within the scope of his employment. Plaintiff’s claims his speech was chilled cannot be established because any speech by him on the issue of the NCAA investigation would have been within the scope

of his employment. Accordingly, Plaintiff's speech was not protected.

Plaintiff's allegations of retaliation are for his speaking out on the NCAA infractions and for his petitioning the government for redress of grievances by filing this civil action. Plaintiff's claims in this case are similar to those made by Ceballos in *Garcetti*. Ceballos's claims were based on a memoranda that he had written to his supervisors, following the requested review by defense counsel, that recommended dismissing a prosecution based on a faulty warrant. He also testified for the defense in a hearing challenging the warrant. Following the denial of the challenge to the warrant, Ceballos alleged a series of retaliatory acts by his employer. Similarly, Plaintiff claims that he was relieved of his teaching duties because he spoke out about the NCAA infractions and filed this lawsuit. The Court in *Garcetti* recognized that "[u]nderlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Garcetti*, 547 U.S. at 420. (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

MU is not a "person" against whom a § 1983 claim for money damages might be asserted. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). Plaintiff has not named the individuals that he claims failed to re-appoint him to teaching duties. Additionally, "[t]he constitutionally protected property interest in employment does not extend to the right to possess and retain a particular job or to perform particular services." *Fields v. Durham*, 909 F.2d 94, 98 (4th Cir. 1990). The Appellant continued to be employed by MU at a pay rate higher than he was earning as Compliance Director. The Code specifically states: "A faculty member wishing to grieve or appeal any action of the institution or Governing Board may utilize the procedures set out in W. Va. Code §29-6A." 133 C.S.R. § 9-15.1. Similarly, non-faculty employees have a right to seek review of their employment

classifications. See 133 C.S.R. § 8-18.1. As such, the Plaintiff had available to him administrative remedies for all alleged violations of his First Amendment rights. The Court in *Garcetti* recognized that “[u]nderlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance.’” *Garcetti*, 547 U.S. at 420 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

In *Garcetti*, the Appellant spoke out as a witness for the defendant in the hearing challenging the warrant. The Court did not find the employment actions taken by the Appellees to be violative of his First Amendment rights. The Plaintiff’s allegations that his teaching position was not renewed because of his filing this lawsuit is baseless. He offers nothing but unwarranted inferences and unreasonable conclusions in his argument supporting this allegation, and this Court “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P’ship*, 213 F.3d 175, 180 (4th Cir. 2000).

Ridpath spoke out pursuant to his official duties as Associate Athletic Director in charge of Compliance. He was in a high ranking, policy making position in the department of athletics. Any speech, words, and conduct he made in that position can only be construed as in his official position. The NCAA implicated the Plaintiff in its investigation report in his capacity as Compliance Director. MU had the right to discipline him for his statements because “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.” *Garcetti*, 547 U.S. at 424. Any reasonable official would have taken corrective action based on the NCAA investigation report. Lastly, as the Court stated in *Garcetti*, “If Ceballos’ superiors thought his memo was inflammatory or misguided, *they had the authority to take proper corrective action.*” *Id.* at 423 (emphasis added). Therefore, even if the non-renewal of the Plaintiff’s adjunct position and the

transfer of the Plaintiff to the Judicial Affairs Department were in retaliation for the statements the Plaintiff made, these actions were permissible because the government entity, MU, may discipline its employees for statements they make pursuant to their official duties. Therefore, the Plaintiff's Amended Complaint fails to allege violations of his First Amendment rights that were clearly established at the time.

Assuming *arguendo* that the Plaintiff's speech was a matter of public concern as stated above regarding the chilling an retaliation claims, the Plaintiff fails the second prong of the *McVey* test because his interest in First Amendment expression did not outweigh MU's interest in efficient operation of the workplace. Angel, Cottrill, and Grose all had a duty to ensure the efficient operation of the university. The university took several "corrective actions" in order to comply with NCAA guidelines and gain credibility within itself and the NCAA. Ang. Dep. at 146. Once the "corrective actions" were put in place and reported to the NCAA, it was in the best interest of MU for all employees to accept the findings and make no public statements about the "corrective actions." MU possessed the greater interest in protecting its reputation with the NCAA so that it could continue to supply several student athletes with scholarships and educational opportunities. Public comments about MU's handling of the circumstances could have lead to greater sanctions imposed on MU by the NCAA, leading to a reduction in educational opportunities for student-athletes. Accordingly, MU's interest in maintaining a good reputation with the NCAA and continuing to provide educational opportunities to student-athletes greatly outweighs the Plaintiff's interest in speaking publicly about labeling his transfer to judicial affairs as a "corrective action."

