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. Judge Chambers

Board of Governors
Marshall University,
Dan Angel, Bob Pruett,
F. Layton Cottrill, Esq.,
and **K. Edward Grose,**

Defendants.

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT
BOB PRUETT'S MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Bob Pruett, pursuant to Federal Rule of Civil Procedure 56, and replies to Plaintiff's Response to Defendant Bob Pruett's Motion for Summary Judgment ("Response").

Plaintiff Ridpath currently maintains the following claims against Pruett: a state law claim for Outrageous Conduct and a state law claim for Tortious Interference with a Contract. Pruett filed a Motion for Summary Judgment regarding both of these claims, stating as grounds for his motion that there is no genuine issue as to any material fact and that he is entitled to judgment against the plaintiff as a matter of law. This is supported by the basis that the plaintiff cannot establish a

prima facie case against Pruett for tortious interference with a contract or the tort of outrage.

I. Tortious interference with contract

To establish a *prima facie* case of tortious interference with a contract, the plaintiff must show:

> (1) existence of a contractual or business relationship or expectancy;
> (2) an intentional act of interference by a party outside that relationship or expectancy;
> (3) proof that the interference caused the harm sustained; and
> (4) damages.

Syl. Pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983).

Ridpath does little to address these elements in his Response to Defendant Pruett's Motion for Summary Judgment, nor does he provide factual evidence sufficient to defeat Pruett's Motion for Summary Judgment:

1) Element 1: existence of a contractual or business relationship or expectancy

Ridpath has admitted he was employed "at the will and pleasure of the president of Marshall University for one year periods beginning in November 1997 until August 2004." (See Defendant Pruett's Motion for Summary Judgment, Exhibit D.) He admits to being an at-will non-tenured employee. The only argument he presents in his Response regarding this element is

that he expected to have continued employment. (See Response, page 9.) However, he presents no evidence supporting this expectation and no evidence that he was promised continued employment as a compliance director. West Virginia is an "at-will" employment state where Ridpath was a non-tenured employee. Ridpath needs to present more than a scintilla of evidence that he had a contractual expectancy as the Compliance Director at Marshall University in order to defeat Pruett's Motion for Summary Judgment. Ridpath has failed to meet this burden.

2) Element 2: an intentional act of interference by a party outside that relationship or expectancy

Plaintiff addresses this element in his Response first by claiming that defendant Pruett influenced others at Marshall University "to offer Ridpath as a sacrificial lamb to the NCAA." (See Response, page 9.) However, Ridpath has no evidence supporting this assertion other than his own opinion and speculation.

Ridpath also claims that Rich Hilliard told him "directly that Pruett was behind the decision to transfer Ridpath to another department outside of athletics. (See Response, page 10.) This assertion is a distraction; testimony by Hilliard is inadmissible evidence and cannot be used to defeat defendant's Motion for Summary Judgment. *See Wood Co. Airport Authority v. Crown Airways, Inc.*, 919 F.Supp. 960, 963

(S.D.W. Va. 1996) (quoting Charles A. Wright & Arthur R. Miller, 10A *Federal Practice and Procedure* § 2727, at 156 (1983)).

Furthermore, former MU President Dr. Dan Angel has testified that the decision to terminate Ridpath was solely his own. (Angel deposition, page 208, attached to this defendant's Motion as Exhibit C.) Dr. Angel had clear grounds to transfer Ridpath out of the athletic department at MU. Indeed, Ridpath's professionalism was called into question many times while he held this position. For example, Ridpath has admitted that he called the senior athletic director, Beatrice Crane, a very offensive name. (See Ridpath Deposition, page 293, in redacted form, attached to this Reply as Exhibit A.) He has also admitted to using aggressive and foul language towards Pruett (*Id*, page 292.) Ridpath admits that, during the NCAA investigation, he told Humphrey, the lead NCAA investigator, "I don't care if you like me, Luann. Bottom line, the feeling is mutual." (Ridpath deposition, p. 257.) Dr. Angel testified in his deposition that Ms. Humphrey told him during the NCAA investigation recess "that, quote, Mr. Ridpath was burying us." (Angel deposition, p. 212, attached as Exhibit B.)

