

**THE 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.)	
)	
)	

**REPLY MEMORANDUM OF DEFENDANTS MICHAEL V. DRAKE, M.D., JOSEPH
E. STEINMETZ, PH.D, AND THE OHIO STATE UNIVERSITY IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS**

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Mr. Waters was employed within the School of Music and terminated by Provost Steinmetz. Ms. Buchman, the former cheerleading coach, was employed within the

Department of Athletics and terminated by Gene Smith, Ohio State’s Athletic Director. Accordingly, Mr. Waters cannot show that he was similarly situated to Ms. Buchman.

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I. INTRODUCTION.

Plaintiff Jonathan N. Waters and defendants Ohio State, President Drake and Provost Steinmetz agree the Band's culture was broken. The parties have a difference of opinion, however, about who is the right person to make the long overdue changes and lead the Band going forward. Mr. Waters, despite his failure to fix the culture while Assistant Director and Director, and despite his concealment of issues with the Band's culture, believes it should be him. The defendants do not.

Mr. Waters' difference of opinion with defendants does not rise to the level of an actionable claim. Recognizing this, in his lawsuit, and now in his opposition to defendant's Motion for Judgment on the Pleadings, Mr. Waters seeks to recast the parties' difference of opinion into claimed due process violations and reverse gender discrimination. His claims fail as a matter of undisputed fact and law, however, as pointed out by defendants in their Motion.

In an attempt to avoid dismissal, Mr. Waters devotes his Memorandum in Opposition to discussing, in large part, what he believes his rights would be under hypothetical fact patterns which neither exist nor have been pled. For example, he discusses procedural due process protections he claims he would be entitled to *if* he were either faculty or *if* he had not entered into a letter agreement expressly stating that he held an unclassified, at-will position. But he is *not* faculty and he *did* sign an at-will letter agreement providing for unclassified employment.

Mr. Waters also discusses procedural due process protections he claims he would be entitled to *if* he had not been offered a public name clearing hearing. But, indisputably, he *was* offered a public name-clearing hearing — he just decided not to accept the offer and filed suit instead.

Mr. Waters additionally discusses substantive due process protections he claims he would be entitled to *if* this matter arose other than in the context of public employment. But his

staff position at Ohio State *was* unclassified and at-will public employment.

Finally, he discusses how he believes his disparate treatment claim would proceed 1) *if* he were a minority, which he is *not*, or 2) *if* the cheerleading coach he claims was similarly situated had actually been in the same department at Ohio State as he was and had been terminated by the same decision maker, which she was *not*.

Neither a difference of opinion as to who should lead the Band, nor a wish list of hypothetical facts, will sustain Mr. Waters' claims. Mr. Waters was correctly and properly terminated from his unclassified, at-will staff position due to his failure to correct a Band culture *he admitted* was broken and in dire need of change. Defendants' Motion for Judgment on the Pleadings should be granted.

II. MR. WATERS' PROCEDURAL DUE PROCESS CLAIM FAILS BECAUSE, AS AN UNCLASSIFIED, AT-WILL EMPLOYEE, HE LACKED A PROTECTED PROPERTY INTEREST IN HIS EMPLOYMENT. FURTHER, HE WAS OFFERED A PUBLIC NAME CLEARING HEARING WHICH HE DID NOT ACCEPT.

To establish a violation of due process, Mr. Waters "must show that [he] had a property interest of which [he] was deprived without due process of law." *Slyman v. City of Piqua*, 494 F.Supp.2d 732, 735 (S.D.Ohio 2007), *aff'd*, 518 F.3d 425 (6th Cir.2008). "[U]nclassified civil servants have no property right to continued employment," however. *Christophel v. Kukulinsky*, 61 F.3d 479, 482 (6th Cir.1995) (citing *Vodila v. Clelland*, 836 F.2d 231, 232 (6th Cir.1987)). Similarly, an at-will employee "is subject to dismissal at any time and without cause; consequently, an at-will employee cannot effectively claim a protectable property interest in his or her job." *Breeden v. HCA Physician Servs., Inc.*, 834 F.Supp.2d 616, 619-20 (W.D.Ky.2011) (citing *Bailey v. Floyd Cnty. Bd. of Educ.*, 106 F.3d 135, 141 (6th Cir.1997)).

The terms of Mr. Waters' employment letter agreement with Ohio State establish he was an unclassified, at-will employee, whose employment could be ended at any time:

The position offered is an unclassified position, not subject to the provisions of section 124.34 of the Ohio Revised Code. Accordingly, your employment is at-will, and may be ended at any time by either you or the university.

See Defs.' Answer at ¶ 1, Ex. A (1/30/13 Employment Letter to Mr. Waters). As such, Mr. Waters cannot establish a protectable property interest in his employment. See *Christophel*, 61 F.3d at 482; *Breeden*, 834 F.Supp.2d at 619-20. Standing alone, this requires that his procedural due process claim be dismissed. See *Slyman*, 494 F. Supp. 2d at 735.

Recognizing his letter agreement indisputably establishes he lacks the predicate property interest necessary to support a procedural due process claim, Mr. Waters now argues he had an implied contract which, in turn, provided him with a constitutionally protected property interest in his employment. See Pl.'s Mem. In Opp. at 17-19. He also argues that he is entitled to peer-review procedures reserved to faculty members at Ohio State, despite his not holding a faculty position. Mr. Waters is incorrect in both respects, as the governing law and the undisputed facts show. Defendants are entitled to judgment on the pleadings.

A. Because The Language Of His Letter Agreement Is Unambiguous, Mr. Waters Cannot Establish The Existence of An Implied Contract.

The “[c]onstruction of a written contract is a matter of law to be determined by the court.” *DavCo Acquisition Holding, Inc. v. Wendy's Int'l, Inc.*, No. 2:07-CV-1064, 2008 WL 755283, at *1 (S.D. Ohio Mar. 19, 2008) (citing *Latina v. Woodpath Development Co.*, 567 N.E.2d 262 (Ohio 1991)). “Where the terms of an existing contract are clear and unambiguous, the court ‘cannot create a new contract by finding an intent not expressed in the clear and unambiguous language of the written contract.’” *Id.* at *3 (quoting *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Co.*, 714 N.E.2d 898 (1999)). “The agreement of parties to a written contract is to be ascertained from the language of the instrument itself, and there can be no implication inconsistent with the express terms thereof.” *Id.*

Here, although Mr. Waters devotes a great deal of his Memorandum in Opposition to the hypothetical exercise of discussing remedies he claims would be available to him *if* he were party to a different or implied contract with Ohio State, there is no ambiguity in the employment letter agreement between Mr. Waters and Ohio State. “The term at-will, a common term in the employment context, is not ambiguous, and Ohio law therefore dictates that this court give effect to the parties’ written intention of at-will employment.” *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 377 (6th Cir. 1999). Mr. Waters, having agreed to unambiguous employment terms, may not now alter those terms after-the-fact to suit his current contentions. “Although an implied contract or promissory estoppel may take a case out of the employment at[-]will doctrine, this does not hold true where there is an unambiguous written contract to the contrary.” *Lane v. Terminal Freight Handling Co.*, 775 F. Supp. 1101, 1105 (S.D. Ohio 1991) *aff’d*, 944 F.2d 905 (6th Cir. 1991) (internal citation omitted).

Mr. Waters characterizes his letter agreement as an “initial letter of employment.” *See* Pl.’s Mem. In Opp. at 17. His characterization is misplaced. An employee who signs an offer letter providing for at-will employment is bound by it. *See Tripp v. Beverly Ent.-Ohio, Inc.*, 9th Dist. Summit, No. 21506, 2003-Ohio-6821 (refusing to alter terms of the offer letter signed by an employee which provided for at-will employment). In fact, signing a job application stating a job is at-will binds the employee signing it. *See Lane v. Terminal Freight Handling Co.*, 775 F. Supp. 1101, 1105 (S.D. Ohio) *aff’d*, 944 F.2d 905 (6th Cir. 1991) (internal citation omitted) (holding that the terms of an employment application which provided for at-will employment controlled).

