

**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.

**DEFENDANTS BOARD OF GOVERNORS OF MARSHALL UNIVERSITY; DAN ANGEL; F.
LAYTON COTTRILL, ESQ.; AND K. EDWARD GROSE'S REPLY TO PLAINTIFF'S
RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Initially, Defendants must point out that Plaintiff filed this action against four individual Defendants and Marshall University. Plaintiff's Response blurs the actions of each Defendant and attributes the actions of different Defendants to all. Plaintiff's Response further attributes the conduct of other Marshall employees, who are not named parties, on all Defendants. The Amended Complaint contained a count for civil conspiracy. This Court, however, correctly dismissed this count based on the intercorporate conspiracy doctrine. *See* February 17, 2004 Order at 23-24. Therefore, Plaintiff must establish that the elements of each claim are satisfied for each Defendant. Defendants' Motion establishes that each are entitled to summary judgment. To defeat this entitlement, Plaintiff must establish the existence of a material fact on each claim for each Defendant. Further, this Court dismissed all claims against Defendant Marshall and the other Defendants in their official capacities for monetary relief. The only relief available against Defendant Marshall and the other Defendants in their official capacities is

prospective equitable relief. Thus, to show an entitlement to relief from any of these Defendants in their individual capacities, Plaintiff must establish a prima facie case against each. When read in this context, Plaintiff's response fails.

STANDARD IN RESPONDING TO A MOTION FOR SUMMARY JUDGMENT

Defendants' Motion, with the pleadings, depositions, and exhibits, show that no genuine issue as to any material fact exists and that each is entitled to a judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). Plaintiff, therefore, must respond with "*specific facts* showing there is a genuine issue of material fact for trial." Fed.R.Civ.P. 56(e)(emphasis added), otherwise, summary judgment is appropriate. *See Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir.1991). While the facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the Plaintiff, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).

Defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." *Temkin v. Frederick County Commrs*, 945 F.2d 716, 718 (4th Cir.1991) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986)). Once established, "the burden then shifts to the [Plaintiff] to come forward with facts sufficient to create a triable issue of fact." *Id.* at 718-19 (citing *Anderson*, 477 U.S. at 247-48). "[O]nce the moving party has met its burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir.1992). The nonmoving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Id.*

ARGUMENT

a. This Court should grant Defendants' Motion for Summary Judgment on 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 Plaintiff’s transfer from the position of Compliance Director as a “corrective action” to the NCAA.

Defendants established their entitlement to summary judgment because they were not acting under the color of law in characterizing Plaintiff’s transfer as a “corrective action”. Plaintiff has failed to come forward with a disputed issue of material fact on this issue. Plaintiff argues “the actions taken by the Defendants (i.e. reassignment, removal from teaching position) were only possible because of their status as State actors.” *See* Response at 7. This is insufficient to defeat summary judgment. Absent specific citations to depositions, or some other evidence showing the actions taken by specific Defendants that were under the color of State law, Defendants are entitled to summary judgment. *See* Rule 56(e).

Plaintiff did not provide any specific action taken by any specific Defendant that shows that he was acting under the color of State law. Ridpath inquired about the transfer before it was offered. *See* Ridpath at 329. His Amended Complaint outlines, “On or about October 1, 2001, for numerous reasons both personal and professional, Ridpath agreed to be re-assigned to the position of Director of Judicial Programs at MU.” Am. Compl. at ¶ 33. Plaintiff testified that he accepted the transfer because “it would give [him] an opportunity to get away from a very dysfunctional athletic department, and [he] would be able to focus on [his] research [for his doctorate dissertation].” *See* Ridpath at 194. Plaintiff’s transfer was at his request. He failed to come forward with specific citations to deposition transcripts, produce affidavits, or any other evidence to establish that any of these Defendants individually were acting under the color of state law.

Angel’s involvement in Plaintiff’s transfer was that he agreed to the transfer rather than terminating his employment.¹ *See* Angel at 151. The only involvement by Grose was that he was the individual that

¹ The Plaintiff’s employment was at the will and pleasure of the President.

Angel delegated to communicate the offer. *See id.* at 112-113. Cottrill was not involved in the transfer. *See* Ridpath 23, Ex. Q. Marshall 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). Finally, “[r]espondeat superior or vicarious liability will not attach under § 1983.” *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 123 (1992)(citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-695 (1978)). Therefore, Plaintiff has failed to identify the specific actions taken by specific Defendants that were conducted under the color of state law.

