UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JONATHAN N. WATERS	)	Case No. 14 CV 1704
	)	
Plaintiff,	)	Judge James L. Graham
	)	
v.	)	Magistrate Judge Terence P. Kemp
	)	
MICHAEL V. DRAKE, M.D. et al,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

COMBINED TABLE OF CONTENTS AND SUMMARY PURSUANT TO S.D. Ohio Civ. R. 7.2(a)(3)

A contractual right can create a sufficient property interest to warrant the protections of due process. Ohio law recognizes that an employee can have an implied contract that alters the terms of an at-will relationship. Whether such a contract exists depends on resolution of factual issues, including the character of the employment, custom, the course of dealing between the parties, company policy, and any other fact which may illuminate the question. Here, the facts and circumstances surrounding Waters' employment, including Defendants' treatment of band staff, including Waters, as faculty, and the identification of the OSU Band Director as a member of faculty in official OSU documents and statements, support Waters' position that he was faculty. As a faculty member, Waters was entitled to the disciplinary and termination protections afforded faculty members under O.A.C. §3335-5-04, and therefore had a property interest in his employment.

The Sixth Circuit applies a three-part balancing test to determine whether due process demands a public name-clearing hearing. By applying that test to the facts of each case, a court can tailor the name-clearing hearing to permit the employee to challenge directly any public stigma while also accounting for any legitimate concerns of the employer. Publicity is an essential element of a name-clearing hearing. Here, OSU disparaged Waters through means including a dedicated website and video that was distributed nationally, and undoubtedly seen globally. Hence, Waters demanded a name-clearing hearing that included local and national publicity, which Defendants ignored in their response to Waters' request. As a result, there is a disputed issue of material fact regarding the sufficiency of the hearing offered by Defendants.

I. INTRODUCTION

After a mere 17 months as the full time Director of the OSU Marching Band, Plaintiff Jonathan N. Waters' good name was destroyed, and his career ruined, with a shocking lack of fairness and due process. Defendants failed to ensure that Waters had adequate representation throughout the process. No opportunity was afforded Waters to discover the allegations, confront witnesses and present a defense. No rights of appeal were afforded. Instead, Waters endured a "process" more akin to a Kafka novel than what should have been expected from Drs. Drake and Steinmetz, employees of a venerable public institution.

Less than two months prior to Waters' dismissal, OSU's Director of the School of Music Richard Blatti wrote in Waters' June 2, 2014 Performance Review that "*Jon* [Waters] *is a naturally gifted leader and he supervises a large and complex operation with grace and efficiency. This is no small task and we are fortunate to have him and his team leading this marching and athletic band program.*" It is impossible to believe that, after more than 25 years on the School of Music faculty, Blatti and others at OSU were ignorant of many of the alleged matters used to justify Waters' firing when giving that review. Regardless, Defendants have pivoted 180 degrees by filing an intensely factual, 377-page Answer filled with distortions, half-truths, and material omissions.

Defendants' 377-page Answer is remarkable for what it does *not* include. To cite just a few examples: *Nowhere* in Exhibits A through X is Waters' June 2, 2014 "*Exceptional*" Job Performance Review. *Nowhere* in Exhibits A through X are the letters from those interviewed in OSU's investigation who objected to how their statements were distorted and key information omitted. *Nowhere* in Exhibits A through X are messages from individuals discussed in OSU's investigation report, telling Drs. Drake and Steinmetz that the report got the facts wrong.

Nowhere in Exhibits A through X are OSU's internal policies and procedures for investigating the claims made against Waters, or an acknowledgement that they were not followed during the investigation. *Nowhere* in Exhibits A through X is OSU's very public denial of Waters' request for a name-clearing hearing. *Nowhere* in Exhibits A through X are the details of former OSU Cheerleading coach Lenee Buchman's progressive discipline, and how it differed from OSU's treatment of Waters. *Nowhere* in Exhibits A through X are the emails of Drs. Drake and Steinmetz, which surely exist, detailing their involvement with the Waters matter. *Nowhere* in Exhibits A through X is there any indication of a meeting of the Board of Trustees, as required by Ohio law, to support OSU's statements that the Board stands behind Waters' firing.

Instead, Defendants include, among other things, a seven year old calendar they claim was found in Waters' office, a songbook that Waters has denied seeing as the Director, and copies of Trip Tics that Waters banned. Further, solely for their shock value and unfair prejudice, Defendants quote the most salacious passages from the songbook, one by one, as if they were separate events, even though none was authored by Waters or otherwise connected to him. Defendants then use a broad brush to blame Waters for events that occurred before he was Director. Defendants also challenge many of the factual averments in Waters' Complaint, and ignore others. By doing so, Defendants' Answer underscores the intensely factual nature of this dispute.

A motion for judgment on the pleadings is not the appropriate method to resolve such factual issues. Defendants have a steep burden, namely, to show that, beyond doubt, Waters has made no plausible claims. Defendants failed to meet their burden: Waters' claims are plausible and he is entitled to pursue them.

For these reasons, as discussed more fully below, Defendants' motion should be denied. If not, the motion should be converted to a motion for summary judgment to enable the parties to conduct discovery, allowing Waters to test the veracity of Defendants' representations, and to create a full and complete record. Finally, if the motion is neither denied nor converted to a motion for summary judgment, Waters requests leave to file an amended complaint, to remedy any perceived deficiencies.

II. STATEMENT OF FACTS

A. *"I may run out of superlatives to describe the 2013-14 season"*

Waters became the full-time Director of The Ohio State Marching and Athletics Bands (the "OSU Band" or the "Band") on February 1, 2013. *See* Complaint, ECF 1 ("Complaint") at ¶1. The following year, Waters led the OSU Band to its most successful season ever, receiving national – and even international – acclaim. *See id*. *The Wall Street Journal*, in a November 1, 2013 article entitled "*Why Ohio State's Band is Truly the Best in the Land*," wrote that "[h]ere in Ohio State country, it's hard to say who is having a better season – the school's undefeated football team or its marching band." Laudatory headlines peppered news outlets worldwide – from Britain's *Daily Mail* to Australia's *Sydney Morning Herald*. *See* Complaint at ¶1. The NBC *Today* show broadcast nationally a live performance of the OSU Band, and the OSU Band's performances were YouTube sensations, with millions of viewers watching their performances each week. *See id*. Indicative of how much its popularity had grown, the OSU Band was featured in Apple's "*Your Verse*" commercial for the iPad Air starting in January 2014. *See id.* The Ohio State University ("OSU") then leveraged the OSU Band's popularity and had Waters travel the country, raising tens of millions of dollars for OSU's *But For Ohio State* campaign. *See id.*

As the Director of The Ohio State University School of Music, Richard Blatti – a 25 year veteran of the School of Music – summed up the 2013-14 season in his June 2, 2014 performance review of Waters: "I have never witnessed football crowd reactions like I did this season, nor have I felt this kind of buzz around one of our university ensembles, not in 25 years on this faculty. This is largely due to Jon's creativity, his knowledge of the medium, and the rapport he has with these students. Truly inspirational. Based on that appraisal, I may run out of superlatives to describe the 2013-14 season." *See id*. at ¶2. In that same review, Waters was given an "*Exceptional*" rating, defined as "Performance consistently exceeded expectations. Demonstrated expertise. Modeled desired behavior for others. Trained and led others in this area. Employee was an exceptional contributor to the success of the department, college, and university." *See id*.

B. Waters' "*Courageous*" Efforts to Improve Band Culture

Waters' success was not limited to the OSU Band's performances. The OSU Band was also making great strides in modernizing its culture, which dates back to at least the 1930's. *See id*. at ¶25. Waters' efforts to change the Band were praised by OSU, with Blatti writing that "Jon is confronted with many years of 'tradition' and many well-meaning alumni whose proclivities and excesses need constant but gradual attitude adjustment. Jon has already begun to address these predispositions and is courageous in tackling some of the more extreme views head-on. Waters tried very hard to keep the SOM [OSU School of Music] informed of his world, an ever evolving, highly active, and interconnected sphere of decisions, protocols, and politics." *See id*. at ¶26.

Waters also embraced a plan to have an outside firm perform a band culture survey, which he discussed with Executive Vice President and Provost Steinmetz ("Dr. Steinmetz"). *See*

id. at ¶54. In a November 21, 2013 email to Dr. Steinmetz, Waters wrote that "[y]ou mentioned that we would have an outside firm conduct a band culture survey, a concept I wholeheartedly endorse…" *See id.* Yet despite "wholeheartedly endors[ing]" a band culture survey, Waters received nothing further from Dr. Steinmetz or any other OSU official to follow up on the survey. *See id*.

C. The Department of Education's Investigation of OSU and the Glaros Report

Troubling issues were brewing for OSU, having little to do directly with the Band. On May 1, 2014, the United States Department of Education Office of Civil Rights ("DOE") named OSU as one of 55 colleges and universities in the United States "under investigation for possible violations of federal law over the handling of sexual violence and harassment complaints." *See id*. at ¶3.

OSU's issues with the DOE set the tone for what would soon follow for Waters. Three weeks after the DOE's public announcement (and ten days *before* Director Blatti signed his exceptional performance review of Waters), the mother of a former Band member approached The Ohio State University Office of Compliance and Integrity, alleging that the Band's culture was "sexualized" and requesting an investigation of her allegations. *See id*. A deeply flawed and incomplete report ensued, skewed and distorted more to appease the DOE than to afford due process to Waters. *See id*. at ¶4. Chris Glaros, Assistant Vice President of Compliance Operation and Investigations for the Office of Compliance, oversaw the investigation and preparation of the report (the "Glaros Report"), and signed the resulting findings. *See id;* Answer at ¶4. He was supervised by Gates Garrity-Rokous, Vice President and Chief Compliance Officer for OSU. *See id*.