Mr. Waters references several cases he contends support his position. But, he ignores that each involved an *oral* employment agreement, not an unambiguous, *written* letter

agreement like the one that defined his employment with Ohio State. *See Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 103-104, 483 N.E.2d 150, 154 (1985) (“A priori, the facts and circumstances surrounding an oral employment at-will agreement . . . can be considered”); *Davis v. Ineos ABS (U.S.A.) Corp.*, No. C-I-09-773, 2010 WL 3909573, *3 (S.D. Ohio Sept. 30, 2010) (stating that a former employee has a heavy burden of proof to establish an implied contract altering the nature of an oral at-will employment relationship); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 438 (applying the *Mers* decision because “[The plaintiff] never had a written employment contract with Fanny Farmer”); *Wright v. Honda of Am. Mfg., Inc.*, 73 Ohio St. 3d 571 (1995) (applying *Mers* to an oral employment agreement); *Finsterwald-Maiden v. AAA S. Cent. Ohio*, 115 Ohio App. 3d 442, 685 N.E. 2d 786 (1996) (no written agreement involved and interpreting employee handbook).

In short, because he was an unclassified, at-will employee whose employment could be terminated at any time by Ohio State, *as a matter of law*, Mr. Waters had no protectable property interest in his job and defendants are entitled to judgment on the pleadings on his procedural due process claim. *See Breeden*, 834 F.Supp.2d 616 at 619-620.

B. Mr. Waters Was Unclassified Staff, Not A Member Of Ohio State’s Faculty.

Mr. Waters next hypothesizes he was actually a member of Ohio State’s faculty. Mr. Waters was *not* faculty at Ohio State. Instead, he was a member of Ohio State’s unclassified and at-will Senior Administrative & Professional staff (“SAP” or “Senior A&P”), as the Position Description he signed makes clear. *See* February 18, 2013 Position Description for Jonathan M. Waters attached hereto as Exhibit Y. Senior A&P staff are expressly defined as unclassified, “non-faculty” employees of Ohio State. *See* Office of Business and Finance, *Payroll Processing Requirements Non-Faculty Appointments*, attached as Exhibit Z, available at <http://controller.osu.edu/pay/requirements/pp-nonfaculty.pdf> (last visited November 26,

2014) (listing “Senior Administrative and Professional” staff as “Non-Faculty”). Such “unclassified employments are at will.” *See* Office of Human Resources, *Appointments Policy 4.20*, available at <http://hr.osu.edu/public/documents/policy/policy420.pdf?t=20141126104812> (last visited November 26, 2014), attached hereto as Exhibit AA.

In contrast to staff, the term “faculty” is limited by Ohio Administrative Code Rule 3335-5-19 to “persons appointed by the board of trustees with tenure-track, non-tenure track, and emeritus faculty titles” O.A.C. 3335-5-19.¹ The listing of faculty titles can be found at O.A.C. 3335-5-19(A)-(C), and, as his Position Description shows, Mr. Waters lacks any such faculty title, a fact of which he is aware and which is well documented. By requiring faculty to be identified through certain titles, the Ohio Administrative Code precludes exactly the type of confusion Mr. Waters seeks to create.

Additionally, the Performance Review Mr. Waters cites at length, and which he signed but failed to attach to either his Complaint or Memorandum in Opposition, expressly states his position was classified as “Senior A&P.” *See* Pl.’s Compl. ¶¶ 2, 24, 26; Pl.’s Mem. In Opp. at 34; June 2, 2014 Performance Review attached hereto as Exhibit BB. Further, Mr. Waters’ biography page on the School of Music website listed him as “Professional Staff.” *See* Jonathan N. Waters’ Staff Profile, attached hereto as Exhibit CC, available at <https://web.archive.org/web/20131230035218/http://music.osu.edu/directory>.²

¹ This particular section of the Ohio Administrative Code is available at: <http://trustees.osu.edu/rules/university-rules/chapter-3335-5-faculty-governance-and-committees.html>

² Web Archive is maintained by a 501(c)(3) corporation that preserves and archives webpage content. Mr. Waters argues he is a member of Ohio State’s faculty because a webpage describing the history of the Band refers generally to “Band Faculty” and includes a photograph of Mr. Waters. *See* Pl.’s Mem. In Opp. at 19. The fact that a webpage designer has captioned a photograph “The Current Band Faculty” does not transform Mr. Waters’ unclassified, at-will, Senior A & P staff position into a faculty position, as defined by the Ohio Administrative Code.

As with the cases he cites related to implied contracts, the cases Mr. Waters cites related to public employees having a property interest do not support his position. *See* Pl.’s Mem. In Opp. at 16. For example, the plaintiffs in *Gratsch* and *Freeze* lacked written contracts like Mr. Waters and were, instead, subject to oral employment relationships. *See Gratsch v. Hamilton County Sheriff’s Dept.*, 91 F. Supp. 2d 1160, 1176 (S.D. Ohio 2000) (“Gratsch has not produced a written contract in which the parties explicitly agreed to a relationship other than employment at will.”); *Freeze v. City of Decherd, Tenn.*, 753 F.3d 661, 665 (6th Cir. 2014) (where employees lacked a written employment contract or durational terms to their employment, the court recognized that such employees are presumptively at-will and lack a property interest under Tennessee law). In *Willson v. Board of Trustees of Ohio State Univ.*, No. 91AP-144, 1991 WL 274862 (10th Dist. Dec. 24, 1991), the plaintiff had a contractual right to employment for a specified term, but was terminated prior to the end of that term. Mr. Waters had no such right as his employment letter agreement stated his employment could be terminated “at any time” by either him or Ohio State. And the plaintiff in *Perry v. Sindermann*, 408 U.S. 593 (1972), was employed by a university that granted permanent tenure “as long as his teaching services are satisfactory” *Id.* at 600. Again, Mr. Waters’ employment letter specifically stated he could be terminated at any time.

Significantly, this is not a case in which the terms of Mr. Waters’ letter agreement contravene anything alleged by Mr. Waters in his Complaint. To the contrary, Mr. Waters’ Complaint lacks any allegations at all about the status of his employment at Ohio State. Instead, he generically alleges he was an employee of Ohio State, without describing the nature of his employment, let alone pleading that it was anything other than at-will. *See* Pl.’s Compl. at ¶¶ 16, 141. Thus, not only are the terms of Mr. Waters’ letter agreement not in contravention

of anything he pled, they are undisputed.

Related to this, Mr. Waters argues that he alleged “in ¶ 130 of the Complaint that ‘OSU’s policies, practices, and procedures provided him with a constitutionally protected property interest in his continued employment.’” This is a legal conclusion, not a fact, which ignores the clear and unambiguous terms of his letter agreement. This Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Where a purported “factual assertion in the pleadings is inconsistent with a document attached for support, the Court is to accept the facts as stated in the attached document.” *See Williams v. CitiMortgage, Inc.*, 498 F. Appx 532, 536, 539 (6th Cir. 2012) (dismissing plaintiff’s claim on a Rule 12(b)(6) motion “given that the clear language of the [attached exhibit] forecloses [plaintiff’s] claim” as a matter of law); *see also See Potestato v. Federal Nat. Mortg. Ass’n*, No. 2:13-cv-11659, 2013 WL 5639351 (E.D. Mich. Oct. 15, 2013) (granting a Rule 12(c) motion where defendants’ exhibits conclusively contradict allegations in plaintiff’s complaint).

Mr. Waters correctly points out that “The Ohio State University Marching Band Statement of Policies and Procedures” states the Band Director is a “faculty member assigned to the Marching Band.” *See Pl.’s Mem. In Opp.* at 19. What he fails to point out, however, is that the Policies and Procedures were drafted in 2012 and expressly refer to Dr. Jon Woods, Ph.D., who was a tenured member of the faculty at Ohio State and the Director of the Band at that time. *See Pl.’s Compl.* at ¶ 28, fn. 9, Ex. B, TBDBITL Report, Attachment 9, Page ID 441 (identifying course instructor as Woods). Likewise, former Director Dr. Paul Droste, Ph.D., the Director before Jon Woods, also held a doctorate degree and was a tenured member of the faculty. *See* <https://music.osu.edu/bands/history> (referring to Dr. Paul Droste); <https://music.os>

[u.edu/people/emeritus](http://osu.edu/people/emeritus) (identifying Paul Droste as emeritus faculty). Additionally, Dr. Russ Mikkelson, Ph.D., the Interim Band Director, is a tenured faculty member and was before being appointed Interim Director upon Mr. Waters' termination. See <https://music.osu.edu/people/mikkelson> (identifying Dr. Russel C. Mikkelson as "director of University Bands, professor of music (Conducting), and area head of Conducting and Ensembles at The Ohio State University"). The fact these three Doctorate holders were members of the faculty in no way establishes that Mr. Waters also was faculty. ***To the contrary, it explains why Mr. Waters, who does not hold a Doctorate degree, was not a faculty member.*** It also explains why Mr. Waters' position description is written to require only a Master's degree. See February 18, 2013 Position Description for Jonathan M. Waters attached hereto as Exhibit Y, at 2 (identifying education requirement for unclassified Senior A & P Director position as a Masters Degree); see also Exhibit CC, Jonathan N. Waters' Staff Profile, available at <https://web.archive.org/web/20131202191300/http://music.osu.edu/people/waters>.