Third, assuming *arguendo* that the first two elements are present, the Plaintiff's claim must fail because there is no causal connection between his protected speech and the termination of his teaching

duties. “The causation requirement is ‘rigorous’ in that the protected expression must have been the ‘but for’ cause of the adverse employment action alleged.” *Ridpath*, 447 F.3d at 318; (citing *Huang*, 902 F.2d at 1140). The appellate court upheld the Plaintiff’s claim on this third element on appeal of the Defendants’ Motion to Dismiss stating that, “the Amended Complaint alleges that Ridpath’s protected speech was the ‘but for’ cause of the termination of his teaching duties, satisfying the causation requirement embodied in the third prong of the *McVey* test. *Id.* at 319. However, the fully developed factual undisputedly shows the Defendant was not terminated from his teaching duties ‘but for’ the use of his protected speech.

The Plaintiff resigned from his compliance position at MU. *See* Rid. Dep. at 660. Neither Ed Grose, nor any other Defendant terminated his position at MU. Rid. Dep. at 692. Adjunct professorships are determined on a semester-by-semester basis. Rid. Dep. at 561; Ang. Dep. at 328. In the summer of 2003, Chandler informed the Plaintiff that he would no longer be teaching PE 696 on intercollegiate activities the following semester, the Fall of 2003. Rid. Dep. at 561. This course was not even offered to during the next semester. Rid. Dep. at 562. Plaintiff cannot meet the “rigorous” standard of showing that his employment was terminated ‘but for’ the expression of protected speech because neither Angel, Cottrill, nor Grose retaliated against the Plaintiff as a result of his protected speech because he was not terminated from employment.

Therefore, because Plaintiff’s grievances regarding his employment are not protected speech, his interests are greatly outweighed by MU’s interest in providing education to student-athletes, and no retaliatory action was taken by any of the named individual Defendants. No material facts support Plaintiff’s claim for violation of First Amendment rights and summary judgment must be granted in favor of the Defendants.

- e. **These Defendants are entitled to summary judgment on the Plaintiff's allegations of breach of contract because the undisputed facts establish that the Plaintiff could not rely on any oral representations regarding the terms of his employment, and any and all alleged promises made by Defendant Grose regarding the Plaintiff's employment are *ultra vires* and not binding on MU.**

While there is a dispute over the terms of the alleged contract (*compare* Rid. Dep. at 331 to Gro. Dep. at 108-09), these disputed facts are not material to the decision of this Court because the Plaintiff cannot rely on unwritten terms of employment. *See* Rid. Dep. at 331. Estoppel cannot be raised against a public entity on the basis of oral advice where a complex public function is involved because a need for written records is indicated. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). The basis for this heightened standard is that the government may not be estopped on the same terms as any other litigant. *Id.* at 60-61. Estoppel could not be erected to bind a public body where the participant relied on the oral advice because the public body carried out a complex public function, in this case medicare, which manifested the need for written records. *Id.* at 65. Thus, a participant in a public program cannot rely on the oral, unwritten representations made by an unauthorized intermediary of a public agency where a complex public function is involved.

The Plaintiff's breach of contract claim arises from a meeting between the Plaintiff and Grose. Grose was designated by Angel to communicate to Plaintiff that he was being removed from the Athletic Department and that he may accept a position in Judicial Affairs. *See* Ang. Dep. at 112-113. Grose and the Plaintiff met to discuss this transfer. *See* Rid. Dep. at 195. Plaintiff stated that he would agree to the transfer, but only if conditions were met in order to prevent him from being publicly linked to the NCAA violations. *Id.* Plaintiff admitted this was entirely a verbal agreement and not placed in writing. *See id.* Due to MU's complex public function of delivering higher education, a written

agreement was needed between the Plaintiff and MU regarding the conditions of his employment, and the Plaintiff cannot raise estoppel based on any oral representations made by Grose. Thus, the Plaintiff's breach of contract claim must fail based on the United States Supreme Court holding in *Heckler*.

Furthermore, MU is not bound by any of the alleged representations made by Ed Grose to the Plaintiff because Ed Grose would have been acting *ultra vires*. The United States Supreme Court states:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though [...] the agent himself may have been aware of the limitations upon his authority.