Plaintiff outlined in his Statement of Facts that Jeff Chandler was the individual responsible for not renewing his teaching position. *See* Reply at 6. Dr. Chandler is not a named Defendant. Thus, Plaintiff has failed to identify a specific action taken by a named Defendant that resulted in his teaching position being terminated. These Defendants cannot be held vicariously liable for the acts of Dr. Chandler. *See Collins*. The only act identified by Plaintiff as having been done by a named Defendant is Dr. Angel’s characterization of his transfer as a “corrective action”. Dr. Angel’s response to the NCAA inquiry in which he characterized Plaintiff’s transfer as a “corrective action” was not under the color of state law, it was under the NCAA Rules. *See National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988).

Plaintiff cites to *Williams v. United States*, 341 U.S. 97 (1951) for the proposition that “color of law includes misuse of power possessed by virtue of State law.” However, the Court in *Williams* was not dealing with Section 1983, it was determining whether a special police officer who beat a confessions out of suspects was subject to prosecution under 18 U.S.C.A. § 242. Obviously, the actions in *Williams* were under the color of law. He flashed his badge and his police supervisor was present during the beatings. The Court, however, was not addressing the same issue that is currently before the Court, and as such does not relieve Plaintiff of his responsibility to come forward with some evidence to establish a genuine issue

of material fact. *See* Rule 56(e). He has failed to meet this burden, and these Defendants are entitled to judgment as a matter of law on the Plaintiff's Section 1983 claims because the only action alleged to have been a violation of a constitutionally protected liberty interest was not taken 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.

Defendants have established that they did not violate Plaintiff's due process rights because he was provided with notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill* 470 U.S. 532, 546 (1985). The only action by any Defendant that Plaintiff has identified is the characterization of his transfer as a “corrective action”. Plaintiff first learned of the “corrective action” characterization in mid-October. *See* Rid. at 213-14. He then met with Grose. *See id.* at 319-20. Ridpath requested to Grose that the transfer be characterized as being because of his actions during the hearing. *Id.* Dr. Angel's response to the NCAA stated that he was transferring to a position outside of athletics because of the “tone and tenor of his testimony” before the NCAA Committee on Infractions. NCAA 000146, Ex. H.

Plaintiff's response to this argument falls short. He simply states, “Defendants induced Dr. Ridpath to transfer by deception, made him a corrective action, and then threatened him when he tried to challenge their actions.” Response at 8. This argument rests solely on Plaintiff's self-serving testimony and completely ignores the argument raised by Defendants in their Motion. Plaintiff also argues, “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.” Response at 8.

Plaintiff's argument assumes that notice and the opportunity to be heard dictates a particular result,

it does not. Notice and opportunity to be heard is simply notice of the action to be taken and the opportunity for Plaintiff to present his side before the action is taken. *See Cleveland Bd. of Educ. v. Loudermill* 470 U.S. 532, 546 (1985). The evidence outlined by these Defendants in their Motion showed that Plaintiff was provided notice and the opportunity to be heard. Plaintiff merely rehashes the allegations made in his Complaint, yet comes forward with no evidence to dispute the fact that he was provided with notice (he knew of the “corrective action” characterization before it happened), or that he was provided an opportunity to be heard (he met with and discussed his objection with Dr. Grose, and his requests were met). Therefore, summary judgment is appropriate on Plaintiff’s due process claims.

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

To establish that the “corrective action” label was a charge of serious character defect, Plaintiff cites the Fourth Circuit, “We agree with Ridpath. . . .” However, he fails to include the precluding phrase, which states: “Of course, we are obliged, in applying Rule 12(b)(6) principles, **to accept the allegations of the Amended Complaint as true and to view them in the light most favorable to Ridpath. Utilizing this standard**, we agree with Ridpath. . . .” *Ridpath v. Bd. Of Governors Marshall University*, 447 F.3d 292, 309 (2006)(emphasis added)(internal citation omitted). These Defendant’s Motion outlined that they did not violate a constitutionally protected liberty interest, it showed that, at most, that Ridpath had a claim of defamation. *See Siegert v. Lilly*, 500 U.S. 226 (1991). Ridpath did not include a claim for defamation.