The Glaros Report was riddled with factual errors and material omissions, and result driven. *See* Complaint at ¶4. The deeply flawed Glaros Report then formed the basis for Defendants' decision to terminate Waters as Director of the OSU Band, less than two months after he was praised by OSU for his "courageous" efforts "tackling some of the more extreme views [of the OSU Band] head-on." *See id*.

Problems riddled the Glaros Report, including that OSU's methodology was destined to produce an invalid result. *See id*. at ¶5. Only ten of the 240 current members and student staff of the OSU Band and its approximately 4,300 alumni were interviewed for the Glaros Report. *See id*. This methodology resulted in a too small, unrepresentative sample size, which in turn led to a skewed picture of the culture of the OSU Band. *See id*. And even in that too small, unrepresentative sample size, the Glaros Report distorted and miscast much of the significant testimony. *See id*.

In fact, several of the interviews of those Band members were distorted and information supportive of Waters was ignored. *See id*. at ¶63. In a letter dated August 3, 2014 addressed to President Dr. Michael Drake and others, one of the individuals interviewed for the Glaros Report wrote:

> …at the center of this issue is an investigation that I feel was deeply flawed and executed with great carelessness and little concern with finding the truth. As someone with a deep understanding of the band, I would think that the hour I spent in the interview would have been used to gather the information I have about these issues and experiences. But as I recall, I was asked only a few general questions about the majority of the content in the report.

See id. A current band member – just elected by his peers as "Most Inspirational Band Member" for 2014 – who was also interviewed for the Glaros Report described his issues with the Glaros Report in a letter addressed to Dr. Drake, in which he wrote:

> The report, whose one job, it would seem, was to bypass objectivity and damn Mr. Waters for events predating his directorship and present only condemning opinions, is hardly a valid assessment of our culture. As one of the few individuals interviewed for this report, I have some merit in stating the above assertion.
>
> My comments were never identified or included in the report. A flagrant disregard for the anecdotes, opinions, and commentary that I provided on the band culture during my hour-long interview leads me to the conclusion that this investigation was not intended on finding the truth. This is truly unsettling…

See id. at ¶64. In a letter dated August 10, 2014 addressed to Dr. Drake and others, another Band member interviewed for the Glaros Report wrote:

> I am writing to express my concern regarding the methodology of the investigation, the conclusions found in the report relating to a culture of sexual harassment, and the poor decision to terminate Jonathan Waters from his position as Marching and Athletic Bands Director….
>
> As I understand, there are upwards of 4,000 OSU marching band alumni, and 240 members of the current OSU marching band. Sadly, the investigators choose to speak to a total of nine of those people and, from that, drew a conclusion regarding a sexualized culture that is vastly different from the actual nature of the band. Much of the backlash the university is receiving from band alumni is based on this sentiment, and I strongly urge you to not discredit the viewpoints of literally thousands of people who are speaking contrary to the report released. To do so shows an unwillingness to seek the truth….

See id. at ¶65. So shoddy was the investigative work that the Glaros Report made assumptions about people without even speaking to them. *See id*. at ¶66. A woman whose nickname was used as example of the "sexualized" culture in the OSU Band was never even interviewed. *See id*. She wrote in a July 27, 2014 letter to Dr. Drake:

> If the investigators felt that my rookie name was so offensive that it was the only one warranting an explanation, why was I never consulted about my opinion? If Ohio State has to investigate claims of sexual harassment, why was I never contacted for my side of the story? Where are the claims of sexual harassment aimed towards me coming from? If the people in charge of the investigation had reached out to me for my opinion, they

> would have learned that I did not feel I was being objectified or harassed by my peers….

See id. at ¶67. Even OSU's former Title IX and Clery Act Coordinator, whose employment overlapped with Waters' tenure as Band Director, was reported in two articles appearing in the *The Lantern*, on August 27th and 28th of 2014, as having stated that serious problems existed within the Office of Compliance and Integrity that lead her to file a complaint against her supervisor, the very same person who oversaw the Glaros Report. *See id.*

D. Dr. Drake's Two Versions of the Glaros Report

Yet, despite these problems, Dr. Drake publicly – and repeatedly – stood by the Glaros Report. *See id*. at ¶68. In an August 13th press conference at the Columbus Metropolitan Club, Dr. Drake publicly described the culture of the OSU Band as one including "[b]ehaviors that would not be tolerated in any class or in any unit on our campus - and I dare say – not in any of your companies." *See id*. at ¶69. Dr. Drake proclaimed that "[w]hat we felt was we had the facts that came to us from the investigation and those facts then describe a pattern that helped us make a decision that we needed based on what we thought was the best decision we could make moving forward to support our students." *See id*. Dr. Drake said, "[t]he facts showed us there was a culture not in line with our requirements of Title IX, not in line with our principles, not in line with our values and we needed to make a change and move forward." *See id*.

But privately, Dr. Drake told a different story. *See id*. at ¶70. Dr. Drake acknowledged *only eight days later*, on August 21, 2014, in a meeting with squad leaders of the OSU Band that the Glaros Report contained "a whole sheath of historical material that was from 2006 or 2011, some 2006, and before that." *See id*. He conceded that "[i]t was clear to me that the vast majority of all that stuff, which actually I wish I didn't know… was stuff from years gone by and wasn't reflective of you in the modern era." *See id*. at ¶72. Continuing on the flawed nature of

the Glaros Report, Dr. Drake admitted that "I believe that the report was overwhelmingly about people I've never met and that you've probably never met in times gone by. The overwhelming volume of this was historical information that was not relevant to you at all. Overwhelmingly." *See id*. And then, reaffirming the problems with the Glaros Report, Dr. Drake conceded that "the report is largely historical… both largely historical first and second, I appreciate the progress that's been made or given that things – I don't believe things today are like they were in the past, which I think is good. And I don't think – I'll try and say it again – if the band were behaving as it were reflected in the report, then that group couldn't march and represent the University… in this era. So I think – so no – I don't believe that it reflects you accurately." *See id*.

E. OSU Gives Waters the Ultimatum: Either Resign by 5 pm or Be Fired

Sometime during the week of May 26th of 2014, Glaros called the Band office and told Waters that a Title IX complaint had been filed against him and that he would need to come to Glaros' office to answer questions. *See id*. at ¶93. On June 12, 2014, Waters participated in an interview with Jessica Tobias ("Tobias") and Rebecca Dickson ("Dickson"). *See id*. at ¶95; Answer at ¶95-96. Contrary to OSU policy, Waters was not given a copy of OSU's "Guidelines for Investigating Complaints of Discrimination and Harassment" ("OSU's Investigation Guidelines"), which would have notified him of his right to have a "support person" present, which could have been an attorney. *See* Complaint at ¶95. Without the benefit of counsel, Waters answered questions about the timeline and reporting of a student issue. The meeting lasted about $2^{1/2}$ hours, after which Tobias told Waters that nothing further would be needed from him. *See id*.

Several weeks later, however, Waters was notified that he was to submit to another interview. *See* Complaint at ¶96. On July 1, 2014, Waters attended a second meeting with

Tobias and Dickson, who took notes. *See id*.; Answer at ¶¶95-96. Contrary to OSU policy, Tobias failed to notify Waters that this interview was focused on a separate complaint, and she again failed to provide him with a copy of OSU's Investigation Guidelines. *See* Complaint at ¶95. The tone of this meeting was much more pointed and hostile, and was all about Band culture. *See id*. The meeting lasted 3 hours. *See id*. Waters was asked to give a written report of the cultural shaping he had done with the Band during his leadership, but no deadline was given for its completion. *See id*.

On July 14, 2014, Waters submitted a written report to Tobias, describing the cultural shaping and training he had done with the Band since taking over as Director. *See id*. at ¶97. Later that day, Waters met with Dr. Steinmetz for the first time about the complaint. *See id*. at ¶98. At the meeting, Dr. Steinmetz placed his hand on a stack of paper and stated that there was enough in the report to fire Waters. *See id*. Dr. Steinmetz presented Waters with two options, either resign immediately, or adopt a zero tolerance policy and adhere to an assessment by an outside firm called Sports Conflict Institute ("SCI"), which would assess the culture of the Band. *See id*. Stunned by the accusation, Waters indicated he would adopt a zero tolerance policy and open the Band to the assessment by SCI. *See id*. No mention was made by Dr. Steinmetz of Waters' email six months earlier, already endorsing a cultural survey of the Band and asking Dr. Steinmetz when it would occur. *See id.*

Dr. Steinmetz also indicated that Waters could see the report "at some point," but would not allow Waters to see it then. *See id*. at ¶99. Dr. Steinmetz said that the SCI cultural assessment would start soon and end by August 25th. *See id*. at ¶99. SCI would then issue a report on the status of the culture and make recommendations from there. *See id*. Dr. Steinmetz also indicated that Waters should do nothing until hearing from him or SCI and that by the end of

the week, Dr. Steinmetz would have a plan in place. *See id*. Dr. Steinmetz also wanted to know all of all media and public appearances for Waters and the OSU Band for the upcoming weeks. *See id*. Waters provided him with a list through September. *See id.*

On July 23, 2014, Waters was again called to a meeting with Dr. Steinmetz. *See id.* at ¶100. At that meeting, Dr. Steinmetz gave Waters an ultimatum to resign or be terminated by 5:00 p.m. that day. *See id*. Upon leaving the office, Waters was handed a copy of the Glaros Report. That was the first time Waters had seen the report. *See id.* Later that day, Waters' attorney asked OSU's attorneys for extra time to read, interpret and digest the Glaros Report that Waters had just been handed, as well as additional time to formulate a response. *See id*. The university declined that request, but extended the deadline by one hour, to 6:00 p.m., to account for time spent negotiating with Waters' counsel. *See id*. Waters did not resign by 6:00 pm. *See id*.