The facts presented above, combined with Dr. Angel's testimony that it was solely his decision to terminate Ridpath's Compliance Director job, illustrate a situation where Dr. Angel

personally felt it was the best decision to remove Ridpath from the athletics department. Further, Ridpath must show that Pruett actually interfered with his employment contract as a compliance director at Marshall University in order to defeat defendant Pruett’s Motion for Summary Judgment. *Holland v. Keyrock Energy, Inc.*, 2007 WL 3070492 (S.D.W.Va. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1984)). For his evidence, Ridpath relies on his own assertion that Pruett interfered with his employment contract, and the supposed statement Hilliard made that Pruett was involved in this transfer. Ridpath’s statement is speculation, and the supposed statement by Hilliard is inadmissible evidence. Clearly, Ridpath has failed to present sufficient evidence pertaining to this element to defeat Pruett’s Motion for Summary Judgment.

3) <u>Element 3: proof that the interference caused the harm sustained</u>

According to the plaintiff, he “agreed to be re-assigned to the position of Director of Judicial Programs at MU under the premise that MU would make it clear to the NCAA (and the public) that his reassignment was NOT for any wrongdoing as MU Compliance Director.” (Response, page 11.) Plaintiff concedes that the alleged breach of contract was not the loss of the Compliance Director position. Rather, the alleged breach of contract stemmed from a broken promise not to label his transfer

as a “corrective action” if he voluntarily transferred out of the position. (See Response, page 11.)[1]

> Q: In your complaint you allege a breach of contract. And I think we have gone over this a bit. What contract was breached with you?
>
> A: It was how the corrective action was going to be communicated to the public and that my transfer had nothing to do with the NCAA infractions.

(Ridpath deposition, page 330-331, attached to this Reply as Exhibit A.) Plaintiff alleged that despite an agreement that it would be made clear to the NCAA that his reassignment was not for any wrongdoing as MU Compliance Director, defendants Marshall University and Angel informed the NCAA that Ridpath’s reassignment was a “corrective action” taken by Marshall University for the NCAA violations. (Amended Complaint, ¶¶ 35 and 36, attached to this Reply as Exhibit C.)

Pruett had nothing to do with this promise. Ridpath has stated that Dr. Angel and Marshall University made him this promise. Therefore, Ridpath’s argument that Pruett interfered with his employment contract amounts to a leap of logic. How can someone else’s action (breaking a promise) define whether or not Pruett took an action (interfering with Pruett’s employment contract)? It cannot; therefore, Ridpath has failed to support

[1] In his Response, plaintiff makes no mention of his employment as a part-time professor at Marshall University, nor does he suggest that Pruett was involved in any interference with an employment contract regarding his professorship. Therefore, this Reply does not address any such averment.

his claim that Pruett interfered with his employment contract and defendant Pruett is entitled to summary judgment on this cause of action as a matter of law.

II. Outrageous conduct

In the portion of Ridpath's Response addressing this cause of action, Ridpath states that the Court found he had alleged conduct sufficient to be considered extreme and outrageous and that, therefore, it is for a jury to decide whether the allegation is proven at trial. (See Response, page 12 and 13.)

Plaintiff is confusing the standards of law. Plaintiff appears to be responding to a Motion to Dismiss for failure to plead a cause of action rather than a Motion for Summary Judgment. The standard for a Motion for Summary Judgment is whether there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Panrell v. United Mine Workers of* America, 872 F.Supp. 1502 (N.D.W.Va. 1995). Facts have been obtained in this case, and there is no genuine issue of material fact that defendant Pruett has not committed the tort of outrage against the plaintiff. Further, it is for a court (not a jury) to decide whether genuine issues of material fact exist in a Motion for Summary Judgment.