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).

Plaintiff argues that Kathy Noble “will testify that this label creates ‘ethical and moral issues.’” Response at 9. She admitted that, the “corrective action” label would require a reader would have to make

strong assumptions to determine that Plaintiff committed any ethical violations. *See Noble* at 33. This is insufficient to create a deprivation of a protected liberty interest. In *Siebert* the defendant called Plaintiff “inept, unethical, and incredibly untrustworthy.” *Siebert* at 228. If these direct statements, as cited in *Siebert*, do not implicate a constitutionally protected liberty interest, then the cryptic phrase “corrective action”, which requires a reader to make strong assumptions to reach an ethical violation, can not implicate a liberty interest.

The characterization of the transfer as a corrective action is not a charge of serious character defect. Furthermore, as noted in the Motion, Plaintiff’s allegations about the “corrective action” characterization are based on the Public Report, authored by the NCAA, not on any document authored by any of the individually named Defendants. These Defendants can only be held liable for their actions, not those of others. *See Collins*, 503 U.S. at 123.

While Ms. Noble opined that the “corrective action” characterization may call into question Ridpath’s ethics, she admitted her opinion was based on the NCAA Report and not on Dr. Angel’s statement. *See Noble* at 28-29, Ex. L. She further admitted that she did not review any of the more than 20,000 pages of NCAA documents from the NCAA investigation prior to issuing her opinion. *See id.* at 24. She 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. The individually named Defendants cannot be found to have violated a constitutionally protected liberty interest based on strong assumptions in reading the words of the NCAA, which were not the actual words used by Dr. Angel.

Plaintiff next points to the opinion of John Gerdy 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 reputations and being labeled a corrective action ‘will, most likely, destroy any chance of a

meaningful career in collegiate athletics.” Response at 10. However, as noted in the Motion, Gerdy’s testified that in reading the NCAA report, “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 Gerdy at 31 & 70, Ex. M. Like Noble, Gerdy’s opinion was based on his reading of the NCAA report and not on anything authored by any of the individual Defendants. See *id.* at 6-7. In fact, he had never even read Dr. Angel’s response to the NCAA. See *id.* at 67-8. Thus, Plaintiff has failed to come forward with some showing of a material fact that each individual Defendant violated a constitutionally protected property interest, nor has he come forward with evidence that the “corrective action” characterization implicated a serious character defect.

A liberty interest may also be implicated if the characterization forecloses the opportunity to take advantage of other job possibilities. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972). Plaintiff did not come forward with evidence showing that Dr. Angel’s letter foreclosed the opportunity for him to take advantage of other job opportunities. Plaintiff merely noted the non-relevant testimony of Gerdy and Nobel discussed above. He did not address the fact that even after this “corrective action” characterization, Plaintiff held the position of Compliance Director at Ohio University on an interim basis. See *Rid.* at 225-6. The Plaintiff is the one who chose not to seek this position on a permanent basis. See *id.* at 225-26. If Ohio hired him on a temporary basis, it obviously would have considered him for a permanent position, but he never applied. Thus, the characterization of the transfer as a corrective action did not foreclose his opportunity to take advantage of other job possibilities.

Plaintiff argues that his inability to gain employment as a compliance director was because of the characterization of his transfer as a “corrective action.” His mediocre job performance and lack of professionalism have played, however, a significant role in his difficulty in finding employment. He demonstrated numerous unprofessional acts and the NCAA found that he failed to understand basic NCAA

rules. For example, he called another assistant athletic director a “cunt” and a “god awful bitch”. *See* Ridpath . at 291 and 293, Ex. Q. When he was yelling, screaming, and calling an assistant athletic director these vulgar names, Coach Pruett placed his hand on Plaintiff’s shoulder and asked the him to calm down. Plaintiff pushed Pruett’s hands away and yelled, “Don't ever fucking touch me, Coach.” *Id.* at 292. To this day Ridpath finds this action appropriate. *See id.* This tirade occurred when the assistant AD informed him that she had inquired with a couple of her sources and they thought there was a NCAA violation with the employment at Chapman Printing. In it’s Report, the NCAA faulted Ridpath for this confrontation as follows:

When she shared this information with the compliance director his response was to chastise her for circumventing reporting channels and initially refused to seek an interpretation from the NCAA. [Note: the compliance officer ultimately obtained an interpretation that violations did occur.] While the committee understands and supports efforts by an administrator to manage his program without officious interference from others, in this case the senior woman administrator was acting appropriately to protect the interest of the university, and the committee finds her efforts commendable.