Heckler, 467 U.S. at n.17; (citing *Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947)). Grose would have been acting outside the bounds of his authority because no authorization was given to Grose negotiate any terms of employment with the Plaintiff. *See* Ang. Dep. at 156. The only person authorized to make the alleged employment arrangements was Dan Angel, with whom the Plaintiff never spoke. *See* Ang. Dep. at 113; Rid. Dep. at 207. According to *Heckler*, the Plaintiff could not rely on any representations made by Grose because he was only an intermediary that was not authorized bind MU to the terms of the Plaintiff's employment. (Respondent could not rely on judgment of mere conduit of public agency).

Furthermore, the corrective action labeling was under the authority of Dan Angel. More than three weeks after Plaintiff accepted the transfer and in Response to the NCAA's additional inquiry into lack of institutional control, President Angel notified the NCAA of the corrective actions he had taken subsequent to the hearing. *See* Ang. Dep. at 152; NCAA 000145-47. He never discussed how this

transfer would be characterized to the NCAA with any of the other Defendants, including Ed Grose and Layton Cottrill. *See* Ang. Dep. at 156-7; Gro. Dep. at 74-5; 95-6; Pru. Dep. at 190. Thus, no contract could be created between the MU and the Plaintiff because Ed Grose had no authority over labeling corrective actions.

The West Virginia Supreme Court of Appeals supports the Defendants' position. The terms of the verbal contract that the Plaintiff alleges he made with Grose is unenforceable as an *ultra vires* promise by a public official. *See Freeman v. Poling*, 338 S.E.2d 415 (W. Va. 1985). In *Freeman*, an incumbent sheriff lost his bid for re-election. *Id.* at 417. Prior to leaving office, he promised employees that their jobs were protected based upon that county's new civil service system. *Id.* However, once the new sheriff took office, she fired four employees. *Id.* The former employees brought suit claiming they were promised jobs by the former sheriff. *Id.* The Court found that the incumbent sheriff was acting outside his governmental capacity by making this promise, and "unlawful or *ultra vires* promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." *Id.* at 420.

In *City of Fairmont v. Hawkins*, 304 S.E.2d 824, 826 (1983), the Court ruled that a mayor's settlement of a case in contravention of statutory authority was unlawful. The Court overturned the ruling of the circuit court and ruled that Fairmont was not liable for the *ultra vires* actions of its mayor. *Id.* Thus, because Grose had no statutory authority to make promises regarding the Plaintiff's employment, MU cannot be held liable for breach of contract. Therefore, the Plaintiff cannot existence of a verbal contract, nor can he establish a breach. The Amended Complaint also alleges the breach of contract was at the direction of Cottrill. Angel made the decision to characterize the transfer as a corrective action. He did not consult with any of the other Defendants before he made the

characterization. Thus, summary judgment is appropriate on the breach of contract claim because the Plaintiff cannot establish the existence of a contract nor a breach of that contract.

f. Defendants are entitled to summary judgment on the Plaintiff's allegations of fraud because he cannot establish that Grose knew any of the terms of the contract he allegedly agreed upon were false at the time he made them.

The Plaintiff's allegations of fraud are limited to Grose. Am. Compl. at ¶¶78-79. Yet, he alleges liability against all Defendants. *See id.* at ¶¶ 82-94. Judge Staker's February 17, 2004 Order only shows that the fraud claim could be maintained against Grose. The West Virginia Supreme Court of Appeals explained:

The essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it."

Kidd v. Mull, 595 S.E.2d 308, 313 (W.Va. 2004) (citing *Horton v. Tyree*, 139 S.E. 737 (W. Va. 1927);

Lengyel v. Lint, Syl. pt. 1, 280 S.E.2d 66 (W. Va. 1981).

A crucial element of fraud, particularly fraudulent concealment, is intent to defraud through false statement. To be actionable, the defendant actually must know the falsity of his misrepresentation or be in a position to know, and have a duty to know, "whether the representations were true or false."