On Thursday, July 24, 2014, Waters received a letter of termination through his counsel. The letter gave no cause for his termination. *See id*. at ¶101. When his counsel questioned OSU about the reasons, OSU's counsel sent an email at 7:12 pm on July 24th that "[y]ou have been provided the reasons for termination. They were set forth in the meeting between the Provost and Mr. Waters, which we attended. You also have a copy of the investigation report." *See id.*

F. <u>The Denial of a Name-Clearing Hearing</u>

At no time prior to his termination or the publication of that fact to the media was Waters provided notice and a meaningful opportunity to be heard on the contents of the Glaros Report. In addition, none of OSU's employees, including Glaros, communicated with Waters about the specific findings of the Glaros Report prior to his July 23, 2014 termination and the later publication of the Glaros Report. *See id.* at ¶102. Drs. Drake and Steinmetz have not since

provided Waters any *meaningful* opportunity to be heard on the contents of the Glaros Report. *See id*. at ¶103. On August 27, 2014, Waters' counsel sent OSU's counsel a letter requesting that OSU provide Waters with a public name-clearing hearing. *See id*. at ¶105. OSU denied Waters the opportunity for a name-clearing hearing that same day, on August 27, 2014. Specifically, OSU stated, "In response to the letter that Jon Waters' lawyer David Axelrod sent today demanding a 'Public Name-Clearing Hearing,' here is a statement from Chris Davey, OSU Assistant Vice President, Media & Public Relations…. We will not be revisiting this decision. It is closed, and it is time to move on." *See id*.

G. The Avalanche of Negative Publicity

Beginning on July 24th, OSU embarked on a public relations campaign to disparage Waters and justify his termination. *See id*. at ¶107. OSU widely publicized the Glaros Report through a dedicated website, and went so far as to have Dr. Drake issue a statement on YouTube that was disseminated and played throughout the United States. *See id*. Waters' good name was dragged through the mud on national news channels, in newspapers, and on the internet, and Waters and the OSU Band became fodder for unjust ridicule and embarrassment. *See id*. at ¶114. Stories like "*Here Are The Dirty, Sexual Things Ohio State's Band Did That Got The Director Fired*" appeared and were read widely. *See id*. To make matters worse, OSU escalated the negative publicity over the ensuing weeks with OSU spokesperson Chris Davey launching false and incendiary remarks about Waters through press releases. *See id*. at ¶12.

H. The Scapegoat

Suspicions that OSU took these actions against Waters to stop the DOE's investigation of OSU proved true. *See id.* at ¶13. On September 11, 2014, the DOE ended its investigation of OSU earlier than expected. *See id*. A letter from the DOE noted that OSU had requested to

resolve the DOE's investigation "with a voluntary resolution agreement prior to the completion of [the DOE]'s investigation of all the issues in the review." *See id*. In that same letter, the DOE made explicit reference to Waters and his termination, citing it as one of the reasons why the DOE was ending its investigation prior to the completion of its review of all of OSU's issues. *See id*. In other words, Waters was a scapegoat.

III. LAW AND ARGUMENT

A. Standard of Review

This Court has previously noted that "[a] motion for judgment on the pleadings should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Mitchell v. Westerville City Sch. Dist. Bd. of Educ.*, No. 2:11-CV-1057, 2013 WL 4776561, at *3 (S.D. Ohio Sept. 6, 2013) (Graham, J.) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). The standard applied under Rule 12(c) is the same standard applicable to motions to dismiss under Rule 12(b)(6). *Id.* "When reviewing a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the court must 'construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief.'" *Burgess v. Fischer*, 766 F. Supp. 2d 845, 848-49 (S.D. Ohio 2010) (quoting *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 512 (6th Cir.2001)). "Only when there are no disputed material facts and the moving party is entitled to judgment as a matter of law should the motion be granted." *Id*. at 849 (citing *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir.1991)); *see also, Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549-50 (6th Cir. 2008) ("A motion brought pursuant to Rule 12(c) is appropriately granted "when no material issue of fact exists

and the party making the motion is entitled to judgment as a matter of law"). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Burgess*, 766 F. Supp. 2d at 849 (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

B. Waters' Due Process Claims Are Valid And Should Not Be Dismissed

At this early stage of the litigation, Defendants face a steep burden to have Waters' claims denied without discovery. Waters' claims raise numerous factual issues. Defendants' motion challenges some and ignores others. A motion for judgment on the pleadings is not the appropriate method to resolve such factual disputes.

1. *Waters Has Pled a Plausible Claim that He Had Property Interest In His Continued Employment at OSU*

After over 21 pages of the same factual distortions, half-truths, and material omissions asserted in their Answer, Defendants argue that Waters' property interest claim should be dismissed because, as a factual matter: (1) Waters was an unclassified, at-will employee who had no property right to continued employment; and (2) OSU's policies, practices, and procedures did not provide Waters with a constitutionally protected property interest in continued employment. Initially, we note that these assertions expressly contradict the averments raised in Waters' Complaint. Waters pled in ¶130 of the Complaint that "OSU's policies, practices, and procedures provided him with a constitutionally protected property interest in his continued employment." For purposes of a motion for judgment on the pleadings, Waters' averments must be taken as true.

When addressing property rights for purposes of due process analysis, "federal constitutional law does not create the right alleged to have been violated, but only affords

procedural due process to protect rights that arise from other sources, such as state law." *Mertik v. Blalock*, 983 F.2d 1353, 1360 (6th Cir. 1993). A contractual right can constitute a sufficient property interest to warrant the protections of due process. "[T]he right to contract is specifically guaranteed by Section 1, Article 1 of the Ohio Constitution and is within the protection of the Fourteenth Amendment to the United States Constitution. It is a property right. Similarly, an interest in a contract has been held to be a property interest." *Id.* (quoting *Joseph Bros. v. Brown*, 65 Ohio App.2d 43 (6th Dist. 1979)); *see also, EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 857 (6th Cir. 2012) (citing *Mertik*).

More than just written contacts can be considered. "[E]xplicit contractual provisions may be supplemented by other agreements implied from words and conduct in light of the surrounding circumstances, and the meanings of the words and acts may be found by relating them to the usage of the past." *Willson v. Board of Trustees of Ohio State Univ.*, No. 91AP-144, 1991 WL 274862, at *14 (10th Dist. Dec. 24, 1991) (citing *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)).

Ohio law recognizes that an employee may have an implied contract that alters the terms of an otherwise at-will relationship. The Supreme Court of Ohio noted two exceptions that expressly change the nature of an at-will relationship in *Mers v. Dispatch Printing* Co: "(1) the existence of implied or express contractual provisions which alter the terms of discharge; and (2) the existence of promissory estoppel where representations or promises have been made to an employee." 19 Ohio St.3d 100, 104-05 (1985); s*ee also Davis v. Ineos ABS (U.S.A.) Corp*., No. C-I-09-773, 2010 WL 3909573, *3 (S.D. Ohio Sept. 30, 2010) (holding that it was not "implausible that [the plaintiff could] offer evidence supporting his claim that the terms of the employee handbook … created an implied contract altering Plaintiff's status as an at-will

employee"); *see also, Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 438 (6th Cir. 1988) (allegations that the defendant had certain employment policies constituting an employment contract that defendants later breached … "satisf[ied] Rule 8(a) and state[d] a claim upon which relief may be granted").

Factual issues must be resolved to determine whether there has been an implied contract amending the terms of an at-will relationship. To make this determination, a trier of fact must "review the history of relations between the employer and employee and the 'facts and circumstances' surrounding the employment-at-will relationship…includ[ing] 'the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question.'" *Wright v. Honda of Am. Mfg., Inc.*, 73 Ohio St.3d 571, 574 (1995) (quoting *Mers*, 19 Ohio St.3d at 104) (holding trier of fact must necessarily determine the agreement's explicit and implicit terms concerning discharge); *Finterswald-Maiden v. AAA S. Cent. Ohio*, 115 Ohio App.3d 442, 447 (4th Dist. 1996) ("[D]etermination of whether certain parties intended to create a binding contract is a question of fact properly resolved by the trier of fact").

Importantly, numerous Ohio and federal cases recognize that faculty members of public universities have a property interest in their continued employment due to the circumstances of his or her employment. For example, the Tenth District Court of Appeals found that where OSU's former men's gymnastics coach was terminated after being reappointed for the fiscal year, and where the reappointment impliedly constituted a contract, OSU administrators denied the coach due process by failing to provide him with an opportunity for a hearing prior to his termination. *Willson*, 1991 WL 274862 at *12-14. Other cases recognize similar protections. *See Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (holding that a professor of a public

university who had held his position for a long period of time might be able to show a legitimate claim of entitlement to tenure from the circumstances of his employment); *Freeze v. City of Decherd, Tenn*., 753 F.3d 661, 665 (6th Cir. 2014) (acknowledging that a non-tenured public employee has a property interest in continued employment where he or she can show a reasonable expectation of continued employment); *Gratsch v. Hamilton County Sheriff's Dept*., 91 F.Supp. 2d 1160, 1174-79 (S.D. Ohio 2000) (at-will employee permitted to pursue a 1983 property claim based on employer policy requiring hearing before termination). Further, "[i]t matters not that the alleged contract at issue is not written" in order for a property interest to attach. *Mertik*, 983 F.2d at 1360 (citing *Joseph Bros*., 65 Ohio App.2d at 990-991).

Here, Defendants claim that "the express terms of Mr. Waters' employment establish that he was an unclassified, at-will employee, whose employment with Ohio State could be ended at any time by either him or Ohio State." *See* Motion at 23. To support these factual allegations, Defendants attach the initial letter of Waters' employment as support for their position, and unsurprisingly go to great lengths to emphasize that Waters should not be afforded the protections owed to a member of OSU's faculty. Otherwise, if Waters is found to be a member of OSU's faculty, he was entitled under OSU policy to an array of procedural and substantive protections that were denied him.

For instance, as a faculty member, Waters' discharge would be governed by OSU's policies and practices regarding the protections afforded faculty members.[1] Section 3335-5-04[2] of the Ohio Administrative Code provides due process for termination, providing extensive

[1] Although Waters is not required by Rule 8(a) to spell out each and every policy and practice in the Complaint, the Court can take judicial notice of O.A.C. §3335-5-04, *Hearing Procedures for Complaints against Faculty Members*. *See Fisher v. City of Cincinnati*, 753 F.Supp. 681, 689 (S.D. Ohio 1990).