Ex. I at NCAA 8725. He “berated” and “dressed down” his boss, the athletic director. *Id.* at 291. When he was attempting to force David Reed to support his allegations in an interview with the New York Times, he sent him an email that stated:

If you don’t talk, the friendship is over and I will put your name in and you’ll be forced to talk and if you try to protect your sorry ass, useless, piece of shit alma mater that you couldn’t even graduate from then you will hear from me. We have talked about the media before and you never said you wouldn’t talk. You need to now or you may not be able to control what is being said—get my drift?

Ex. N, attached hereto.² Plaintiff continues to threaten Mr. Reed by stating, “BTW you are not so big time that you can get away from my influence—trust me. In a second email to David Reed attempting about talking to the New York Times, Ridpath stated:

² Plaintiff admits that he sent the emails with the address pruettsucks@hotmail.com from his work computers at Marshall.

How ashamed your Dad must be to have raised such an unethical puss. However with his background in integrity it is no wonder. Like father like son I guess. I am sure it is only a matter of time until you have a baby out wedlock (sic) with some local trailer trash—oh wait that is your sister.

. . . You are pathetic and your name is really going to be in the press now. You have not heard the last of me, but our friendship is dead. Don't ever come within 10 feet of me you worthless fat fuck. You and Marshall deserve each other, but I will always be there as a thorn trust me. I never thought you would big time me, but hanging out with cunts like Jennifer Smith has changed you.

Id. When Plaintiff sent these emails, David Reed was the Assistant Compliance Director at the University of Pittsburgh. During one of Plaintiff's interviews with the NCAA enforcement staff, he told the NCAA lead investigator that he did not like her and he threatened to sue her personally if she named him in the investigations. *See* Ridpath . 258 and 326, Ex. Q.

Plaintiff also conspired with Kevin Klotz to steal several bankers boxes full of documents that belonged to Marshall. *See* Motion to Compel [Document 137]. Plaintiff described in his draft book:

The trove I needed consisted of 4-5 bankers boxes chock full of important material. I just wanted to have all of the documentation I needed, in case I decided to fight this corrective action, whether through the NCAA or Marshall University itself. Kevin readily agreed to get the material and we even had a little fun with the transport of the documents. Kevin had taken the boxes into what we called the "Achieve Room" in the Cam Henderson Center. This was a mess of a room that mostly had old sports information and media articles. It was musty, wet, smelly, and full of the biggest cockroaches you ever saw, but it was a perfect place to "make a drop." I continued to work out daily in the Gullickson Hall Fitness Center during lunch hour even though I avoided the athletic side of the building. Kevin was also there most days at the same time. I even still used the same locker room, although I entered the building from a different floor, and although I was close to the athletic department, I never went back into the old Green hallway again. On the particular day I wanted the boxes I felt I needed to do it soon, in case someone in the administration got smart and secured the items, Kevin brought me the keys to the Archive Room during our workout. He said he would call me later in the afternoon to tell me when the boxes were there. I would then go pick up the boxes, secure the room, and return the keys to Kevin in the next day.

I waited for Kevin's call and when the phone rang, I knew it was him because of the caller ID. I picked up the phone and answered and all Kevin said was, "The Cake is in the oven, the cake is in the oven. Then he hung up. I chuckled at this James Bond type scenario. Soon scenario's like this would become commonplace as I began the long uphill climb of fighting Marshall and the corrective action they applied to me. While they ended one career, they unwittingly started in motion the creation of another career that being my new role as a reformer

of the business of intercollegiate athletics. It was my fight to prove my innocence and my willingness to sue that led to what I am doing now.