West Virginia Housing Development Fund v. Ocwen Technology Xchange, Inc., 200 F.R.D. 564, 567

(S.D. W.Va. 2001). The Defendant or its representative must know of his falsity or have a duty to

know of the falsity in his representations. Grose neither knew of the falsity in his alleged statements

nor had a duty to know of the falsity. The Plaintiff alleges:

Defendant MU, by and through its agent, Defendant Grose, made one or more representations or withheld information related to material facts specifically, Defendant(s) induced Ridpath to accept internal employment transfer at MU by assuring him that his transfer would not be reported to the NCAA (or to the public) as related to or the result of the NCAA infractions found at MU.

See Plaintiff’s Complaint at 78. The Plaintiff cannot show that the statements made by Grose were false at the time they were made. Even if Angel had already decided to characterize the Plaintiff’s transfer as a “corrective action,” the Plaintiff cannot demonstrate that Grose knew of the falsity at the time the contract was made. *See* Rid. Dep. at 331. Angel never discussed his intention to characterize the transfer as a “corrective action.” *See* Ang. Dep. at 156-57. In fact, Grose had never heard the term “corrective action” prior to the release of the Public Report. *See* Gro. Dep. at 74-75. Grose had no involvement in the characterization of the Plaintiff’s transfer, and as such, he had no knowledge of the characterization. Thus, because the characterization of the Plaintiff’s transfer was made solely by President Angel without consulting Ed Grose, summary judgment must be granted on the alleged fraud count.

- g. Summary Judgment should be granted in favor of the Defendants on the outrageous conduct claim because characterizing the Plaintiff’s transfer as a “corrective action” due to his conduct during the NCAA Infractions Committee hearing, and terminating his adjunct teaching position as a result of Plaintiff violating MU policy is not extreme and outrageous.**

Count VI of the Amended Complaint alleges the tort of outrage, also known as intentional infliction of emotional distress, (“IIED”) as a result of characterizing the Plaintiff’s transfer as a “corrective action” and terminating his adjunct faculty status. To sustain a claim for IIED, unaccompanied by physical injury, the Plaintiff must show:

One, the wrongdoer’s conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer’s conduct and the emotional distress. Four, the emotional

distress was severe.

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

Plaintiff cannot show any extreme and outrageous conduct on the part of the Defendants because characterizing Plaintiff's transfer as a "corrective action" laid solely in the hands of President Angel, and was made as a result of the Plaintiff's conduct at the September 22, 2001 hearing. Non-renewal of Plaintiff's adjunct professorship occurred after he took another employee's phone code, running up a large long distance bill, and did not pay for his charges until months later, and only after being confronted with his wrongdoing. *See Ang. Dep. at 774-76.*

President Angel made the decision to remove the Plaintiff from the compliance department when he returned from the NCAA hearing in September, 2001. *See Ang. Dep. at 150.* The decision was based upon Ridpath's behavior and comments at the NCAA hearing. *See Ang. Dep. at 152.* None of the other Defendants were involved in the characterization of the transfer. *See Gro. Depo. at 74; Ang. Dep. at 156-7.* To be liable for IIED, the Plaintiff must show that each of the Defendants' "conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Travis*, 504 S.E.2d at 425. Transferring the Plaintiff out of compliance due to his behavior during the September, 2001 hearing, is not outrageous and extreme. Grose and Cottrill persuaded Angel to offer the Plaintiff employment in the Judicial Affairs department due to the fact that he had a young family to support. *See Ang. Dep. at 173.* On the other hand, President Angel had the responsibility to notify the NCAA of the actions taken by MU, he agreed, however, to allow the Plaintiff to remain employed at MU without a loss in pay. Plaintiff cannot satisfy the requirements of a claim for outrageous

conduct.

Second, Plaintiff cannot show that any of the named Defendants played any role in the decision not to renew his adjunct teaching position. As stated previously in the facts, the department chair, Jeffrey Chandler, chose not to renew Plaintiff's adjunct position. The positions are awarded each semester based on needs of the various departments. The position that the Plaintiff taught did not have enough students enrolled, so Chandler chose not to offer the class. Angel had no involvement with the selection or retention of adjuncts, did not know Ridpath served as an adjunct, and did not know Chandler had chosen not to renew his position. *See Ang. Dep.* at 179. These adjunct professorships were determined on a semester-by-semester basis. *See id.* at 328. The course taught by Plaintiff was not offered after Chandler chose not to renew the position. *See id.* at 562. Thus, that Chandler made the decision not to renew Plaintiff's adjunct position was based upon the Plaintiff's conduct and that the course was no longer offered by MU prevents a showing of outrageous conduct. As such making this decision cannot be said to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Travis*, 504 S.E.2d at 425 (W. Va. 1998). Thus, the Plaintiff cannot establish the requirements to maintain a cause of action for IIED, and summary judgment should be granted in favor of the Defendants.

h. Summary judgment must be granted in favor of MU and Layton Cottrill on the Attorney Negligence - Legal Malpractice claim because this Court has ordered and the Plaintiff has admitted that he was never personally represented by MU General Counsel Layton Cottrill.