Additionally, the fact the Band was a class for which Mr. Waters assigned grades does not transform him from staff to faculty. Ohio State Human Resources policies expressly state that staff members who have teaching duties are not transformed into faculty by virtue of also having teaching duties. See Office of Human Resources, *Appointments Policy 4.20(II)(C)(4)*, available at <http://hr.osu.edu/public/documents/policy/policy420.pdf?t=20141126104812> (last visited November 26, 2014), attached hereto as Exhibit AA.

Mr. Waters was an unclassified and at-will Senior Administrative & Professional staff member at Ohio State. He asks this Court to ignore the unambiguous terms of his employment letter agreement, his Position Description and the Ohio Administrative Code. This is not proper. He cannot establish a protectable property interest in his employment as a matter of

law and defendants are entitled to judgment on the pleadings on his procedural due process claim. *See Christophel*, 61 F.3d at 482; *Breeden*, 834 F.Supp.2d at 619-20.

C. Mr. Waters Was Offered A Public Name-Clearing Hearing, But Failed To Respond To The Offer, Thereby Barring Him From Claiming He Was Denied Such A Hearing.

To prevail on his procedural due process claim related to a name clearing hearing, a claimant must both “request a name-clearing hearing and be denied this hearing before [he has] suffered a deprivation of [his] liberty interest without due process of law” *Brown v. City of Niota, Tenn.*, 214 F.3d 718, 723 (6th Cir. 2000); *see also Allen v. City of Jackson*, 981 F.Supp.2d 738, 746 (E.D. Tenn. 2013); *Cross v. Metro. Govt. of Nashville/Davidson Cty.*, No. 3-12-1109, 2013 WL 1899169 at *4 (M.D. Tenn. May 7, 2013) (“The Sixth Circuit also requires that a plaintiff raising this claim must show that he requested a name-clearing hearing after he was fired and was denied that hearing.”).

In his Complaint, Mr. Waters admits Ohio State offered him a name-clearing hearing on Ohio State’s main campus. *See* Pl.’s Compl. at ¶ 106; Defs.’ Answer at ¶ 106, Ex. V (September 11, 2014 Letter From Alexandra Schimmer). As part of that offer, his counsel was asked to contact Ohio State to confirm the date, location and other logistical details, including those related to publicizing the name clearing hearing. *See* Defs.’ Answer at ¶ 106, Ex. V (September 11, 2014 Letter From Alexandra Schimmer). Mr. Waters’ counsel chose not to respond. *See* Pl.’s Compl. at ¶ 106; Defs.’ Answer at ¶ 106, Ex. V (September 11, 2014 Letter From Alexandra Schimmer). Mr. Waters now says the name-clearing discussed in the letter was improper because it was not going to be public, and therefore, he is entitled to certain remedies. *See* Pl.’s Mem. In Opp. at 20. His claim is indisputably not true. The September 11, 2014 letter offering Mr. Waters a name-clearing hearing expressly stated he was being offered the opportunity “to speak *in a public setting*” *See* Exhibit V to Defs.’ Answer at 2

(emphasis added). In other words, Mr. Waters cannot meet the second prong of the Sixth Circuit's test for a due process violation relating to a name clearing hearing: meaning, he cannot show that his request was denied. To the contrary, it was granted. His claim in this regard should be dismissed.

Mr. Waters also spends nearly three pages of his Memorandum in Opposition discussing *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009). But the demands he made pre-suit related to a name-clearing hearing are directly at odds with the parameters identified in *Gunasekera*. For example, Mr. Waters demanded a hearing lasting two eight-hour days during which he could compel the appearance of OSU officials, including President Drake, and subject them to cross-examination. See Pl.'s Compl. Prayer For Relief at (b). This Court and the Sixth Circuit have previously rejected these very demands. See *Gunasekera v. Irwin*, 678 F.Supp.2d 653, 663-64 (S.D. Ohio 2010); *Chilingirian v. Boris*, 882 F. 2d 200, 206 (6th Cir. 1989) (rejecting plaintiff's demand to cross-examine city council members because "a name-clearing hearing need only provide an opportunity to clear one's name and need not comply with formal procedures to be valid").

Mr. Waters also claims this Court should order a name-clearing hearing "tailored to address the particulars of each situation and the extent of harm done" and that *Gunasekera* stands for the proposition that a public employee may file suit to determine the parameters of a name-clearing hearing before participating in the hearing. See Pl.'s Mem. In Opp. at 21-23. This is a misstatement of *Gunasekera*. In *Gunasekera*, the former employee was offered only a private name-clearing hearing in a conference room, with only representatives of the university and the Ohio Attorney General's office present, and therefore, was denied a public name-clearing hearing. See *Gunasekera v. Irwin*, 678 F. Supp.2d at 663. In contrast, Mr. Waters not

only was offered a *public* name-clearing hearing, but also the opportunity to work with Ohio State on the details of the hearing. Mr. Waters chose to decline the offer from Ohio State by not responding, and instead, orchestrated his own media campaign which included public appearances on national television and Ohio State's campus. Only a denial of a name-clearing gives rise to a due process claim. *See Quinn v. Shirey*, 293 F.3d 315, 320 (6th Cir. 2002) ("It is the denial of the name-clearing hearing that causes the deprivation of the liberty interest without due process."). No denial occurred here, however, and Mr. Waters cannot, as a matter of undisputed fact and law, claim to have been denied a public name-clearing hearing. Defendants are entitled to judgment on the pleadings. *See Cross*, No. 3-12-1109, 2013 WL 1899169 at *4.

III. MR. WATERS' SUBSTANTIVE DUE PROCESS CLAIM FAILS BECAUSE HE DOES NOT DISPUTE THAT HIS CLAIMS ARISING FROM PUBLIC EMPLOYMENT DO NOT IMPLICATE A FUNDAMENTAL RIGHT.

Mr. Waters does not dispute that his claims do not implicate a fundamental right. *See* Pl.'s Mem. In Opp. at 24. Instead, he argues defendants have "overlook[ed] several important Sixth Circuit cases" he claims apply a "shocks the conscience" standard absent the implication of a fundamental right. *Id.* He is wrong. As a matter of law, those precedents have no impact here. When analyzing claims related to public employment, like Mr. Waters', the Sixth Circuit holds that "a public employee's termination does not 'shock the conscience' in this court if it was not based on the violation of some fundamental right." *Gurik v. Mitchell*, 26 Fed. Appx. 500, 505 (6th Cir. 2002); *see also Lesinski v. City of Steubenville*, 2:03-CV-932, 2005 WL 1651737, *5 (S.D. Ohio July 13, 2005). In fact, the Sixth Circuit believes that "at-will employment hardly seems the sort of fundamental interest protected by substantive due process." *See Bracken v. Collica*, 94 Fed. Appx. 265, 269 (6th Cir. 2004). Consistent with this, the Sixth Circuit does not even afford substantive due process protection to public

employees who were terminable only for cause, as opposed to being at-will like Mr. Waters. *See Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (6th Cir.1992) (“plaintiffs’ statutory right to be discharged only for cause is not a fundamental interest protected by substantive due process”).