Id. While there are other instances of unprofessional conduct, such as the use of another employees phone card to make substantial long distance calls, factors leading to the decision not to renew his teaching position, this list shows that Plaintiff's lack of professionalism and criminal behavior played a significant role in his failure to gain employment.³

Plaintiff was not without fault in the infractions found by the NCAA. During the hearing, he was rude and raised his voice at members of the Committee. *See Cottrill* at 46, Ex. B; *Angel* at 144-145, Ex. C. Rather than simply responding to the questions posed to him by the Committee, "he took the opportunity to rehabilitate himself." *Humphrey* at 21-22, Ex. D. During this hearing he emphasized several times that he did not know about the employment at Chapman Printing, but he went on to state, "Again I, myself, did not know specifically that these athletes were working at Chapman, but if I did know, I would not have stopped the act from occurring." NCAA Tra. at 68, attached hereto as Ex. P. The NCAA found a violation based on an incorrect Rules interpretation by Plaintiff. Ex. I at NCAA 8719. The NCAA further explained this finding by stating:

In brief, committee concerns include . . . the failure of the compliance and other institutional staff members to understand a basic NCAA bylaw principle that countable financial aid includes employment arranged by an athletics department; [and] the failure of compliance and other institutional staff members to understand a basic NCAA bylaw principle prohibiting institutionally arranged nonqualifier employment in the first year of enrollment."

In discussing its finding of lack of institutional control, the NCAA explained that "the lack of

³David Swank opined that the Plaintiff's actions during the NCAA investigation, his failure to understand NCAA legislation, his student criticism of the NCAA in his testimony before Congressional committee in 2004, his testimony before the Knight Commission in November, 2005 where he called for governmental intervention into the NCAA, and his authoring a commentary in November, 2006 to the United States Senate and the House of Representative stating that he was "alarmed and disheartened by academic corruption in college sports" would play a significant role in his inability to find employment. *See Swank Report* at Opinion 4, p. 8-11, Ex. O, attached hereto.

understanding of a basic NCAA financial aid and nonqualifier legislation is inexplicable.” *Id.* at 8723. It further found that “the passive compliance program administered by the compliance director vested unreviewed responsibility in the institutional staff.” *Id.* The Committee recognized Plaintiff’s creation of a system to monitor employment of athletes in 1998, but stated that “establishment of this policy did not include knowledge and understanding of basic NCAA bylaws. It is a truism that there can be no monitoring, no effective education, and no control of particular conduct if there is no awareness that the conduct is impermissible. No one at the university, including the compliance director, knew that the employment by the athletics representative of nonqualifiers was impermissible.” *Id.* at 8724-25. Finally, the Committee was critical of Plaintiff when it quoted his testimony from the hearing as follows: “The committee also was concerned by the compliance director’s approach to NCAA Rules interpretations. As he stated at the hearing, “We make interpretations based upon the best interest of Marshall University, and I don't care what other people are doing.” *Id.* at 8726. Clearly Plaintiff has created numerous reasons to bypass him in the hiring process in favor of another applicant. Thus, Plaintiff has failed to demonstrate that the characterization of his transfer as a “corrective action” was the reason for his inability to gain future employment in the field of athletics compliance.

Plaintiff again points to the Fourth Circuit’s decision stating that “Ridpath’s 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.” Response at 10-11(citing *Ridpath* at 33 (sic) [310]). He goes on to quote additional discussion from the Fourth Circuit opinion. As noted above, these findings were based solely on Plaintiff’s allegations in his Amended Complaint. *See Ridpath* at 309. He cannot rely on the Fourth Circuit’s findings to create a disputed material fact because the Fourth Circuit’s findings were based solely on the allegations in his Amended Complaint. This is insufficient to satisfy the requirements of Rule 56(e). Plaintiff did not identify any specific actions by any specific

Defendant in his transfer. Additionally, Plaintiff's allegations are not based on his transfer, but its characterization.

Plaintiff next argues that a liberty interest was implicated because "Defendants made Dr. Ridpath's corrective action and disclosed that information to the NCAA." To find each of these Defendants liable for a due process violation, Plaintiff must establish that each voluntarily made it public. *See Wooten v. Clifton Forge School Board*, 655 F.2d 552, 554 (4th Cir. 1981). Plaintiff failed to identify the specific action taken by each Defendants to make it public. He sued each Defendant in their individual capacity and, as such, he must show every element by each Defendant. Here again, he simply refers to "Defendants" without identifying the actions taken by each. This is insufficient to defeat these Defendants Motion for Summary Judgment.