[2] Section 3335-5 of the Ohio Administrative Code was current at the time of Waters' termination and the provisions therein remain current in *The Ohio State University Rules of the University Faculty*, found at http://trustees.osu.edu/rules/bylaws-of-the-board-of-trustees/.

procedural and substantive protections prior to termination of a faculty member.[3] *See also*, Rule 3335-5-04 of *The Ohio State University Rules of the University Faculty*. These protections include notice, opportunities to be heard, and several appellate rights. *See* O.A.C. §3335-5-04(E)-(J); Rules 3335-5-04(E)-(J) of *The Ohio State University Rules of the University Faculty*. Additionally the procedure requires that any findings against a faculty member be based on "clear and convincing evidence" and that any resulting disciplinary sanctions be "commensurate with the nature of the complaint." O.A.C. §3335-5-04(E)(2) and (3); Rule 3335-5-04(E)(2) of *The Ohio State University Rules of the University Faculty*. There are also substantive and procedural limits on the rights of both the president and the provost to terminate employment. *See* O.A.C. §3335-5-04(G) and (I); Rules 3335-5-04(G) and (I) of *The Ohio State University Rules of the University Faculty*. These protections are all incorporated by reference into all faculty contracts of employment pursuant to O.A.C. § 3335-5-12 and Rule 3335-5-12 of *The Ohio State University Rules of the University Faculty*; in other words, OSU intended them to be contractual in nature. None of these protections were followed by Defendants before destroying Waters' good name and ruining his career.

Considering the "character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question," the pleadings demonstrate that sufficient facts exist to support the plausibility of such a claim. For instance, Defendants rely heavily on "*The Ohio State University Marching Band Statement of Policies and Procedures*" in their Motion and Answer, citing it at least three times for the proposition that Waters was in the "core power structure of the Band." *See* Complaint, Exhibit B (Doc. No. 1-3)

[3] Waters' complaint pled in ¶130 that "[t]hrough policies, practices, and procedures of OSU, Waters has a constitutionally protected property interest in his employment by OSU." Although not required by notice pleadings rule to attach O.A.C. §3335-5-04, a copy of the Policy is attached as Appendix A to this memorandum.

at Page ID #442. But the same page of the *Policies and Procedures* clearly states that the Band Director "is a *faculty member* assigned to the Marching Band." *Id*. (emphasis added). Waters' faculty status is also consistent with OSU's past practices, where Waters' predecessors as Director, including Paul Droste and Jon Woods, were tenured members of OSU's faculty and are currently considered Emeritus Faculty. *See* https://music.osu.edu/people/emeritus. Indeed, OSU's current interim director is designated as an OSU faculty member and thus entitled to due process protections. *See* https://music.osu.edu/bands/resources/faculty. OSU's website refers to the OSU Band leadership as "Band Faculty" and specifically identified Waters as faculty at https://music.osu.edu/bands/history.

One of Defendants' central arguments reinforces this point. Defendants' Motion repeatedly emphasizes that the OSU Marching Band "is a class within the School of Music for which Band members receive grades and academic credit…. As such, the Band was subject to the same codes of conduct as all other Ohio State academic programs…" *See* Motion at 5. At the same time, Defendants contradictorily argue that Waters, the one assigning grades and academic credit in this class, should not be considered a member of OSU's Faculty. OSU's two positions are difficult, if not impossible, to reconcile. Discovery is needed to explore these issues further.

As explained above, Waters has pled enough facts to support a property interest that required Defendants to provide due process before his termination. A host of factual issues exist, which cannot be resolved at this stage. These issues – and others – require substantive factual analysis pursuant to *Mers* and its progeny, and Defendants' motion for judgment on the pleadings on this claim must be denied.

2. *Waters Was Not Offered A Constitutionally Sufficient Name-Clearing Hearing*

Defendants argue that Waters' liberty interest procedural due process claim must fail because – again, as a factual matter – Waters declined Defendants' offer of a name-clearing hearing. As a preliminary matter, Waters has denied[4] Defendants' averments. In fact, Waters pled the opposite in ¶105 of the Complaint, *i.e.*, that OSU in fact denied a name-clearing hearing, detailing that: "[i]n response to the letter that Jon Waters' lawyer David Axelrod sent today demanding a 'Public Name-Clearing Hearing,' here is a statement from Chris Davey, OSU Assistant Vice President, Media & Public Relations…We will not be revisiting this decision. It is closed, and it is time to move on."

In response, Defendants attach a letter from its counsel, referring to an undefined "forum" for a name clearing hearing, asserting – once again, as a factual matter – that Waters never accepted the offer. This raises factual questions, including without limitation: How is the public denial of a name-clearing hearing not a denial? Was the public denial ever publicly retracted? Was a constitutionally sufficient hearing ever offered? What procedures was OSU prepared to follow? Who made the decision to publicly deny the name-clearing hearing? Given that Waters' request for a name-clearing hearing was denied in a public forum, in an inflammatory fashion, is there any reason to believe that Defendants' subsequent "offer" was made in good faith or would meet minimal constitutional protections? These factual questions regarding the hearing and any alleged waiver can only be properly resolved through

[4] According to Rule 7(a), a plaintiff is not required to reply to affirmative defenses or new matter appearing in the answer, and, under Rule 8(d), averments in a pleading to which no responsive pleading is required are considered by the court to have been denied. Thus, when material issues of fact are raised by the answer and the defendant seeks judgment on the pleadings on the basis of this matter, the motion cannot be granted. *See* Wright & Miller, §1368 Judgment on the Pleadings—Practice Under Rule 12(c), 5C Fed. Prac. & Proc. Civ. § 1368 (3d ed.)

interrogatories, affidavits and depositions – none of which can be considered on a motion for judgment on the pleadings.

Moreover, seeking relief from the Court to determine the parameters of a name-clearing hearing, before participation in the hearing, is not a waiver of that right. That is precisely what happened in *Gunasekera v. Irwin*, 678 F.Supp.2d 653 (S.D.Ohio 2010), where a terminated employee refused to participate in the hearing offered by Ohio University, and did so only *after* the Court denied the defendant's motion for summary judgment and issued an Order detailing the requirements of the hearing. This case arises in a similar situation.

In *Gunasekera*, an Ohio University professor requested a name-clearing hearing and demanded, among other things, publicity of the name-clearing hearing. University officials had publicized and held a press conference regarding a report that found flagrant plagiarism among a group of graduate students, and had accused Gunasekera of "ignoring [his] ethical responsibilities and contributing to an atmosphere where issues of academic misconduct were ignored." *Id.* at 656-57. In response, the university officials offered him a constitutionally insufficient, i.e., private, name-clearing hearing, which he declined. *Id.* Gunasekera subsequently filed a complaint in this Court alleging causes of action for due process violations of his liberty and property interests, but the complaint was initially dismissed by this Court. *Gunasekera v. Irwin*, 551 F.3d 461, 465 (6th Cir. 2009). Gunasekera appealed, and the Sixth Circuit reversed.

The Sixth Circuit applied the three-part *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test to determine whether due process demands a public name-clearing opportunity for a terminated public employee: "(1) the nature of the private interest affected-that is, the seriousness of the charge and potential sanctions, (2) the danger of the error and the benefit of

additional procedures, and (3) the public or governmental burden…." *Gunasekera*, 551 F.3d at 470 (quoting *Flaim v. Med Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005)). "By applying this test to the facts of the case before it, a court can tailor a name-clearing hearing which allows the employee to challenge directly any public stigma while also accounting for any legitimate concerns of the employer." *Id*.

Applying the *Mathews* test, the Sixth Circuit highlighted the importance of publicity in Gunasekera's case:

> Considering the first prong of this test, we believe that it is clear that where, as here, the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name of the public stigma is *through publicity*… As to the second prong of *Mathews*, publicity adds a significant benefit to the hearing, and *without publicity the hearing cannot perform its name-clearing function*. A name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved.

Id. (emphasis added). The Sixth Circuit held that the university was required to offer an adequately publicized name-clearing hearing that would address the stigmatizing statements publicized by the university. *Id*. at 471. And, perhaps more importantly, the Sixth Circuit concluded that "the exact nature of that publicity depends on a *fact-intensive review* of the circumstances attending his case, and we leave to the district court the initial determination regarding the exact parameters of the name-clearing hearing due Gunasekera." *Id*. (emphasis added).

Following the Sixth Circuit's decision, the defendants offered Gunasekera another name-clearing hearing, and filed a motion for summary judgment after Gunasekera rejected their offer. *Gunasekera*, 678 F.Supp.2d at 658, 663. The Court ultimately found summary judgment to be

improper because "the Court had not provided the parties with the procedural requirements necessary for Dr. Gunasekera's name-clearing hearing." *Id*. at 664.

Similar to Ohio University in *Gunasekera*, Defendants have also failed to offer a sufficient name-clearing hearing, even if their factual representations were taken as true. A name-clearing hearing must be tailored to address the particulars of each situation and the extent of the harm done. As pled in the complaint, the harm done to Waters was nationwide, if not global – including the *USA Today*, *Washington Post*, *Los Angeles Times*, CNN, and *Huffington Post*. *See* Complaint at ¶¶108-117. Here, Waters specifically requested that Defendants "provide notice of the hearing to all local and national media." Answer at ¶ 104, Exh. U. Given the extent of the coverage of Defendants' stigmatizing comments regarding Waters in nationwide publications, such publicity is essential to clear the public stigma inflicted by Defendants.