If this Court were to analyze Mr. Waters’ substantive due process claim arising out of public employment under the “shocks the conscience” standard Mr. Waters proposes, which it should not, his claim still fails as a matter of law. As the Sixth Circuit has noted: “The ‘shocks the conscience’ standard is not a font of tort law, but is instead a way to conceptualize the sort of egregious behavior that rises to the level of a substantive due process violation.” *Range v. Douglas*, 763 F.3d 573, 590 (6th Cir. 2014). “[T]he ‘shocks the conscience’ standard sets a high bar: Substantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Range*, 763 F.3d at 589 (quoting *EJS Props. LLC v. City of Toledo*, 698 F.3d. 845, 862 (6th Cir. 2012) (internal quotation marks omitted)). An unclassified, at-will employee’s termination cannot “shock the conscience” such that it constitutes a deprivation of substantive due process. *See Mertik*, 983 F.2d at 1367 (holding it is not enough to plead that public officials dismissed an employee and published stigmatizing statements to third parties, as such conduct does not rise to the level of shocking the conscience); *Sutton*, 958 F.2d at 1351 (finding that even a “state-created right to tenured employment lacks substantive due process protection”); *Gurik*, 26 Fed. Appx. at 505 (“a public employee’s termination does not ‘shock the conscience’ in this court if it was not based on the violation of some fundamental right”).

The cases Mr. Waters cites related to substantive due process do not support his claims. Initially, the only Sixth Circuit decision he relies on actually involved the fundamental right to

familial association. *See Palmer v. Adams*, 517 Fed. Appx. 308, 310 (6th Cir. 2013). In another of the cases he cites, *Farmer v. Pike County Agr. Soc.*, 411 F. Supp. 2d 838, 843-44 (S.D. Ohio 2005), the plaintiff's allegation of a substantive due process violation was dismissed because the court failed to find conduct that involved a fundamental right and shocked the conscience. The court in *Goudlock v. Blankenship*, No. 1:13cv1215, 2014 WL 320386 (N.D. Ohio Jan. 29, 2014), did not analyze the plaintiff's substantive due process claim under the shocks the conscience standard. Instead, it dismissed the claim because it was duplicative of his Eighth Amendment claim. *Id.* at *6. Additionally, in *Myers v. Delaware County*, No. 2:07-cv-844, 2008 WL 4862512 (S.D. Ohio 2008), the claim was that the defendant knowingly published false statements to the media indicating the plaintiff's computer contained child pornography. *Id.* at *11. Here, Mr. Waters expressly admits the Band's culture was inappropriate. *See, e.g.* Pl.'s Compl. at ¶¶ 36, 38. Further, in *Moran v. Clarke*, 296 F.3d 638 (8th Cir.), the Eighth Circuit indicated that a fundamental right must be implicated to invoke substantive due process, hardly a holding which supports Mr. Waters' claims. *Moran*, 296 F.3d at 644 ("Here, we deal with fundamental rights and interests specifically identified by the Supreme Court.")

Mr. Waters argues that *Peterson v. Northeastern Loc. Sch. Dist.*, No. 3:13CV00187, 2014 WL 2095380 (S.D. Ohio May 20, 2014), stands for the proposition that the Sixth Circuit does not limit application of substantive due process principals to cases involving physical force. This is not the holding of *Peterson*, nor does *Peterson* support Mr. Waters' substantive due process claim. In *Peterson*, the plaintiffs pled, and the defendants did not dispute, that the students received notes at school "replete with racial epithets and imagery, that . . . unmistakably portrays a lynching," *i.e., the students were threatened with physical violence.* *See Peterson*, 2014 WL 46228544, at *1. The termination of Mr. Waters' at-will employment

cannot be equated to the failure to protect high school students from known and consistent racial bullying and threats of physical violence.

Additionally, contrary to the position Mr. Waters seeks to have the court adopt, the Sixth Circuit holds that conduct does not shock the conscience unless it involves physical force. *See Braley v. City of Pontiac*, 906 F.2d 220, 225 (6th Cir.1990)(“applying the ‘shock the conscience’ test in an area other than excessive force, however, is problematic . . . [w]e doubt the utility of such a standard outside the realm of physical abuse”); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir.1987) (finding that physical beatings by a principal on a student may be a “brutal and inhumane abuse of [the principal’s] official power, literally shocking to the conscience”); *King v. Ohio*, No. CIV A 2:05-CV-966, 2006 WL 2707964, at *5 (S.D. Ohio Sept. 15, 2006) (“Indeed, in this circuit, the standard appears to be recognized only in the context of physical abuse”).

Finally, Mr. Waters attempts to mischaracterize President Drake’s statements to current Band members as an admission that the Title IX report was flawed. *See* Pl.’s Mem. In Opp. at 26. This is not so. President Drake addressed the current Band *after* Mr. Waters’ termination, *see* Pl.’s Compl. at ¶ 10, and characterized the Title IX findings as historical to them. *See id.* This does not mean the Title IX report was flawed. This is particularly true where, again, Mr. Waters admits that the Band culture, under his leadership, was “not . . . in a ‘good place.’” *See* Ex. F to Defs.’ Answer (July 14, 2014 Statement of Jonathan N. Waters).

In short, defendants are entitled to judgment on the pleading in regard to Mr. Waters’ substantive due process claim. He admits his termination does not implicate fundamental rights. And the law of the Sixth Circuit holds that the termination of an unclassified, at-will, public employee cannot “shock the conscience” such that it constitutes a deprivation of

substantive due process. *See Mertik*, 983 F.2d at 1367; *Sutton*, 958 F.2d at 1351; *Gurik*, 26 Fed. Appx. at 505.

IV. MR. WATERS HAS NOT PLED ANY FACTS TO SUPPORT THAT EITHER PRESIDENT DRAKE OR PROVOST STEINMETZ DEPRIVED HIM OF DUE PROCESS.

Mr. Waters' procedural and substantive due process claims fail for all of the reasons discussed above. They also fail for another reason. The Eleventh Amendment prohibits Mr. Waters from bringing due process claims against Ohio State. Accordingly, he has stated such claims against President Drake and Provost Steinmetz personally in an impermissible attempt to make an end-run around the Eleventh Amendment.

Mr. Waters asserts that he has pled adequate facts "showing that Drs. Drake and Steinmetz were actively involved in Waters' termination." Pl.'s Mem. In Opp. at 29. But, he ignores that termination alone does not give rise to a due process claim. *See Silvernail v. County of Kent*, 385 F.3d 601, 607 (6th Cir. 2004) (applying two-part analysis to due process claim: (1) whether a deprivation or property occurred **and** (2) whether such deprivation occurred without due process of law).

In regard to the Title IX investigation, "[p]ersons sued in their individual capacities under § 1983 can be held liable based only on their own unconstitutional behavior." *Heyerman v. Cnty. of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012). Though Mr. Waters makes much of the status of President Drake and Provost Steinmetz as supervisors, even "supervisors must have actively engaged in unconstitutional behavior." *Billock v. Wyandot Cnty. Children's Servs.*, No. 3:07 CV 234, 2007 WL 1306598, at *5 (N.D. Ohio May 3, 2007). Here, Mr. Waters pleads that **Ohio State's** Office of University Compliance and Integrity initiated, conducted, and oversaw the Title IX investigation. *See* Pl.'s Compl. at ¶¶ 4, 93-97. He further pleads that

Ohio State initially denied him a name-clearing hearing through its Assistant Vice President of Media & Public Relations, but later did offer him a name-clearing hearing. *See* Pl.’s Compl at ¶ 105-106. In the absence of facts demonstrating that President Drake and Provost Steinmetz were involved in the Title IX investigation and the communications regarding the name-clearing hearing, Mr. Waters’ due process claims against President Drake and Provost Steinmetz fail as improper claims under Section 1983 and constitute a thinly veiled attempt to evade sovereign immunity.

Mr. Waters does not dispute that Section 1983 claims cannot derive from theories of *respondeat superior*. Yet, he argues that “[l]ike a corporation, OSU cannot speak on its own but must do so through its administrators, in this case Drs. Drake and Steinmetz.” Pl.’s Mem. In Opp. at 28-29. “This is just another way of saying that liability is based on a theory of respondeat superior,” and, as such, “is not a proper claim under § 1983.” *Billock v. Wyandot Cnty. Children's Servs.*, No. 3:07 CV 234, 2007 WL 1306598, at *5 (N.D. Ohio May 3, 2007) (rejecting plaintiff’s claim that individual defendants in supervisory roles ratified the conduct of employees).