The final requirement Plaintiff must establish is that the "corrective action" label was false. To defeat this argument, Plaintiff again points to the Fourth Circuit's opinion equating the "corrective action" to him being responsible for the NCAA Rules violation. *See Response*. Again, this opinion was based on the facts alleged in his Complaint. These Defendant's Motion established the "corrective action" characterization was not false. Dr. Angel's Response to the NCAA clearly outlines that the "corrective action" was because of Ridpath's "conduct at the hearing, coupled with the tone and tenor of that conduct" and because "his comments and statements were unwarranted." *See NCAA 000145-47, Ex. H*. Nothing in this statement identifies Ridpath as being responsible for the NCAA rules violations. These Defendants Motion established that the "corrective action" label was not false. Plaintiff's Response merely referred to the Fourth Circuit's opinion that was relied on his Amended Complaint. Thus, these Defendants are each entitled to summary judgment on Plaintiff's due process claims.

To satisfy the second prong of the § 1983 test Plaintiff must show that each Defendant violated a right that was clearly established and of which a reasonable person would have been aware. *Mellen v.*

Bunting, 327 F.3d 355, 365 (4th Cir. 2003). Ridpath cannot satisfy any of the elements of the first prong of the § 1983 test, he also cannot satisfy the second prong of the test. These Defendant outlined the actions taken by each. Plaintiff cannot simply rely on the findings of the Fourth Circuit that were nothing more than it reiterating his Amended Complaint. At this stage, he must come forward with some evidence to the contrary. *See* Rule 56(e). He did not. Thus, these Defendants are each entitled to summary judgment.

d. Summary judgment should be granted to Defendants on First Amendment claims because no material facts exists to show 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’s Response to these Defendant’s Motion relating to his claims of First Amendment Infringement are insufficient because he did not come forward with evidence that his speech was related to a matter of public concern and Plaintiff’s interests did not outweigh those of Marshall’s interest. Plaintiff listed two First Amendment Complaints—retaliation and chilling. His retaliation claim was discussed above, but simply put, he alleges Jeffrey Chandler retaliated against him for exercising his First Amendment rights in speaking out on a matter of public concern. Plaintiff’s claims for relief for these allegations are brought under Section 1983. Marshall is not a "person" against whom a § 1983 claim for money damages might be asserted. *See Will*, 491 U.S. at 66. “Respondeat superior or vicarious liability will not attach under § 1983.” *Collins*, 503 U.S. at 123. As such, Plaintiff’s allegations relating to Jeffrey Chandler terminating his teaching position do not impart liability on any of the named Defendants.

As to the chilling claim, Plaintiff did not come forward with any evidence to contradict the Defendant’s motion. He must establish each element against each Defendant. He simply argues “Defendants threatened him.” In the facts section of his Response he states, “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.” However, what he fails to mention

is that the comment attributed to Dr. Angel was not made to him. *See* Ridpath at 316, Ex. Q. He alleges that these comments were made during a meeting with Marshall executives. Dr. Angel cannot be held liable for these alleged threats when he did not say them to Plaintiff. He next argues that Defendant Grose threatened him when he said, “If you do anything to resurrect this [NCAA issue] I will bury you personally and professionally.” As Dr. Grose testified, the statement attributed to him was actually that “he really needed to think about, he was a young person, he needed to think about his personal and professional future.” Grose at 81, R. Dr. Grose, however, had no authority to fire or discipline the Plaintiff, Dr. Angel was the only one with that authority. Finally, he alleged that Defendant Cottrill said, “You have no say in this matter. You need to think about your family, young man.” Response at 6. This is not a threat, it is advice. The only Defendant that the Plaintiff alleged to have made a threat to him was Dr. Grose, and he had no authority to terminate Plaintiff’s employment. Furthermore, the statements attributed to Angel, Grose, and Cottrill were all alleged to have been made to a public employee regarding a matter relating to his employment. Plaintiff was the Compliance Director for Marshall. Any statements he made regarding the NCAA investigation he could have impaired the proper performance of governmental functions. Marshall was entitled to have “a significant degree of control of their employees’ words and actions.” *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Garcetti* went on to note, “[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, therefore, failed to come forward with evidence that each of the named Defendants chilled his speech or that his speech was a matter of public concern. Plaintiff further failed to come forward with evidence that the statements he alleges to have been made by these Defendants did not fall under *Garcetti*.