Yet, in their response to Waters' request for a name-clearing hearing, Defendants failed to offer to publicize the hearing, or anything more than an on-campus forum. *See* Answer at ¶ 106, Exh. V. Instead, Defendants remarked that "Mr. Waters has of course had numerous opportunities to state his position with respect to the Marching Band's culture both before and after his termination, and on stages both local and national," thereby implying that publicity had ceased to be an element of a constitutionally sufficient name-clearing hearing. *See id.* But, Waters' informal statements to the media do not carry nearly the weight of a formal name-clearing hearing offered on the OSU campus – especially one with procedures even remotely resembling those requested by Waters.

At a minimum, there is a disputed issue of material fact regarding the sufficiency of any name-clearing hearing offered by Defendants, which must be left for a jury's determination. *See Patterson v. City of Utica*, 370 F.3d 322, 337 (2d Cir. 2004) (reviewing jury's verdict regarding

the sufficiency of the name-clearing hearing provided to Patterson). Thus, Defendants' Motion regarding Waters' liberty interest due process claim must be denied.

3. *Waters Has Adequately Pled A Claim For A Violation Of His Substantive Due Process Rights*

Defendants next argue that Waters' claim for a violation of his substantive due process rights must fail because (1) he has not alleged a denial of a fundamental right; (2) the "shocks the conscience" standard does not apply in cases not involving physical force; and (3) even if the "shocks the conscience" standard did apply, it cannot rise to the level of a substantive due process violation absent a deprivation of a fundamental right. Defendants are mistaken.

a. The "shocks the conscience" standard applies – and would apply even if there were no violation of a fundamental right

Defendants' argument that the "shocks the conscience" standard cannot be applied without a deprivation of a fundamental right fails because it overlooks several important Sixth Circuit cases. For instance, in *Palmer v. Adams*, 517 Fed. Appx. 308, 310 (6th Cir. 2013), the court applied the shocks the conscience standard to the plaintiff's substantive due process claim, even though her allegations did not establish the violation of a fundamental right. Similarly, in *Farmer v. Pike County Agric. Soc'y*, 411 F.Supp.2d 838, 843 (S.D.Ohio 2005), involving a parents' right to assist a stepson in a county fair livestock competition, this Court applied the "shocks the conscience standard" despite the absence of allegations of a violation of a fundamental right. And, more recently, the Northern District of Ohio analyzed a substantive due process claim under the "shocks the conscience" standard, even though the plaintiff did not claim deprivation of a fundamental right. *See Goudlock v. Blankenship*, No. 1:13CV1215, 2014 WL 320386, at *6 (N.D. Ohio Jan. 29, 2014). Against that background it becomes clear that Defendants' argument is mistaken.

b. The "shocks the conscience" standard does not depend on the presence of physical force

Defendants' argument that the "shocks the conscience" standard applies only in cases involving physical force also fails. Recently, this Court applied the "shocks the conscience" standard in a case involving racial harassment that did not involve physical force. In *Peterson v. Northeastern Loc. Sch. Dist*., No. 3:13CV00187, 2014 WL 2095380 (S.D. Ohio May 20, 2014); *report and recommendation adopted*, No. 3:13-CV-187, 2014 WL 4628544 (S.D. Ohio Sept. 15, 2014), two female African American students and their guardians filed a complaint against a number of defendants alleging a substantive due process claim, pursuant to the "shocks the conscience" standard, based on claims of racial harassment. *Id*. at **2, 10. Addressing a motion to dismiss, the court determined that the defendants' actions would "shock the conscience," even though physical force was absent. *Id*. at *10-11 (internal citations omitted). Accepting the plaintiffs' allegations as true and construing them in the plaintiffs' favor, this Court found that the allegations were "sufficiently specific to demonstrate that Defendants' acts and omissions were worse than negligent and, instead, were done for the purpose of injuring [the plaintiffs] in furtherance of invidious discrimination." *Id*.

The facts in *Myers v. Delaware County, Ohio* are particularly instructive in this case. *Myers v. Delaware County, Ohio*, No. 2:-07-cv-844, 2008 WL 4862512 (S.D. Ohio Nov. 7, 2008) There, Myers, a former Delaware County sheriff, filed substantive due process claims after his successor, Wolfe, issued a press release stating that Myers had child pornography on his computer. Myers alleged that Wolfe knew that the child pornography was part of an investigation, and had been given specific advice from the prosecuting attorney's office not to issue the press release. *Id*. at *10. In response, the defendants filed a motion for partial judgment on the pleadings. *Id*. at *1.

Applying the "shocks the conscience" standard, despite Myers' failure to allege the use of physical force or a violation of a fundamental right, the Court concluded,

> Plaintiff's allegations, if true, do state a substantive due process violation. If Wolfe knew that the child pornography found on Plaintiff's computer was, in fact, related to an official investigation and yet, against the advice of the county prosecutor, in a personal, unwarranted attack on Plaintiff's character and reputation, used his position as the county sheriff to issue a press release branding Plaintiff as a "child pornographer," such egregious conduct would, in this Court's view, shock the conscience. Such an abuse of power by a government official for the purpose of oppression rises to the level of a constitutional violation.

Id. *See also, Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002) (evidence of defendants' commitment to producing a scapegoat for alleged wrongdoing, their use of questionable procedures and proof that they had ignored exculpatory evidence satisfies the "shocks the conscience" standard).

Here, Waters has pled conduct by Defendants that is egregious and shocking. Waters was made a scapegoat for a culture that existed for decades before he became the Band's Director. Dr. Drake has acknowledged that the alleged "facts" contained in the Glaros Report do not apply to the current Band, describing the Glaros Report as:

- "[L]argely historical;"
- "[O]verwhelmingly about people [he's] never met and that [the Band squad leaders have] probably never met in times gone by;"
- About "an entirely different group of people" and
- Not "reflective of [the Band] in the modern era."

Complaint at ¶¶70, 72. Defendants have nonetheless continued to publicize and support it.

The record must be viewed in the light most favorable to Waters. But even if it were not, Waters has alleged more than a plausible substantive due process claim based on the "shocks the

conscience" standard. Therefore, the motion for judgment on the pleadings with respect to Waters' substantive due process claim must be denied.

4. *Waters Has Sufficiently Pled Due Process Violations By Both Drs. Steinmetz and Drake*

Defendants' final due process argument is that Waters has failed to identify any action on the part of Drs. Drake and Steinmetz that deprived him of due process. Defendants' argument ignores longstanding Sixth Circuit law regarding §1983 claims against supervisors, as well as numerous factual allegations in the Complaint. This argument, too, must fail.

Although a supervisor will not be liable under §1983 based solely on theories of *respondeat superior* or the right to control employees, a supervisor may be liable for "encourage[ing] the specific incident of misconduct or in some other way directly participat[ing] in it." *Colvin v. Caruso*, 605 F.3d 282, 292 (6th Cir. 2010) (quoting *Cardinal v. Metrish*, 564 F.3d 794, 802-03 (6th Cir. 2009)). "At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Grose v. Caruso*, 284 Fed.Appx. 279, 282 (6th Cir. 2008) (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (quoting *Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir.1982)).

Waters has pled numerous facts implicating Drs. Drake and Steinmetz in the investigation and his termination. For instance, Waters quotes the following admissions by Dr. Drake during his August 13th press conference: "[w]hat *we* felt was *we* had the facts that came to *us* from the investigation and those facts then describe a pattern that helped *us* make a decision that *we* needed based on what *we* thought was the best decision *we* could make moving forward to support our students." Complaint at ¶¶ 9, 73 (emphasis added). Waters also quotes Dr. Drake's comments during his August 21st meeting with the Band squad leaders:

> *I* want you to think that when *I* saw things that looked like they were biased or tainted or sensationalized that those were discounted because of that because that's what *I* would do… speaking for *myself* but all but *I* did everything *I* felt that *I* was appropriate to filter out information that *I* thought was irrelevant or extraneous or inflammatory or historical.…

Id. at ¶ 75 (emphasis added). These statements alone are sufficient to demonstrate that Dr. Drake was directly involved in the process leading up to Waters' termination. In fact, Defendants confirm Dr. Drake's involvement in their Answer: "*President Drake*, after a review of the hazing and harassing culture of the Band, and after consultation with senior leaders of the University and apprising the Board of Trustees, *determined Mr. Waters should no longer be the Director of the Band*." *See* Answer at ¶5 (emphasis added).

The allegations of Dr. Steinmetz's involvement in Waters' termination are also more than sufficient. For instance, Waters has pled that Dr. Steinmetz gave Waters ultimatums on two different occasions: (1) on July 14, 2014, resign immediately or adopt a zero tolerance policy and cooperate in a cultural assessment by an outside firm; and (2) on July 23, 2014, resign by 5:00 p.m. that day or be fired. Complaint at ¶¶11, 98. And when Waters' attorney asked for a statement of the reasons for Waters' termination, Defendants' in-house counsel replied that "[y]ou have been provided the reasons for termination. They were set forth in the meeting between the Provost and Mr. Waters, which we attended. You also have a copy of the investigation report." *Id*. at ¶ 101. Further, Dr. Steinmetz signed the letter of termination referred to in ¶101 of the Complaint. These allegations are sufficient to support that Dr. Steinmetz was directly involved in Waters' termination.

Defendants' arguments regarding Waters' liberty interest due process claim also fail. Waters alleges that OSU empowered Drs. Drake and Steinmetz to take administrative action against Waters under color of state law. *See* Complaint at ¶¶ 17-18. Like a corporation, OSU

cannot speak on its own, but must do so through its administration, in this case Drs. Drake and Steinmetz. *See Tokles & Son, Inc. v. Midwestern Indemn. Co*., 65 Ohio St.3d 621, 627 (1992) ("As an artificial person, a corporation does not speak on its own, but, rather, only through the authorized acts of its agents or alter egos").

The Complaint alleges specific facts showing that Drs. Drake and Steinmetz were actively involved in Waters' termination. By virtue of their authority within OSU and active engagement in other matters involving the Band and Waters' termination, the Court can infer that Drs. Drake and Steinmetz were equally involved in the decision to deny a name clearing hearing. Therefore, Defendants' motion for judgment on the pleadings with respect to Waters' due process claims against these individual defendants must be denied.