President Drake and Provost Steinmetz did not deprive Mr. Waters of due process and are entitled to judgment on the pleadings.

V. MR. WATERS FAILS TO STATE A CLAIM UNDER TITLE IX THAT HE WAS DISCHARGED BY OHIO STATE BECAUSE HE IS A MAN.

To prove he was discriminated against because he is a man, Mr. Waters must do two things:

First, he must state a *prima facie* case for disparate treatment under the heightened standards used in reverse discrimination cases. This means he must plead and ultimately prove the standard four-pronged *prima facie* case of disparate treatment—showing (1) that he was a

member of a protected class; (2) that he was discharged or subject to an adverse employment decision; (3) that he was qualified for the position; and (4) that he was replaced by a person outside the protected class or that similarly-situated non-protected employees were treated more favorably—*plus*, unique to reverse discrimination cases, he must also 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.” *Treadwell v. Am. Airlines, Inc.*, 716 F.Supp.2d 721, 728 (W.D. Tenn. 2010), *aff’d*, 447 Fed. Appx. 676 (6th Cir. 2011), (quoting *Sutherland v. Michigan Dep’t of Treasury*, 344 F.3d 603, 614 (6th Cir.2003)).

Second, if he states a *prima facie* case, he must then also allege and show that the entire Title IX investigation process, findings and report, which were initiated in response to the Title IX complaint lodged by a Band member and her parent, were all just a pretext to terminate him because he is a man.

Mr. Waters can satisfy none of these burdens and defendants are entitled to judgment on the pleadings on Mr. Waters’ Title IX claim.

A. Mr. Waters Fails To Satisfy The Heightened Standard For A Reverse Discrimination Claim.

Mr. Waters agrees that the Sixth Circuit: 1) follows the *McDonnell-Douglas v. Green* standard in Title IX cases; 2) holds that Title VII standards for proving discriminatory treatment also apply to claims of employment discrimination under Title IX; and 3) “continues to apply the ‘heightened standard’ in pleading and proving reverse discrimination cases.” Pl. Mem. In Opp. at 30-31. Despite these significant concessions, he argues this Court should ignore binding Sixth Circuit precedent and not apply the heightened standard to his claim. While he cites to dicta in a footnote expressing doubt about the heightened standard doctrine, he points to no case indicating the Sixth Circuit has reversed its position in this regard.

Accordingly Mr. Waters is required to plead, and ultimately prove, the existence of “background circumstances support[ing] the suspicion that [Ohio State] is that unusual employer who discriminates against the majority.” *Treadwell*, 716 F.Supp.2d at 728. He has not, and cannot, do so. The heightened pleading standard doctrine applies and Mr. Waters has failed to meet it.

Mr. Waters alternatively argues that even if he is required to plead and prove background circumstances demonstrating that Ohio State is that unusual employer who discriminates against the majority, he has done so by pleading that “he was made a scapegoat by [d]efendants in order to resolve the Department of Education investigation as promptly as possible” See Pl.’s Mem. In Opp. At 32. But a “plaintiff may not rely on his own situation to provide the ‘background circumstances,’ rather, some indication of impermissible discrimination in addition to plaintiff’s own allegedly poor treatment is necessary to support an inference of impropriety.” *Smith v. Ohio Dep’t of Jobs & Family Servs.*, No. 2:13-CV-56, 2014 WL 5529588, at *6 (S.D. Ohio Nov. 3, 2014) (citing *Treadwell*, 447 F. App’x at 679).

Mr. Waters next argues that, as a man, he is not a member of the majority for purposes of gender discrimination. He says this Court should permit discovery related to whether, as a man, he is a non-minority. Minority status, however, is not defined by the male/female composition of Ohio State. A minority group is one which has “historically suffered the type of discrimination” that Title IX and Title VII seek to prevent. See *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999) (defining male as the majority plaintiff in a reverse discrimination claim). Consistent with this, the Sixth Circuit has, without exception, identified the male gender as the non-minority for purposes of gender discrimination claims. See, e.g. *Smith*, 2014 WL 5529588, at *6; *Rossi v. Alcoa, Inc.*, 129 Fed. Appx. 154, 157 (6th Cir. 2005);

Sampson v. Sec'y of Transp., 182 F.3d 918 (6th Cir. 1999). Mr. Waters is in the majority and his claim is one of reverse discrimination subject to the heightened pleading standard, which he has failed to satisfy. Moreover, in this non-hiring based claim, the number of women employed by Ohio State is not relevant. See *Smith v. Ohio Dept. of Jobs and Fam. Servs.*, 2014 WL 5529588 at *7 (finding statistical evidence insufficient where plaintiff was proceeding on a disparate treatment theory but presented statistical evidence that more women were employed than men in a failure to promote claim). Allowing him to engage in discovery will not correct his failure to satisfy the heightened pleading standard.

Mr. Waters next claims defendants misstated the holding in *Turner v. Grande Pointe Healthcare Cmty.*, 631 F. Supp. 2d 896, 911 (N.D. Ohio 2007). *Turner* expressly relied upon the Sixth Circuit's decision in *Zambetti v. Cuyahoga Community College*, 314 F.3d 249 (6th Cir.2002), and noted "[t]he *Zambetti* court allowed the 'background circumstances' prong to be satisfied by the fact that the *decision maker* was not a member of the protected group." *Id.* (citing *Zambetti*, 314 F.3d at 257) (emphasis added). Accordingly, the court in *Turner* decided to "follow[] this precedent" and found background circumstances satisfied based on the gender of the decision-makers and management. *Id.* Here, while Mr. Waters points to investigators who were women, he points to no decision makers who were women. Defendants did not misstate *Turner*.

The cases Mr. Waters relies upon regarding the use of statistical evidence do not support his claim. Initially, as those cases demonstrate, such evidence is relevant to across-the-board practices, not claims of wrongful termination of a particular individual. See *Sutherland v. Michigan Dept. of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003) (considering statistical evidence where plaintiff sought a declaration that defendants past affirmative action, racial and gender

preferences in hiring and promotions were improper); *DeBiasi v. Charter County of Wayne*, 537 F. Supp.2d 903, 917-20 (E.D. Mich. 2008) (plaintiffs sought to rely on statistical evidence related to claim that affirmative action, racial and gender preferences in hiring and/or promotions were improper). Here, Mr. Waters expressly pleads a claim based on a *one-to-one* comparison - he claims that Lenee Buchman, the former cheerleading coach, was treated differently than he was, which she was not. *See* Pl. Compl. at ¶ 146. In other words, he has not pled across-the-board wrongdoing, and therefore, the cases discussing statistics-based discovery are irrelevant.

Mr. Waters also cites to *Murray v. Thistledown Racing*, 770 F.2d 63, 68 (6th Cir. 1985). This is curious in that *Murray* applied the heightened standard for reverse discrimination claims Mr. Waters states is inapplicable. *See Murray*, 770 F.2d at 67. It also is curious in that the Court in *Murray* makes no mention of statistical evidence, and instead, simply found that the plaintiff had failed to establish the existence of background circumstances sufficient to meet the heightened standard. *Id.*

Mr. Waters has failed to plead “background circumstances” showing Ohio State is that unusual employer who discriminates against the majority. *See Turner*, 631 F. Supp. 2d at 911. As such, his claim for disparate treatment should be dismissed.

B. Mr. Waters Admits And Does Not Dispute An Inappropriate Band Culture Existed Under His Leadership And He Was Therefore Not Performing His Job To Ohio State’s Expectations.

The third requirement of the traditional *McDonnell Douglas* framework requires that Mr. Waters plead and prove that he was qualified for his position as Band Director and was “performing his job at a level which met his employer’s legitimate expectations.”³ *DeMasellis*

³Mr. Waters’ claim that *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000) modified the standard used by the Sixth Circuit in determining whether a person was qualified

v. Saint Mary's of Michigan, No. 10-12138-BC, 2011 WL 5404268 (E.D. Mich. Nov. 7, 2011) (quoting *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir.1990)). He cannot make this showing due to his own admissions.