Cottrill and MU cannot be held liable for attorney negligence as alleged in Count VIII of the Amended Complaint because Plaintiff was not represented by MU's general counsel, Cottrill. In West Virginia, a plaintiff suing for legal malpractice must prove "(1) the attorney's employment; (2) his

neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.” *Keister v. Talbott*, 391 S.E.2d 895, 898 (W. Va. 1990); *see also Holland v. Kohn*, 12 Fed.Appx. 160, 165 (4th Cir. 2001). As the Plaintiff admits and this Court has ruled, Cottrill was not employed as the personal representative of Plaintiff. Plaintiff stated in his deposition:

Q: And you did not look at Layton as your attorney, did you?

A: Vaughn, it’s hard to say. I mean at times I did and times I didn’t. But I think probably the best answer is just no.

Rid. Dep. at 707. Thus, as Plaintiff admitted that Cottrill was not his attorney, there was no attorney employment to allow a claim for attorney negligence.

Furthermore, this Court previously issued an order finding that the attorneys for MU were not personal representatives of Plaintiff. In its order issued on February 4, 2008 in this matter, the Court stated, “[No] basis is presented for finding that plaintiff was the ‘personal client’ of counsel for the university. . .” *See* February 4, 2008 Order. Accordingly, based upon Plaintiff’s admission and this Court’s ruling, summary judgment should be granted in favor of Cottrill and MU because there is no genuine issue of material fact that shows Cottrill was employed as the personal representative of the Plaintiff.

i. The individual Defendants are entitled to qualified immunity from suit because they did not violate a well established law that a reasonable administrator in their position would have known, nor did they act maliciously or oppressively.

The determination of the entitlement to qualified immunity is a purely legal question. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991). The United States Supreme Court set forth a two-prong test for evaluating a claim of qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 609 (1999). A court “must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.” *Id.* (quoting *Conn v. Gabbert*, 526 U.S. 286 (1999)). If so, the court then proceeds to

“determine whether that right was clearly established at the time of the alleged violation.” *Id.* (quoting *Conn*, 526 U.S. at 290). The Court reasoned that this test would “spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit.” *Id.* (quoting *Siegert v. Gilley*, 500 U.S. 232-33 (1991)).

“[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

As the United States Supreme Court noted, in cases dealing with qualified immunity,

Qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation.” *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). The privilege is “an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” *Ibid.* As a result, “we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”

Saucier v. Katz, 533 U.S. 194, 201 (2001)(quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (emphasis in original)). Therefore, this legal question must be determined at the earliest stage in the litigation possible to preserve the Defendants’ entitlement to this important immunity.

The Fourth Circuit denied Defendants’ appeal of the denial of their Motion to Dismiss based on qualified immunity, but made it clear that its decision was based on Plaintiff’s Amended Complaint, which they had to assume was true. *See Ridpath*, 447 F.3d at 300. However, the allegations in the Amended Complaint no longer have to be taken as true.

To show that a constitutional right is clearly established, the Plaintiff must show that “its contours [are] sufficiently clear that a reasonable official would understand that what he is doing

violates this right.” *Hope v. Pelzer*, 536 U.S. 730, 730 (2002). As outlined above, the Plaintiff cannot establish an entitlement to relief under 42 U.S.C. § 1983 for his claims of a due process violation. The Fourth Circuit found that the “corrective action” label was just the type of charge that implicates a protected liberty interest.” *Ridpath*, 447 F.3d at 314. However, this was based on the assumption that Ridpath’s allegations that the “corrective action” label was a charge of dishonesty or impugned his integrity. *See id.* The facts as discovery uncovered them show Plaintiff’s allegations are not true. Defendants are entitled to qualified immunity on Plaintiff’s due process claims because he cannot show that Defendants violated his liberty interests and he cannot show that a reasonable public official in their position would have known that they were violating his liberty interests.