C. The Court Should Deny Defendants' Motion With Respect To Waters' Title IX Claim

Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681 *et seq*., provides that "no person … shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." This statute provides a private cause of action for damages to both students and employees who have been subject to discrimination on the basis of sex by an educational institution that receives federal financial assistance. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Waters' Title IX claim has two components: (1) Title IX violations in connection with the internal investigation, and (2) a disparate treatment violation of Title IX in connection with the termination itself. Both have been properly pled.

1. *Waters Has Pled A Plausible Claim Of Gender-Based Discrimination*

The Sixth Circuit has adopted the familiar *McDonnell-Douglas Corp. v. Green* standard for establishing a prima facie case of disparate treatment by an employee in a Title IX action. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1972), applied in *Ivan v. Kent State University*, 92 F.3d 1185 (6th Cir. 1996) (unreported); *Weaver v. Ohio State University*, 71 F.Supp.2d 789, 793 (S.D. Ohio 1998), *aff'd* 194 F.3d 1315 (6th Cir. 1999) ("Title VII standards for proving discriminatory treatment also apply to claims of employment discrimination" under Title IX). This standard requires Waters to show that: (1) he is a member of a protected class; (2) he was discharged or subjected to an adverse employment decision; (3) he is qualified for the position; and (4) a "comparable non-protected person was treated better." *Ivan*, *supra*, n.7. If Waters can establish a prima facie case of discrimination, the burden then shifts to Defendants to establish a nondiscriminatory reason for its actions, which Waters must then show to be a pretext.

Waters' burden in establishing a prima facie case "is not onerous" and poses "a burden easily met." *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 665 (6th Cir. 2000) (citing cases). The burden at the pleading stage is even lower, because "the precise requirements of a prima facie case can vary depending on the context, and the appropriate type of prima facie case may not be evident until discovery is conducted, it would be improper to impose a rigid pleading standard for discrimination cases." *Serrano v. Cintas Corp.*, 699 F.3d 884, 897 (6th Cir. 2012) *cert. denied sub nom. Cintas Corp. v. E.E.O.C.*, 134 S. Ct. 92, 187 L. Ed. 2d 254 (2013) (quoting *Swierkiewicz v. Sorema NA*, 534 U.S. 506 (2002). *See also, Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012) (application of the *McDonnell-Douglas* prima facie case at the pleading stage is "contrary to the Federal Rules' structure of liberal pleading requirements").

2. *Waters Has Properly Pled That He Was A Member Of A Protected Class*

Waters has pled that OSU's actions were based on his sex. *See* Complaint at ¶144. Defendants argue for an extension of the law, *i.e.*, that the prima facie case formulation should be "heightened" because this is supposedly a case of "reverse discrimination." OSU argues that under the heightened standard that has developed in Title VII cases, Waters must plead and ultimately prove the existence of "background circumstances support[ing] the suspicion that the Defendant is that unusual employer who discriminates against the majority." *See* Motion at 33. The Court should decline to extend the law, but Defendants' argument would fail even if a "heightened standard" did apply to Title IX claims.

Although the Sixth Circuit Court continues to apply the "heightened standard" in reverse discrimination cases under Title VII, it has been discounted or discarded altogether by many federal courts since the United States Supreme Court's decisions in *Adarand Constructors, Inc. v. Pẽna*, 515 U.S. 200 (1995) and *Martin v. Wilks*, 490 U.S. 755 (1989). *See generally, Title VII and Reverse Discrimination: The Prima Facie Case*, 31 Indiana L. Rev. 413 (1998). *Cf. Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("we have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts"). Given the number of courts that have retreated from this standard in the Title VII context, it should not be extended to entirely separate federal legislation directed solely to the issue of discrimination on the basis of sex by educational institutions receiving federal funds.

OSU also argues that Waters has failed to plead circumstances showing that "Ohio State is the unusual employer who discriminates against the majority." The argument is predicated on Defendants' assumption that Waters was a member of the majority at OSU. This puts the cart

before the horse. As this point, it is uncertain as a factual matter *which* gender constitutes the "majority" at OSU. This is an issue for discovery, along with issues regarding OSU's affirmative action policies and practices and statistical hiring patterns. *See Sutherland v. Michigan Department of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003); *Murray v. Thistledown Racing*, 770 F.2d 63, 68 (6th Cir. 1985).

Further, even if the "heightened standard" did apply, the Complaint does in fact allege "background circumstances" suggesting a motive to discriminate against a male Band Director. *See* Complaint at ¶146. As noted before, Waters' termination arose in the context of the high-stakes Title IX investigation of OSU by the DOE's Office of Civil Rights. The DOE investigation – and similar investigations of other universities across the nation – was part of a highly publicized federal effort to address what the DOE characterized as an epidemic of sexual violence against female students on college campuses. The DOE investigation was reported extensively in the media, and put millions of dollars of federal funding at risk for OSU.

In paragraphs 118-122 of the Complaint, Waters pled that he was made a scapegoat by Defendants in order to resolve the DOE investigation as promptly as possible, without risk to OSU's federal funding or its other programs. These background circumstances are the setting for the current case. Under these circumstances, OSU had a strong motive to find – and decisively punish – a male administrator for allegedly failing to address the kind of conduct that prompted the DOE's investigation.

Finally, OSU misplaces reliance on *Turner v. Grande Pointe Healthcare Cmty.*, 631 F.Supp.2d 896, 911 (N.D. Ohio 2007) for the proposition that the Court must consider "whether the decisionmakers were of the opposite sex" in deciding whether to allow a reverse discrimination claim. Even if this were a pertinent factor for determining "background

circumstances," the investigators from OSU's Office of Compliance and Integrity were female, and discovery may reveal that other females of OSU were involved in the decision to terminate Waters, as well. *See* Answer, Exh. H at 3.

Regardless, Defendants mischaracterize *Turner*, where the Court recognized "the Sixth Circuit has not developed a bright line test for what constitutes 'background circumstances' for the purposes of the first prong in a reverse discrimination case." *Id*. at 911. The gender of the decision makers is only one of a variety of background circumstances that may suffice. For example, another relevant circumstance may flow from "significant evidence in the form of statistical data" tending to show that the employer favored the non-majority class in making employment decisions. *Sutherland v. Michigan Department of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003). *See also, Murray v. Thistledown Racing*, 770 F.2d 63, 68 (6th Cir. 1985) (suggesting that reverse discrimination plaintiff might have satisfied the background circumstances requirement by showing that the defendant's employment practices were grounded in an affirmative action program); *DeBiasi v. Charter County of Wayne*, 537 F.Supp. 2d 903, 917-920 (E.D. Mich. 2008) (in reverse race discrimination case, court relied on statistical evidence in finding sufficient evidence of background circumstances).

Waters is entitled to discovery concerning whether OSU's investigative protocols and employment practices favor females. These factual issues must be left for resolution by the trier of fact.

3. *Waters Has Properly Pled That He Was Discharged Or Subjected To An Adverse Employment Decision*

Waters properly pled that he was discharged by OSU. *See* Complaint at ¶101. Defendants do not dispute that this second element has been pled.

4. *Waters Has Properly Pled That He Was Qualified For The Position*

Defendants argue – again, as a factual matter – that Waters was failing to meet OSU's expectations at the time of his termination, of course making no mention of his "*Exceptional*" performance review less than two months prior to his termination. This argument fails, too.

First, there are more than enough facts pled to support a plausible claim that Waters was qualitied for the position of Band Director. As noted before, less than two months before Waters' dismissal, OSU's Director of the School of Music Richard Blatti praised Waters effusively and gave him an "*Exceptional*" performance rating, defined as "Performance consistently exceeded expectations. Demonstrated expertise. Modeled desired behavior for others. Trained and led others in this area. Employee was an exceptional contributor to the success of the department, college, and university." *See id.* A portion of the review is quoted above, and the review is reproduced at greater length in the below footnote.[5] It should suffice here to note that Blatti described Waters as "a naturally gifted leader [who] supervises a large and complex operation with grace and efficiency", and Waters' effort to modernize Band culture – the specific attribute that OSU now claims was lacking – as "courageous." If not unprecedented, such lavish praise is rarely seen in performance reviews.

[5] Blatti wrote that "Jon [Waters] is a naturally gifted leader and he supervises a large and complex operation with grace and efficiency. This is no small task and we are fortunate to have him and his team leading this marching and athletic band program." Waters' efforts to change the Band were praised by OSU, with Blatti writing that "Jon is confronted with many years of 'tradition' and many well-meaning alumni whose proclivities and excesses need constant but gradual attitude adjustment. Jon has already begun to address these predispositions and is courageous in tackling some of the more extreme views head-on. Waters tried very hard to keep the SOM [OSU School of Music] informed of his world, an ever evolving, highly active, and interconnected sphere of decisions, protocols, and politics." *See* Complaint at ¶26. As Richard Blatti, summed up the 2013-14 season: "I have never witnessed football crowd reactions like I did this season, nor have I felt this kind of buzz around one of our university ensembles, not in 25 years on this faculty. This is largely due to Jon's creativity, his knowledge of the medium, and the rapport he has with these students. Truly inspirational. Based on that appraisal, I may run out of superlatives to describe the 2013-14 season." *See id.* at ¶2. In that same review, Waters was given an "*Exceptional*" rating, defined as "Performance consistently exceeded expectations. Demonstrated expertise. Modeled desired behavior for others. Trained and led others in this area. Employee was an exceptional contributor to the success of the department, college, and university." *Id.*

Second, Defendants rely on outdated law to support their argument. Defendants cite *McDonald v. Union Camp Corp.*, 898 F.2d 1155 (6th Cir. 1990), but the case's prima facie analysis was modified by the Sixth Circuit in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). In *Cline*, the Sixth Circuit found the elements of whether someone was qualified is easily met, and – at least for purposes of establishing a prima facie case – cannot be negated by introducing evidence that goes directly to the reason for the underlying adverse employment action. As the court explained in *Cline*, "forcing plaintiff to make such a proof at the prima facie stage defies the very purpose of the production stage in the overall sequence of *McDonnell-Douglas*." *Id.* at 665.