Mr. Waters admits that despite ten years as an Assistant Band Director and approximately two as Interim Director and Director, he failed to eliminate activities which “were demeaning and created a hierarchy among band students.” *See, e.g.*, Pl.’s Compl. at ¶ 25 (Mr. “Waters *began* in earnest to address and shape the culture to address these lingering issues.”); ¶ 36 (“Discussions with squad leaders yielded *fewer* inappropriate nicknames.”); ¶ 38 (Mr. Waters permitted Midnight Ramp up through 2013)). He also admits that at the time he became Director, the Band’s culture was “in dire need of change.” *See* Ex. F to Defs.’ Answer (July 14, 2014 Title IX Statement of Jonathan N. Waters Entitled, “An Analysis & Review of Cultural Changes in The Ohio State University Marching & Athletic Band Program,” at 1). Additionally, he admits that almost two years after he became Director, the Band’s culture was still “not . . . in a ‘good place’ currently.” *See id.*

Ohio State agrees with Mr. Waters about the state of the Band’s culture under his leadership. There is a difference of opinion, however, that he was the right person to change it. Mr. Waters’ opinion he was is irrelevant. *See Conner v. State Farm Mut. Auto. Ins. Co.*, 273 F. App’x 438, 442 (6th Cir. 2008) (“Conner’s ‘subjective view of [her] qualifications in relation to those of the other applicants, without more, cannot sustain a claim of discrimination.’”) (quoting *Briggs v. Potter*, 463 F.3d 507, 516 (6th Cir.2006)); *Mynatt v. Lockheed Martin*

under the *McDonnell Douglas* framework, as set out in *McDonald v. Union Camp Corp.*, 898 F.2d 1155 (6th Cir. 1990), is incorrect. The court in *Cline* quoted from *McDonald* and expressly stated that its decision does not deviate from earlier precedent, including *McDonald*. *See Cline*, 898 F.2d at 664-65, n.8.

Energy Sys., Inc., 271 Fed. Appx. 470, 477 (6th Cir. 2008) (“A plaintiff’s contention that he was better qualified than the workers who were retained is insufficient to establish a prima facie case.”) (citations omitted).

Mr. Waters did more than fail to eliminate conduct he admits was inappropriate, however. He also concealed the conduct and dismissed it as unfounded “rumors,” ***which he does not dispute***. See Pl.’s Compl. at ¶ 54; Defs.’ Answer at ¶ 54, Ex. O (October 31, 2013 E-mail from Jonathan N. Waters to Gayle Saunders). This denial and attempt to conceal the problems, in conjunction with the failure to eliminate the problems, could not meet Ohio State’s legitimate expectations. Mr. Waters cites no cases holding that an employee who behaves this way was found to have met his employers’ expectations.

Related to the concealment of the problems, Mr. Waters references at length the Performance Review he received in the spring of 2014 from Dr. Richard Blatti, Ph.D. Mr. Waters’ Complaint does not allege Dr. Blatti knew about the issues with Band’s culture. This only underscores the success of Mr. Waters’ concealment efforts. Additionally, Mr. Waters cannot legitimately argue he could not have effected immediate change. By his own words, he exercised such control over Band members that he believed he could tell them to stand on their heads if he so pleased:

You f***ing better realize who you’re dealing with We tell you to stand on your head . . . you’ll stand on your Godd*** head.”

See Pl.’s Compl. at ¶ 40; Defs.’ Answer at ¶ 40, Ex. H (July 22, 2014 Investigation Report, at 20, fn. 9). If Mr. Waters could order a Band member to stand on his head, he could have surely ordered the Band to cease conduct he knew was improper and resulted in a culture that was “in dire need of change” and “not . . . in a ‘good place.’” That would have taken a matter of

minutes. Mr. Waters had years.

Ohio State Sexual Harassment Policy 1.15 — and Title IX — prohibit the sexualized and inappropriate culture which existed in the Band and required that it be immediately eradicated. *See* Pl’s. Compl. at ¶ 4; Defs.’ Answer at ¶ 4, Ex. I, at 4 (Ohio State Sexual Harassment Policy 1.15); Ex. G (September 11, 2014 Letter From OCR to President Drake (“Under established OCR policy, a sexually hostile environment violates Title IX.”)). By his own admission, Mr. Waters failed to do so. For this reason, as well as his attempts to conceal, which he does not dispute occurred, Mr. Waters cannot establish he was “performing his job at a level which met [Ohio State’s] legitimate expectations” related to the Band’s culture, and his disparate treatment claim should be dismissed. *See DeMasellis*, 2011 WL 5404268.

C. Mr. Waters Does Not Dispute That The Cheerleading Coach Was Supervised And Terminated By The Athletics Department And Therefore He Cannot Establish That She Is A Similarly Situated Employee.

To meet the fourth element necessary to establish his *prima facie* case, Mr. Waters must show that he was treated less favorably than a similarly-situated woman. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992). To be similarly situated, the “plaintiff must show that [he] and the comparable person were similarly situated in all respects, *in that they had the same supervisor*, were subject to the same standards, and engaged in the same conduct without differentiating or mitigating circumstances to distinguish their conduct or the treatment they received.” *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 797 (S.D. Ohio 1998)(rejecting the argument that women’s field hockey coach and men’s basketball coach were similarly situated where the coaches engaged in different conduct and did not report to the same supervisor during the applicable time period).

Mr. Waters cites to *Ercegovich v. Goodyear Tire and Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) and argues the “similarly “situated analysis is fluid and will change from case-to-

case. In *Ercegovich*, however, the Sixth Circuit expressly recognized that, while employment circumstances can vary, in order to state a prima facie case, a “plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in ‘all of the *relevant* aspects.’” *Ercegovich*, 154 F.3d at 352 (emphasis in original). And, another case Mr. Waters, cites, *DeBiasi v. Charter Cty. of Wayne*, 537 F.Supp.2d 903, 920 (E.D.Mich.2008), held that “similarly situated” requires that the person making the employment decision be the same for both individuals. In this regard, Mr. Waters does not dispute that as Band Director, he was employed within the School of Music and terminated by Provost Steinmetz. See Pl.’s Compl. at 2, ¶ 100; Pl.’s Mem. In Opp. at 28, 34 (relying upon the performance review completed by the Director of the School of Music). Mr. Waters also does not dispute that Ms. Buchman, the former cheerleading coach, was employed within the Department of Athletics and terminated by Gene Smith, Ohio State’s Athletic Director. See Pl.’s Compl. at ¶ 147; Defs.’ Answer at ¶ 147, Ex. W (November 25, 2013 Termination Letter from Eugene Smith to Lenee Buchman), Ex. X (Athletics Department Organizational Chart). In short, it is undisputed that Mr. Waters and Ms. Buchman were situated in different departments at Ohio State and were terminated by different decision makers. This indisputable fact requires that Mr. Waters’ disparate treatment claim be dismissed. See *Weaver*, 71 F.Supp.2d 797.

Moreover, to the extent Mr. Waters argues that defendants have relied on materials outside the pleadings to show that Ms. Buchman was under the supervision of the Athletics Department, his argument misapplies the standards governing a Rule 12(c) motion. In deciding a motion for judgment on the pleadings, the court may take into account “the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss *so long as they are referred to*

in the Complaint and are central to the claims contained therein.” *Bassett v. Nat’l Coll. Athl. Ass’n*, 528 F.3d 426, 430 (6th Cir. 2008) (emphasis added). “In addition, if extrinsic materials merely ‘fill in the contours and details’ of a complaint, such materials may be considered without converting the motion to one for summary judgment.” *DavCo Acquisition Holding, Inc. v. Wendy’s Int’l, Inc.*, No. 2:07-CV-1064, 2008 WL 755283, at *1 (S.D. Ohio Mar. 19, 2008) (Graham, J.). Mr. Waters referred to Ms. Buchman’s employment and termination in his Complaint. *See* Pl.’s Compl. ¶ 147. Additionally, Mr. Buchman’s termination letter, as well as the organizational charts for the Athletics Department, are public records, and may properly be considered by this Court on a motion for judgment on the pleadings. *See Bassett*, 528 F.3d at 430. Significantly, Mr. Waters does not dispute the accuracy of either document.

As a matter of undisputed fact and law, Mr. Waters cannot establish that he and Ms. Buchman were similarly situated and his Title IX claim must be dismissed. *See Mitchell*, 964 F.2d at 582.

D. Mr. Waters’ Admissions That The Band Culture Was Inappropriate Demonstrate That His Termination Was Not A Pretext For Discrimination.