Furthermore, the Defendants are entitled to qualified immunity on the Plaintiff’s First Amendment claims. As outlined above, the Plaintiff’s claims are based on his speaking out about his employment, thus, he was not speaking on an issue of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). The statements that Plaintiff attributes to Grose and Cottrill were not made in a threatening manner. *See Gro. Dep.* at 80-81; *Cot. Dep.* at 68. The threat attributed to Angel was not made to him. *See Rid. Dep.* at 19-20. Thus, as more fully argued above, these Defendants are entitled to qualified immunity on the Plaintiff’s First Amendment chilling claims because a public official in the positions of Cottrill and Grose would not know that counseling another employee would violate his right to free speech and a public official in the position of Angel would not know that making a statement outside the presence of an individual would result in the employee being intimidated. Also, the Plaintiff’s second claim on a First Amendment violation is based on the non-renewal of his adjunct professor position. Because the individual Defendants played no role in declining to renew the Plaintiff’s adjunct position and MU is not a person under § 1983, these Defendants are entitled to

qualified immunity on the First Amendment retaliation claims.

Qualified immunity applies to “all but the plainly incompetent or those who knowingly violate the law.” *Mally v. Briggs*, 475 U.S. 335, 341 (1986). The standard for analyzing an official’s conduct is “objective reasonableness,” *Torchinsky v. Siwinski*, 942 F.2d 257, 259 (4th Cir. 1991), and generally, “[s]ubjective factors involving the officer’s motives, intent, or propensities are not relevant.” *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (quoting with approval *Smith v. Reddy*, 101 F.3d 351, 357 (4th Cir. 1996)). “[I]f there is a ‘legitimate question’ as to whether an official’s conduct constitutes a violation, the official is entitled to qualified immunity.” *Tarantino v. Barker*, 825 F.2d 772, 775 (4th Cir. 1987). Obviously, while two judges agreed with the Plaintiff, one did not. This does not raise a legitimate question as to whether these officials’ conduct in using the term “corrective action” constituted a violation of a clearly established, constitutionally protected liberty, and therefore, the Appellants are entitled to qualified immunity.

WHEREFORE, for the foregoing reasons, these Defendants move this Honorable Court for summary judgment, for their fees and costs for defending this action, and for such other relief as this Court see just and fit.

**BOARD OF GOVERNORS MARSHALL
UNIVERSITY, and DAN ANGEL and F.
LAYTON COTTRILL, ESQ. and K.
EDWARD GROSE,**

By Counsel,

/s/ Vaughn T. Sizemore
Charles R. Bailey, Esquire (WV Bar No. 0202)
Vaughn T. Sizemore, Esquire (WV Bar No. 8231)
Bailey & Wyant, P.L.L.C.
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, WV 25337-3710
(304) 345-4222

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

DR. B. DAVID RIDPATH,

Plaintiff,

v.

CASE NO. 3:03-02037

Hon. Robert C. Chambers

BOARD OF GOVERNORS
MARSHALL UNIVERSITY
and DAN ANGEL and BOB PRUETT
and F. LAYTON COTTRILL, ESQ.
and K. EDWARD GROSE,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed “**Memorandum in Support of Defendant Board of Governors Marshall University, Dan Angel, Ed Grose, and Layton Cottrill’s Motion for Summary Judgment**” with the Clerk of Court using the CM/ECF system, which will send notification of filing to the following:

Jonathan Matthews, Esquire
FORMAN & HUBER, L.C.
100 Capitol Street, Suite 400
Charleston, West Virginia 25301
Counsel for Plaintiff

J. D. Hartung, Esquire
HARTUNG & SCHROEDER, L.L.P.
608 Locust Street
Equitable Building, Suite 100
Des Moines, Iowa 50309
Co-Counsel for Plaintiff

Edward M. Kowal, Esquire
CAMPBELL, WOODS, BAGLEY, EMERSON,
MCNEER & HERNDON, P.L.L.C.
517 Ninth Street, Suite 1000
Post Office Box 1835
Huntington, West Virginia 25719-1835
Counsel for Defendant Bob Pruett

Done this 21st day of July, 2008.

/s/ Vaughn T. Sizemore

Charles R. Bailey, Esquire (WV Bar No. 0202)
Vaughn T. Sizemore, Esquire (WV Bar No. 8231)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222
*Counsel for Defendant, Board of Governors
Marshall University, Dan Angel, F. Layton Cottrill, and
Edward Grose*