Because Plaintiff's grievances regarding his employment are not protected speech, his interests are greatly outweighed by Marshall's interest in providing education to student-athletes, and no retaliatory action was taken by any of the named individual Defendants. Thus, summary judgment must be granted in favor of each of these Defendants.

e. These Defendants are entitled to summary judgment on Plaintiff's allegations of breach of contract because the undisputed facts establish that 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 Plaintiff's employment are *ultra vires* and not binding on MU.

Here again, Plaintiff's Response lumps all of the individually named Defendants as one. To defeat the Motion for Summary Judgment, he must show a contract between him and each of the Defendants and a breach by each. Otherwise, each Defendant is entitled to summary judgment. He alleges Grose was responsible for negotiating the terms of the contract *See* Response at 25, *see* Ridpath at 331. Defendants Angel and Cottrill cannot be held liable for breach of contract if they didn't have one. He next argues the "Defendants" breached the contract. Response at 26. Plaintiff again lumps all Defendants together. While he alleges the creation of a contract between himself and Dr. Grose, he has not alleges a breach by Dr. Grose. Dr. Angel sent the response to the NCAA that characterized Plaintiff's transfer as a corrective action. *See* NCAA 000145-47, Ex. H. This Court dismissed Plaintiff's civil conspiracy claims. *See* February 17, 2004 Order at 23-24. Dr. Angel cannot be held liable for breaching a contract if he did not have one. Dr. Grose cannot be held liable for Dr. Angel's alleged breach of contract. Thus, the only Defendant Plaintiff has alleged a breach of contract against is Marshall. This Court has ruled that Marshall cannot be held liable for any monetary relief. Thus, even if Plaintiff were able to show the existence of a contract, he could only seek prospective equitable relief against Marshall. As such, each Defendant is entitled to summary judgment.

In their Motion, these Defendants outlined that Plaintiff cannot use estoppel to bind Marshall to

the oral, unwritten representations made by an unauthorized intermediary. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 65 (1984). Plaintiff failed to cite to any specific facts that would show a disputed issue of fact. To argue in favor of estoppel, Plaintiff cited to cases from the other Circuits. He cited to no authority from the Fourth Circuit that carved out exceptions to *Heckler*. Thus, the legal standard governing this Court's decision is *Heckler*.

On the issue of whether Grose's actions were *ultra vires*, Plaintiff argues that the defense is barred by equity because it must be asserted promptly. *See* Response at 29-30. Plaintiff's reliance on the 1922 case of *Berkeley County Court v. Martinsburg & Potomac Turnpike Co.*, 92 W.Va. 246, 115 S.E. 448 (1922) is misplaced. The question in *Martinsburg & Potomac* is whether a stock-holder, knowing of a contract he claims to be *ultra vires*, must act within a reasonable time to sue to preserve profitability. Here, the party raising *ultra vires* is not the party bringing suit. These Defendants raised this defense in accordance with the scheduling order of this Court. Plaintiff further relies on *Martinsburg & Potomac* to argue that if Grose did not violate a "statute, charter, or by-law," then he could not be acting *ultra vires*. However, this is not the holding of *Martinsburg & Potomac*. These Defendants came forward with evidence that the only authority Dr. Angel gave to Dr. Grose was to offer Plaintiff the transfer. He did not authorize any agreements relating to how the transfer would be characterized. Plaintiff has failed to come forward with evidence that would create a disputed material fact on this issue. Thus, summary judgment is appropriate.

f. Defendants are entitled to summary judgment on 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.

These Defendants established that they are entitled to summary judgment on Plaintiff's fraud claims. Plaintiff failed to come forward with any facts to the contrary. He simply argued that Grose could be held liable for fraud even if he did not have "actual knowledge at the time." *See* Response at 31. To

support this proposition Plaintiff relies on the 1922 case of *Osborne v. Holt*, 92 W.Va. 410, 114 S.E. 801 (1922) and the 1927 case of *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927). These Defendants produced evidence that Dr. Grose did not know, nor was he in the position to know, that Dr. Angel was going to characterize the transfer as a “corrective action.” Plaintiff did not produce any evidence to the contrary.