Mr. Waters characterizes defendants’ pretext position as a “straw man argument.” *See* Pl.’s Mem. In Opp. at 37. In so doing, he confuses the elements of a *prima facie* case of disparate treatment with the concept of pretext. *See id.* Pretext is not an element of the *prima facie* analysis, but rather, is the final consideration under the *McDonnell Douglas* framework. *See Thomas v. Union Inst.*, 98 F. Appx 462, 466 (6th Cir. 2004) (“Establishing a *prima facie* case creates a rebuttable presumption of discrimination, and the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for taking the challenged employment action;” and plaintiff must then show “the proffered reason was actually a pretext to hide unlawful discrimination.”). Here, Ohio State conducted a Title IX investigation, as

required by law, *see Doe v. Univ. of the South*, 687 F.Supp.2d 744, 758 n. 1 (E.D.Tenn.2009), and, based on that investigation, concluded that an inappropriate culture existed within the Band which Mr. Waters knew about and admitted still existed at the time of his termination. *See, e.g.*, Pl.'s Compl. at ¶ 25, ¶ 36; Pl.'s Compl. at ¶ 97; Defs.' Answer at ¶ 97, Ex. F (July 14, 2014 Title IX Statement of Jonathan N. Waters Entitled, "An Analysis & Review of Cultural Changes in The Ohio State University Marching & Athletic Band Program," at 1) (admitting on July 14, 2014 that the Band's culture was "not . . . in a 'good place' currently"). In other words, even if he pled and could prove a prima facie case of reverse discrimination - which he has not - Mr. Waters bears the burden of demonstrating the Title IX investigation really was a pretext for discrimination on the basis of gender. *See Thomas*, 98 F. App'x at 466. Meaning, he must plead and establish that the entire Title IX investigation into the sexualized culture of the Band was just an excuse to discriminate against Mr. Waters because he is a man. Ohio State's position is simple: Mr. Waters cannot show that the Title IX investigation was a pretext for anything, because it was mandated by federal law. This is especially so considering Mr. Waters admits the culture of the Band was inappropriate under his leadership.

Mr. Waters ultimately must prove that he was terminated because he is a man. He cannot. He advances several theories for his termination including that he was a scapegoat for a DOE investigation and that the findings of the Title IX Investigation were flawed. *See* Pl.'s Compl. ¶¶ 56-67, 118-122. None of his proffered "theories" implicate his gender. Instead, they focus on Band conduct and Mr. Waters' involvement and failure to change that culture, not the fact he is man. He has consistently stated publicly that the Band culture was inappropriate, entrenched, and in need of change. *See, e.g.* Defs.' Answer at ¶ 106 (available at <http://www.today.com/video/today/55800789> (last visited October 13, 2014); <https://gma.yahoo>

[o.com/former-ohio-state-band-director-slams-universitys-inaccurate-121908454--abc-news-topstories.html](http://www.abcnews.com/topstories.html) (last visited October 13, 2014)). He also publically describes himself as the “agent of change.” Ohio State agrees change was needed. There is just difference of opinion on who should effectuate that change. Mr. Waters says he should. Ohio State says he should not and terminated him to effectuate the necessary changes. That is not gender discrimination as a matter of law. *See Conner*, 273 F. Appx at 442; *Mynatt*, 271 Fed. Appx. at 477.

“Courts should grant motions for judgment on the pleadings when there is an absence of law or facts to support a claim.” *Doe v. Westerville City Sch. Dist.*, No. 2:07-CV-00683, 2008 WL 2323526, at *3 (S.D. Ohio June 2, 2008). Ohio State is entitled to judgment on the pleadings.

E. Mr. Waters Now Attempts To Assert A Second Title IX Claim Based On The Performance Of The Title IX Investigation. But An Investigation Is Not An Adverse Employment Action.

Mr. Waters’ final argument in opposition to defendants’ Motion now seeks to assert a second Title IX claim “based on OSU’s adverse and discriminatory treatment of [Mr.] Waters during OSU’s internal investigation process.” Pl.’s Mem. In Opp. at 38. Mr. Waters claims his “second” Title IX claim is found in paragraph 144 of his Complaint. Significantly, Mr. Waters has misquoted paragraph 144 by omitting language and using ellipses. *See* Pl.’s Mem. In Opp. at 38. The omitted language of paragraph 144 sets forth legal conclusions which simply reiterate Mr. Waters’ due process claim: “[s]pecifically, Mr. Waters was not provided due process and fairness protections required under OSU policy, and Title IX regulations and guidance.” *See* Pl.’s Compl. ¶ 144; Pl.’s Mem. In Opp. at 38. His so-called “second” Title IX claim is duplicative of his due process claims.

Even if Mr. Waters intended to and did set out a second Title IX claim separate from his termination, it fails as a matter of law. To prove disparate treatment, among other elements,

Mr. Waters must establish he was discharged or subject to an adverse employment *action*. See Pl.'s Mem. In Opp. at 30, 33; see also *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir.1992). An adverse employment action "is a materially adverse change in the terms or conditions of employment because of the employer's actions." *Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 625 (6th Cir. 2013) (citing *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 593 (6th Cir. 2007)). The Sixth Circuit has repeatedly held that "[t]he act of investigating possible employee misconduct is not an adverse employment action." *Id.* (quoting and affirming *Kuhn v. Washtenaw Cnty.*, No. 10-11191, 2012 WL 1229890 (E.D. Mich. April 12, 2012)); see also *Dendinger v. Ohio*, 207 Fed. Appx. 521, 527 (6th Cir. 2006) (holding that an employer's internal investigation of an employee and its failure to notify the employee of the investigation until after it had been completed did not constitute an adverse employment action). Consistent with this, the only adverse employment *action* referenced by Mr. Waters in his Memorandum in Opposition is his termination. See Pl.'s Mem. In Opp. at 33.

Additionally, Mr. Waters fails to plead any facts demonstrating that Ohio State violated due process or Title IX guidance. Nor could he, as he admits he was provided notice of the investigation, permitted to provide oral and written statements and was informed of the findings. See Pl.'s Compl. at ¶ 93 (notice of the investigation; ¶ ¶ 95-96 (interviewed in investigation); ¶ 97 (provided written statement); ¶¶ 4, 98 (informed of findings and received signed written findings); cf. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* at 12-13 and 26, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (identifying notice and an equal opportunity to present witnesses and other evidence for a "balanced and fair process").

"The purpose of a motion under [Rule 12(c)] is to test the sufficiency of the complaint."

Myers, 2008 WL 4862512, at *2. Mr. Waters “second” Title IX claim is insufficient and should be dismissed.

VI. CONCLUSION

Mr. Waters tells this Court it should delay judgment on his claims and permit discovery on what he deems “fact issues.” Neither his opinion as to whether he should be the person to change the Band’s broken culture or his wish list of hypothetical facts resuscitate the legal merits of his claims. The factual allegations of Mr. Waters’ Complaint, the documents referred to therein and attached to the pleadings, and statements and writings of public record all make plain that Mr. Waters’ legal claims are without legitimate bases:

- 1) Mr. Waters held an unclassified, at-will Senior Administrative and Professional staff position in which he has no constitutionally protected property right;
- 2) Mr. Waters was not denied a public name-clearing forum;
- 3) Mr. Waters cannot establish a *prima facie* case of discrimination or that his termination was a pretext for discrimination; and
- 4) the Title IX investigation itself does not constitute an adverse employment action.

This Court should grant defendants’ motion for judgment on the pleadings and enter judgment in their favor.

MICHAEL DeWINE

ATTORNEY GENERAL OF OHIO

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on December 4, 2014. Notice was also sent by operation of the Court's electronic filing system to all other counsel who have entered an appearance and any parties who have entered an appearance through counsel. The parties may access this filing through the Court's ECF system.