"…[W]hen a defendant moves for summary judgment, a plaintiff may not rest on [his] pleadings, but must demonstrate that specific, material facts exist that give rise to a genuine issue that must be tried before a jury." *Blair v. Ravenswood Village Health Center*, 43 F.Supp. 2d 586, (S.D.W.Va. 1998) (citing *Harleysville Mut. Ins. Co. v. Packer*, 60 F. 3d 1116, 1120 (4th Cir. 1995); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.); *Cabro Foods, Inc. v. Wells Fargo Armored Serv. Corp.*, 962 F.Supp. 75, 77 (S.D.W.Va. 1997); *Spradling v. Blackburn*, 919 F.Supp. 969, 974 (S.D.W.Va. 1996).

The tort of outrage requires conduct that is "atrocious, utterly intolerable in a civilized community, and/or so extreme and outrageous as to exceed all possible bounds of decency." Syl. Pt. 3, *Travis v. Alcon Laboratories, Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998).

Plaintiff makes various allegations of wrongdoing by defendant Pruett that are irrelevant and act as a smoke screen to hide the real issues in this case. For instance, plaintiff claims that Pruett was involved in academic fraud regarding tests given to football players at Marshall University. This Reply is not the place to address the veracity of this allegation, but this defendant must ask what this allegation has to do with the causes of action at hand? A test given at

Marshall University has nothing to do with Ridpath's transfer out of the athletic department at Marshall University, and cannot be tied in to any damages he claims to have suffered as a result of the "corrective action" label to the NCAA.

Ridpath states that "Pruett and his staff told the Props they should not report the employment to Compliance…" and cites affidavits from Charles Tynes and Sam Goines. (See Response, pp. 4.) Charles Tynes, however, states "I do not recall anyone specifically telling me not to talk to compliance…" (Tynes aff. ¶ 11.) Sam Goines does not state he was told not to tell Marshall Compliance about the employment. Furthermore, there is no evidence that Pruett had anything to do with the drafting of statements indicating the Prop players were paid $12.50 per hour for work. In fact, Ridpath admits in his deposition that *he* drafted the statements the players signed. He also admits that *he* was present when the players signed the statements, not Pruett, and that *he* instructed the players to sign the statements if they were true. (See Ridpath deposition, pp. 596-600, attached to this Reply as Exhibit D.)

Ridpath also claims that Pruett offered "false and misleading testimony to the NCAA Enforcement Staff and Committee on Infractions" (Response page 13). However, Ridpath offers no proof. Allegations are not sufficient. Ridpath must present more

than a scintilla of evidence that Pruett's conduct was "atrocious, utterly intolerable in a civilized community, and/or so extreme and outrageous as to exceed all possible bounds of decency,"[2] and such actions must directly have resulted in some damage to Ridpath. He cannot present such evidence. Instead, Ridpath resorts to allegations of wrongdoing that are irrelevant, distracting, and have nothing to do with Ridpath's alleged damages in the case at hand. As such, Pruett is entitled to dismissal of this cause of action against him as a matter of law.

WHEREFORE, defendant Pruett respectfully requests that this Court grant his Motion for Summary Judgment and dismiss the claims of Tortious Interference with a Contract and the Tort of Outrageous Conduct against him with prejudice.

s/ Edward M. Kowal, Jr.
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Bob Pruett

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[2] Syl. Pt. 3, *Travis v. Alcon Laboratories, Inc.*, 202 W. Va. 369, 504 S.E.2d 419.

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CERTIFICATE OF SERVICE

I hereby certify that on **August 22, 2008,** I electronically filed the foregoing **REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT BOB PRUETT'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Charles R. Bailey, Esq., Jason E. Huber, Esq., and Vaughn T. Sizemore, Esq., and I hereby certify that I have mailed by United States Postal Service the **REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT BOB PRUETT'S MOTION FOR SUMMARY JUDGMENT** to:

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