Plaintiff argues that the Defendants are held to a high standard in a fraud claim. *See* Response at 31. To the contrary, it is Plaintiff who must establish each element of fraud “by clear and convincing evidence.” *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 472, 425 S.E.2d 144, 148 (1992). Plaintiff cannot shift this incredibly high burden. As noted in the Motion, a crucial element of fraud is intent to defraud through false statement. Plaintiff must establish Grose knew of the falsity of his alleged misrepresentation or was in a position, and had 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). 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 Plaintiff’s transfer as a “corrective action,” Plaintiff cannot demonstrate that Grose knew of the falsity at the time the contract was made. *See* Rid. at 331. Angel never discussed his intention to characterize the transfer as a “corrective action.” *See* Angel at 156-57. In fact, Grose had never heard the term “corrective action” prior to the release of the Public Report. *See* Grose at 74-75. Grose had no involvement in the characterization of Plaintiff’s transfer, and as such, he had no knowledge of the characterization. Thus these Defendants are entitled to summary judgment on Plaintiff’s fraud claims.

g. Summary Judgment should be granted in favor of the Defendants on the outrageous conduct claim because characterizing 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.

These Defendants demonstrated their entitlement to summary judgment on Plaintiff's claim of outrage. Here again, Plaintiff lumps all of the Defendants together and blurs the actions taken by each. As previously noted, Plaintiff must establish each element of the claim against each Defendant. Plaintiff attempts to attach liability to each of these Defendants by arguing that Dr. Chandler felt pressure to terminate Plaintiff's teaching position. In support of this argument, he cites to his own testimony before the Grievance Board. *See* Response at 33-34. This was not Dr. Chandler's testimony. He made the decision on his own, and not under pressure from any of these Defendants. *See* Level III grievance hearing transcript, Box I - 1189-96, Ex. J. It is insufficient to create a material issue of fact.

Plaintiff failed to show any extreme and outrageous conduct by each of these Defendants that was "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 v. Alcon Laboratories, Inc.*, 504 S.E.2d 419, 425 (W.Va.1998). Thus, these Defendants are entitled to summary judgment on Plaintiff's claims for intentional infliction of emotional distress.

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 Plaintiff has admitted that he was never personally represented by MU General Counsel Layton Cottrill.

Defendant Cottrill established that he was entitled to summary judgment on Plaintiff's claim of attorney negligence. He established that he was not Plaintiff's attorney. Plaintiff admitted in his deposition that Defendant Cottrill was not his attorney. *See* Rid. at 707. To establish a claim of attorney negligence, Plaintiff must first establish that he was a client of Defendant Cottrill. *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). Additionally, this Court heard argument and allowed several supplemental briefs when deciding whether Hilliard was also counsel to Plaintiff. After considering the evidence, including affidavits from Plaintiff, this Court ruled that "no basis is presented for finding that plaintiff was the 'personal client' of counsel

for the university. . .” See February 4, 2008 Order. Plaintiff presented no additional evidence in response to this Motion. Accordingly, based upon Plaintiff’s admission and this Court’s ruling, summary judgment should be granted in favor of Cottrill and Marshall on Plaintiff’s attorney negligence claims.

- 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.**

_____ Apparently the Plaintiff is not opposing these Defendant’s entitlement to qualified immunity because he did not respond to these Defendant’s argument. Therefore, under Rule 56(e), these Defendants are entitled to qualified immunity because the Plaintiff has failed to come forward with specific evidence to dispute the Motion.

CONCLUSION

These Defendants made a properly supported Motion for Summary Judgment. The Plaintiff failed to come forward with evidence establishing a disputed material fact. He merely relies on the Fourth Circuit opinion that based its findings on the Plaintiff’s Amended Complaint and attempted to blur these Defendants actions. Plaintiff failed to establish each element of each claim against each Defendant. As such, these Defendants are entitled to summary judgment on each of the Plaintiff’s claims.

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

By Counsel,

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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 “**DEFENDANTS BOARD OF GOVERNORS OF MARSHALL UNIVERSITY; DAN ANGEL; F. LAYTON COTTRILL, ESQ.; AND K. EDWARD GROSE’S REPLY TO PLAINTIFF’S RESPONSE TO MOTION FOR SUMMARY JUDGMENT**” with the Clerk of Court using the CM/ECF system, which will send notification of filing to the following:

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