Third, Waters is consistent in his denial that he was responsible for establishing a "sexualized culture" in the Band, or failing to provide adequate leadership in connection with problems claimed in the Glaros Report. These issues go to the heart of the case, are fact-intensive matters for discovery and ultimate determination by the trier of fact.

5. *Waters Has Properly Pled That Similarly Situated OSU Female Employees Were Treated Different Than He Was*

Waters has properly pled that similarly situated OSU female employees were treated differently than he was. The Complaint alleges that after the Office of Compliance and Integrity conducted its investigation and issued its conclusions and recommendations, OSU treated Waters more harshly than it would a female employee under similar circumstances. Paragraph 145 of the Complaint alleges that "OSU … subjected Waters to unlawful discrimination on the basis of his gender in terminating his employment after receiving the results of the Glaros Report…. But for his gender, he would have been permitted to continue working under the terms of a performance improvement program, in accordance with existing OSU policy." Paragraph 146 continues that "[a]s part of OSU's effort to show the federal government and others that it is

vigilant in enforcing perceived Title IX objectives, OSU's current practice is to use a harsher and more punitive standard in considering, investigating and punishing allegations of harassment, discrimination and 'promoting a sexualized culture' when the subject is male."

Paragraph 147 then discusses the example of former OSU Cheerleading coach, Lenee Buchman, pleading that "[s]imilarly situated female employees have been treated more favorably under similar circumstances, including a female cheerleading coach who was the subject of an investigation in 2013 involving sexualized behavior in the cheerleading crew." The paragraph details that while Buchman "was determined to be responsible for alleged wrongdoing similar to that identified in the Glaros Report," OSU did not immediately terminate her employment. Instead, OSU provided Buchman "with an opportunity to correct the concerns identified in the investigation and resulting report." The paragraph then alleges that "[b]ut for his gender, Waters would have been provided the same opportunity." For purposes of Defendants' motion, these allegations of the Complaint must be accepted as true, and the motion to dismiss Waters' Title IX claim denied.

Nevertheless, Defendants assert – once again, as a factual matter – that Buchman was not "similarly situated" to Waters. To do so, Defendants rely extensively on material outside of the pleadings to support their claim that this individual is not "similarly situated," going so far to even attach OSU's November 25, 2013 termination letter of Buchman as Exhibit W to its Answer. Unsurprisingly, no material from Buchman's progressive discipline prior to her termination is attached. From that letter, Defendants make several factual representations, such as Waters "and the female cheerleading coach were not supervised or terminated by the same individual."[6] *See* Motion at 36. Defendants then present, for the first time, more than a full page

[6] Defendants' also rely on the "same actor inference" on page 37 of the Motion citing a 1995 Sixth Circuit decision. But that case is no longer good law. In *Wexler v. White Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir.

of factual representations regarding Buchman's employment with OSU. None of this has been subject to discovery.

At this stage, the Court cannot simply accept the Defendants' representations as true. The "similarly situated" analysis is a fluid and fact-intensive analysis that will change from case to case. *Ercegovich v. Goodyear Tire and Rubber Co.*, 154 F.3d 344 (6th Cir. 1998). Here, there is *no* evidentiary record for reaching any conclusions on the "similarly situated" issue, only Defendants' bald assertions. These are fact-intensive matters requiring discovery.

6. *Defendants' "Pretext" Argument Does Not Support Judgment On The Pleadings*

For their final argument for dismissal of the Title IX claim, Defendants set up a "straw man" argument on the issue of pretext, and then attempt to knock it down. According to Defendants, "the notion that Ohio State's Title IX investigation of the Band was a pretext for discriminating against Waters because he is a man is meritless." Once again, this assumes a litany of facts that are in dispute, and Defendants make this assertion without identifying whose "notion" this is or where it came from. Defendants then argue that "the investigation was not a pretext for anything," and that it was "compelled by law." *See* Motion at 38.

This misguided argument shows the dangers of attempting to seek a ruling on complex substantive issues at this stage of the litigation. Several factual questions must first be addressed. The *McDonnell-Douglas* analysis (*supra* at pp. 29-30) is a framework used to analyze evidence *after* a record has been developed, not a basis for analyzing pleadings. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 665 (6th Cir. 2000) (finding that the burden in establishing a prima facie case "is not onerous" and poses "a burden easily met"); *Serrano v. Cintas Corp.*, 699 F.3d

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2003), the Court in an *en banc* decision rejected the use of the so-called "same actor inference" for summary judgment purposes. 317 F.3d at 573-574. The use of this "inference" is even less appropriate in ruling on a motion for judgment on the pleadings.

884, 897 (6th Cir. 2012) *cert. denied sub nom. Cintas Corp. v. E.E.O.C.,* 134 S. Ct. 92, 187 L. Ed. 2d 254 (2013) (finding that "[t]he burden at the pleading stage is even lower, because "the precise requirements of a prima facie case can vary depending on the context, and the appropriate type of prima facie case may not be evident until discovery is conducted, it would be improper to impose a rigid pleading standard for discrimination cases").

7. *Defendants' Motion Addresses Only Part of Waters' Title IX Claim*

Finally, Defendants' Motion with respect to the Title IX claim is not only legally insufficient, but also incomplete. The Motion mistakenly assumes that Count Two of the Complaint is based entirely upon OSU's termination of Waters' employment on July 24, 2014. This misreads Count Two. There are two components to this Count, only the second of which is addressed in Defendants' Motion (the termination). The first component is based on OSU's adverse and discriminatory treatment of Waters during OSU's internal investigation process. The key allegations underlying this violation are set forth in paragraph 144 of the Complaint where "[i]n its investigation and determination of the allegations of the complaint that resulted in the Glaros Report, and in the preparation of that report, OSU subjected Waters to discrimination on the basis of his gender…[that] OSU routinely extends these protections to female participants in Title IX sexual harassment investigations." Because Defendants' Motion does not even address these allegations, and these allegations constitute a separate and independent violation of Title IX, there is no basis for dismissing this aspect of the claim set forth in Count Two.

IV. CONCLUSION

For these reasons, Defendants' motion for judgment on the pleadings should be denied. If not, the motion should be converted to a motion for summary judgment to enable the parties to conduct discovery so that a full and complete record can be before the Court to address these

issues. And, finally, if the motion is neither denied nor converted to a motion for summary judgment, Waters seeks leave to file an amended complaint to remedy any perceived pleading deficiencies.

Respectfully submitted,

Dated: November 17, 2014

/s/ David F. Axelrod

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CERTIFICATE OF SERVICE

This is to certify that on November 17, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Katherine S. Decker
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APPENDIX A

Board of Trustees (http://trustees.osu.edu/)

ru5-04

3335-5-04 Hearing procedures for complaints against faculty members.

(A) Definitions and construction.

(1) This rule shall apply to all formal complaints of misconduct against faculty members as defined in Chapter 3335-5 of the Administrative Code. Complaints may be filed under this rule against administrators who hold faculty appointments.

(2) As appropriate, department chairs, deans, or the executive vice president and provost (hereinafter "provost") will attempt, through the use of informal consultation, to resolve complaints to their satisfaction and that of the complainant, and the faculty member against whom the complaint is made (hereinafter "respondent").

(3) Gross incompetence is defined as conduct that reflects gross indifference or consistent failure to satisfactorily perform faculty obligations. Allegations of gross incompetence shall be judged on the basis of a faculty member's serious failure to meet his or her obligations as a faculty member.

(4) Grave misconduct is defined as flagrant, egregious, and willful misbehavior in violation of the law or established university rules or policies. Allegations of grave misconduct shall be judged on the basis of acts or omissions which seriously impair the effectiveness of a faculty member to meet his or her obligations as a faculty member.

(5) Nontrivial financial fraud is defined as a deliberate act or deliberate failure to act that is contrary to law, rule or policy so as to obtain unauthorized financial benefit from the university for oneself, one's family or one's business associates. Nontrivial financial fraud includes, but is not limited to, misappropriation of university funds or property, authorizing or receiving compensation or reimbursement for goods not received orservices not performed or hours not worked, or unauthorized alteration of financial records.

(6) Research misconduct is defined as fabrication, falsification or plagiarism in proposing, performing, or reviewing research, or in reporting research results. A finding of research misconduct requires: a) that there be a significant departure from accepted practices of the relevant research community; and b) the misconduct be committed willfully, knowingly, or recklessly. Research misconduct does not include honest error or differences of opinion.

(7) Department chairs, deans, or the provost shall not act in their administrative capacities in the consideration of any complaint naming them as respondent. If a complaint names a department chair or a dean as respondent, the provost shall appoint an equivalent rank administrator from another department or college to perform the

responsibilities of the named official under this rule. If a complaint names the provost as respondent, the chair of the steering committee of the university senate shall perform the responsibilities of this official under this rule.

(8) All records of proceedings under this rule shall be maintained in the office of academic affairs. Such records shall remain confidential to the extent permitted by law.

(9) At the time of their initial appointment and when they receive their annual review, faculty members shall be given notice of their right to review their personnel file maintained by their tenure initiating unit (hereinafter "primary personnel file"). A member of the faculty may place in his or her primary personnel file a response to any evaluation, comment or other material contained in the file.

(10) Documents related to the performance of a faculty member which are received by his or her tenure initiating unit prior to the filing of a complaint may not be introduced in proceedings under this rule unless they have been placed in the faculty member's primary personnel file, and the faculty member has been so informed, or copies have otherwise been provided to the faculty member.

(11) The designation "department chair" in this rule includes division chair, school director, deans of colleges without departments, and regional campus deans and directors.

(12) The term "day" as used in this rule means "calendar day." If the last day of a designated time period falls on a weekend or a day on which the university is closed, the time period shall expire at the close of business on the next succeeding business day.

(13) If at any time the provost determines that a faculty member poses a clear and present danger to persons or property, the provost may temporarily and immediately reassign the faculty member or, in the event of allegations of nontrivial financial fraud, suspend the faculty member with pay pending completion of investigation of a complaint under this rule. The provost shall be responsible for assuring that a complaint is filed promptly.

(14) Respondents shall be given written notice of decisions required by this rule. Any notice shall be sent by certified mail, and a copy shall be sent by regular mail. The time period for any action to be taken after delivery of the notice shall begin to run on the date on which the notice is mailed.

(15) Complainants shall be given written notice of decisions of the department chair and the dean, and the final disposition of the case. Any notice shall be sent by certified mail, and a copy shall be sent by regular mail.

(B) Initial proceedings.

(1) A complaint may be filed by any student or university employee.

(2) The complaint shall be set forth in writing. A copy shall be furnished to the respondent by the administrator with whom the complaint is filed.

(3) A complaint shall state facts to support an allegation that a faculty member has failed to meet his or her obligations as a faculty member, has committed acts or omissions which otherwise impair his or her effectiveness in meeting these obligations, has engaged in grave misconduct, research misconduct, has committed nontrivial financial fraud, or has otherwise violated university rules.

(4) Only allegations stated in the complaint shall be considered at the various stages of deliberation.

(5) A complaint may be filed with a department chair, a dean, the provost or the president. If a complaint is filed with the dean, provost, or president, it shall be immediately referred to the appropriate department chair for initial review. A complaint against a faculty member in a college without departments shall be referred directly to the dean of the college. If a complaint is filed against a regional campus faculty member, the regional campus dean shall serve jointly with the department chair in the initial review. The regional campus dean and the department chair must agree that there is probable cause for the case to go forward.

(C) Review by the department chair.

(1) The department chair shall review the allegations in the complaint and discuss the matter with the

complainant and with the respondent.

(2) If the chair determines that there is probable cause to believe that the allegations are true and that it is not appropriate to reach an informal resolution, the chair shall refer the matter to the dean.

(3) If the chair determines that there is not probable cause to believe that the allegations are true, the chair shall dismiss the complaint. In this event, the complainant may appeal the dismissal to the dean. The appeal must be in writing and must be filed with the dean within twenty-one days after the notice of the chair's decision was mailed. In the event of an allegation of grave misconduct, research misconduct, or nontrivial financial fraud, the chair shall refer the matter to the dean.

(4) The chair shall make every effort to complete the review in fourteen days.

(D) Review by the dean.

(1) Upon receipt of an appeal or a referral of a complaint from a department chair, the dean shall review the allegations in the complaint and discuss the matter with the complainant and the respondent.

(2) If the dean determines that there is probable cause to believe that the allegations are true and that it is not appropriate to reach an informal resolution, the dean shall refer the matter to the college investigation committee.

(3) If the dean determines that there is not probable cause to believe that the allegations are true, the dean shall dismiss the complaint. The proceedings shall terminate at this point except in cases involving faculty members in colleges without departments or in the event of an allegation of grave misconduct, research misconduct, or nontrivial financial fraud. In the case of colleges without departments, the complainant may appeal a dismissal by the dean to the college investigation committee. The appeal must be in writing and must be filed with the dean within twenty-one days after the dean's decision was mailed to the complainant. Upon receipt of an appeal the dean shall immediately forward the appeal to the college investigation committee, which shall proceed in accordance with paragraph (E) of this rule. In the case of an allegation of grave misconduct, research misconduct, or nontrivial financial fraud, the matter shall be forwarded to the college investigation committee.

(4) The dean shall make every effort to complete the review in fourteen days.

(E) The college investigation committee.

(1) Each college shall establish a procedure for the creation of a standing college investigation committee, which shall consist of tenured faculty members. A college may include on its college investigation committee tenured faculty members from other colleges.

(2) Upon receipt of a referral of a complaint from the dean, the college investigation committee shall meet with the complainant and the respondent and shall review any documentary evidence provided by these parties. The respondent shall be given copies of any documentary evidence provided to the committee by the complainant. The committee may also obtain relevant information from other persons, but shall protect the confidentiality of the proceedings. At the conclusion of its investigation, the committee shall deliver to the dean its findings, a recommendation concerning the merits of the complaint and, if the complaint is judged to have merit, a proposed sanction. Findings of the committee shall be based on clear and convincing evidence.

(3) Any proposed sanctions shall be commensurate with the nature of the complaint. Sanctions of a continuing nature must include time limitations and an annual review. Sanctions include but are not limited to:

(a) Verbal reprimand;

(b) Written reprimand;

(c) Mandatory counseling or other rehabilitation;

(d) Reimbursement for damages to or destruction of university property, or for misuse or misappropriation

of university property, services or funds;

(e) Reassignment of duties or other restrictions on duties or privileges;

(f) Restriction of access to university property or services, the abuse of which led to the complaint;

(g) Reduction of salary base not to exceed thirty-three percent for one-year;

(h) Reduction of twelve-month appointment to nine-month appointment;

(i) Combination of above sanctions;

(j) Dismissal of non-tenured faculty; and

(k) Dismissal of tenured faculty.

(4) The committee may recommend termination of employment of tenured faculty members only in demonstrated cases of gross incompetence ~~or~~, grave misconduct, research misconduct, or nontrivial financial fraud.

(5) The committee shall make every effort to complete its investigation and submit its report within forty-five days.

(F) Decision by the dean.

(1) After reviewing the report and recommendation of the college investigation committee, the dean may:

(a) Dismiss the complaint;

(b) Uphold the committee's recommendation and proposed sanction;

(c) Uphold the committee's recommendation with what would reasonably be interpreted as an equivalent or lesser sanction.

(2) If the college investigation committee has recommended a sanction other than termination of employment, the dean may not increase the sanction to termination of employment except in the case of grave misconduct, research misconduct, or nontrivial financial fraud

(3) The dean shall make a decision in thirty days.

(4) Except in the case of grave misconduct, research misconduct, or nontrivial financial fraud, if the dean dismisses the complaint, the proceedings shall be terminated and the matter closed. The dean shall refer all cases of grave misconduct, research misconduct, and nontrivial financial fraud, to the provost.

(5) The respondent may appeal any decision or sanction to the provost.

(6) An appeal by the respondent must be in writing and must be filed with the provost within twenty-one days after notice of the dean's decision was mailed.

(G) Review of appeals by the provost.

(1) After reviewing the record of a case appealed by a respondent or referred by the dean, the provost may:

(a) Dismiss the complaint;

(b) Uphold the dean's decision and proposed sanction;

(c) Uphold the dean's decision with what would reasonably be interpreted as an equivalent or lesser sanction.

(d) In the case of grave misconduct, research misconduct, or nontrivial financial fraud, increase the sanction.

(e) In the case of grave misconduct, research misconduct, ornontrivial financial fraud, reverse the dean’s

decision and impose a sanction.

(2) The provost shall make every effort to reach a decision within fourteen days.

(3) If the provost upholds the dean's decision and proposed termination of employment, or if the provost modifies a sanction that is less than termination, the respondent may appeal to the faculty hearing committee. In all other cases, the provost's decision shall be final.

(4) An appeal by the respondent must be in writing and must be filed with the faculty hearing committee within twenty-one days after notice of the provost's decision was mailed.

(H) The faculty hearing committee.

(1) Within thirty days of receipt of an appeal from a respondent the faculty hearing committee which is established by rule 3335-5-48.10 of the Administrative Code, shall convene a hearing panel to consider the complaint. The respondent and the provost or designee may each make one peremptory challenge to the seating of one person on the hearing panel and one peremptory challenge to the selection of a presiding officer.

(2) The hearing panel may restrict the attendance of persons at the proceedings. However, the respondent and the provost shall have the right to have one observer of their choosing present at all times.

(3) Respondents shall have the right to be represented by legal counsel or any other person of their choice, to examine the witnesses and evidence against them, to present witnesses and evidence on their own behalf, and to refuse to testify or be questioned in the proceedings without prejudice to their cause.

(4) The provost, or designee, shall present the case to the hearing panel. In presenting the case, the provost may be advised by the general counsel.

(5) The hearing panel shall receive testimony and other evidence as it deems to be material and relevant to the issues before it.

(6) An electronic recording shall be kept of all proceedings.

(7) At the conclusion of the proceedings, the hearing panel shall make separate written findings of fact with respect to each substantive issue raised at the hearing and a recommendation as to a sanction, if any, to be imposed. Such findings of fact and recommendation, together with a record of the proceedings, shall be transmitted to the president of the university and to the respondent. Findings of the hearing panel shall be based on clear and convincing evidence.

(8) The hearing panel will not be bound by the findings of the college investigation committee.

(9) The hearing panel may recommend termination of employment of tenured faculty members only in demonstrated cases of gross incompetence, grave misconduct, research misconduct, or nontrivial financial fraud.

(10) The hearing panel shall make every effort to conclude the proceedings within sixty days.

(I) The president.

(1) Upon receipt of the written findings of fact and recommendation and a record of the proceedings from a hearing panel, the president shall review the matter. The president may:

(a) Dismiss the complaint;

(b) Impose any sanction less than termination of employment whether or not it accords with the recommendation of the hearing panel;

(c) Recommend to the board of trustees termination of employment on such terms and conditions as the president may deem advisable;

(d) Remand the case to the hearing panel for reconsideration.

(2) Any decision of the president shall be communicated in writing to the hearing panel and to the respondent.

(J) Board of trustees.

The board of trustees, in reviewing and deciding upon a case in which termination of employment has been recommended, has the ultimate authority to take that action necessary to promote the best interest of the university and to protect the rights of the individual. In such cases, the board shall give the respondent an opportunity to present to it arguments in writing, or in person, or both.

(Board approval dates: 4/4/1997, 12/4/1998, 2/4/2000, 6/7/2005, 7/8/2005, 9/9/2011, 6/7/2013)

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