/s/Michael H. Carpenter

One of the Attorneys for Defendants

Michael V. Drake, Joseph E. Steinmetz,
and The Ohio State University

The Ohio State University
POSITION DESCRIPTION

Name:	Position #:	00096487
Employee ID:	Jobcode/Classification:	4034 Director-00
Effective Date:	Working Title:	Director-00

Title Group:	Unclassified	Position Status:	Approved
Salary Admin Plan/Range:	A&P / 00	Status Date:	12/10/2012
FLSA Status:	No FLSA Required	Headcount:	
Senior A & P:	Yes	Target/Hiring Range:	\$0 to \$0 per year
Reg/Temp/Term:	Regular	Long Term Closure Code	Standby
Full-Time/Part-Time:	Full-Time	Short Term Closure Code	Standby
Appointment Length:	12/12 Months		

College/VP Office:	Arts and Sciences	1) Reports to Position #:	00021421
Department:	D0262 School of Music	Working Title:	Director, School of Music
Position Organization:	02620 School of Music	2) Reports to Position #:	
		Working Title:	

Detailed Job Description:

The Director of The Ohio State University Marching Band will oversee all aspects of the Marching and Athletic Band Program as a constituency in the comprehensive University Band Program; creates and implements field show concepts; serves as liaison with students, administration, alumni, donors, and media; leads outreach efforts; manages OSUMB student and staff employees; teaches courses.

Duties Description:

Duty Pct	Duty Description
50	Administration: Direct band staff in the promotion efforts of the total University Band Program; Planning and oversight of performances and scheduling of Marching Band, Athletic Bands, and Pep Bands; Oversee logistical aspects of Marching and Athletic Bands; Supervise/Oversee Operations Manager; Supervise/Oversee Student Staff and hiring thereof; Supervise/Oversee Graduate Assistants while assigned to Marching and Athletic Bands; Supervise/Oversee Percussion Instructor; Oversight of financial aspects of the band budget and budgeting, planning, and forecasting; Chapter advisor for Kappa Kappa Psi, National Band Service Fraternity; Chapter advisor for Tau Beta Sigma, National Band Service Sorority; Coordinate development and donor promulgation with advancement office; Serve as liaison to Athletic Department; Serve as liaison between Marching and Athletic Band staff and School, College, and University Administration; Serve as liaison to media outlets; Oversee promotion of the Marching and Athletic Band program via media, online, and public sources; Coordinate music arranging staff; Coordinate all Marching Band field show concepts and implementation.
25	Outreach: Serve as liaison for the Ohio State Active Alumni Band, Hyperactive Alumni Band, and Reunion Band; Serve as member of Alumni Band Board of Governors; Serve as liaison to The Ohio State Alumni Association; Serve as CARL (Campus Alumni Relations Liaison) for Alumni Association; Coordinate recruitment of high school students to the band program; Assist in Band Department outreach to High Schools.
25	Teaching: Teach Marching Band Class; Teach Athletic Band Class; Principal conductor of the Marching, Athletic, and Pep Bands; Teach Marching Band Techniques; Teach additional School of Music classes as assigned

The Ohio State University
POSITION DESCRIPTION

Report Input Criteria:

As of Date:

VP/College(s) or College_1 Level(s):

Department(s) or Organization(s):

Position # or Employee ID:

Jobcode:

Reg/Temp/Term:

TGIC:


What should I know about the different non-faculty appointments?

- There are multiple positions that make up non-faculty regular appointments including regular unclassified and classified civil service.
- In addition, there are temporary unclassified, temporary civil service, and student appointments.
- The following tables provide information relating to different non-faculty appointments:

Appointment Type	Description
Unclassified Staff	<p>There are three types of Unclassified employees:</p> <ol style="list-style-type: none"> 1. Principal Administrative Officers (PAO) <ul style="list-style-type: none"> ➤ University President ➤ Deans of colleges and the graduate school ➤ Members of the President's staff ➤ Administrative heads of offices ➤ Some Senior Administrative and Professional staff 2. Senior Administrative and Professional (SAP) <ul style="list-style-type: none"> ➤ All Principal Administrative Officers ➤ Individuals whose assignments require the most advanced levels of skill recognized in the professional field ➤ Individuals whose assignment includes management responsibilities 3. Unclassified Professional <ul style="list-style-type: none"> ➤ Individuals who perform academic support, student service or institutional support activities and whose positions are not designated as Classified Civil Service <p>HELPFUL LINKS: HR Policy 4.20 – Appointments Assist Pages: Unclassified Staff – Position Data & Job Data Matrix</p>
Classified Civil Service (CCS)	<p>Classified Civil Service positions are governed by Sections 111 and 124 of the Ohio Revised Code. There are two types of Classified Civil Services (CCS) Employees:</p> <ul style="list-style-type: none"> ➤ <u>Non-Bargaining unit Classified Civil Service</u> employees are those individuals whose salary, salary increases, and other conditions of employment are governed by university action. ➤ <u>Bargaining unit Classified Civil Service</u> employees are identified by their appointment titles, which fall under a bargaining unit agreement between the University and a Union. <p>HELPFUL LINKS: HR Policy 4.20 – Appointments Ohio Revised Code: Chapter 124 – Personnel OSU Rules for Classified Civil Service Assist Pages: CCS – Appointment Length Values OSU CWA Contract</p>



**Office of
Business and Finance**

**Payroll Processing Requirements
Non-Faculty Appointments**

Appointment Type	Description
<p>Students</p>	<p>A student employee is defined as an individual who is:</p> <ul style="list-style-type: none"> ➤ Enrolled at The Ohio State University ➤ Appointed to a position designated as student employment ➤ Associated with the university primarily in the pursuit of an academic degree <p>HELPFUL LINK: HR Policy 10.10 – Student Employment</p>
<p>Graduate Students</p>	<p>Student enrolled in a graduate program and meet criteria designated for a graduate appointment from the Graduate School.</p> <p>HELPFUL LINKS: OSU Graduate School Handbook Student – Position Data & Job Data Matrix</p>
<p>Work Study Students</p>	<p>The Federal Work-Study Program (FWS) is a need-based program which provides jobs for undergraduate and graduate students with financial need, allowing them to earn money to help pay education expenses.</p> <p>HELPFUL LINKS: Federal Work-study/Student Employment Work Study Student Appointment Values</p>
<p>Hourly/Wage Students</p>	<p>Students that are compensated on department budgets.</p>
<p>Non-OSU Students</p>	<p>Students who are attending an academic institution other than Ohio State or students not affiliated with the university.</p>
<p>Regular</p>	<p>Any appointment for which the relationship between the department and the individual is intended to be ongoing. This includes Classified Civil Service and Unclassified Staff with at least 50% FTE with an appointment expected to be greater than one year.</p> <p>HELPFUL LINK: HR Policy 4.20 – Appointments</p>
<p>Temporary</p>	<p>Any appointment for which the relationship between the department and the individual is for a designated period of time.</p> <ul style="list-style-type: none"> ➤ Appointment to a Classified Civil Service position may not exceed six months ➤ Appointment to an Unclassified position may not exceed one year ➤ Other temporary appointments include students, lecturers, visiting scholars, and workshop leaders. ➤ Appointment to a Retirement position that does not exceed one year
<p>Term</p>	<p>A subset of temporary appointments for which the employment relationship between the university and the employee is intended for a designated period of time, normally greater than one year and less than three years.</p>
<p>Seasonal</p>	<p>A regular appointment where the service reoccurs for a specified period of time during a particular time of year. Seasonal employees transferred to an inactive status (e.g. LOA, Layoff) take a leave of absence at the end of their seasonal employment. When the season begins again, appointment status is reactivated.</p>
<p>Intermittent</p>	<p>An appointment where the employee works irregular hours or days on an as-needed basis. The employee works a total of less than 50% FTE over the appointment year.</p>



HELPFUL LINK:

[HR Policy 4.20 – Appointments](#)

Requirements

- It is extremely important to set up the appointment correctly in the HR System following the appointment length table matrix.
- Payroll deadlines must be kept in mind when entering job data changes in order to prevent improper compensation or complex manual corrections.
- Use the correct chartfield combination to ensure that the expense is accurately charged.

HELPFUL LINKS:

- [Appointment Length Values](#)
- [Pay Calendars](#)
- [Assist Pages: Account Code Descriptions](#)

What rules apply to appointment processing for non-faculty appointments?

- An employee cannot have exempt and non-exempt appointments at the same time.
- HRPs should enter an expected job end date in the HRIS for all temporary or term appointments.

HELPFUL LINKS:

- [Fair Labor Standards Act](#)
- [HR Policy 10.10 – Student Employment](#)
- [HR Policy 3.10 - Salary Administration and Classification](#)

What rules apply to regular appointment lengths that are less than one year?

- Regular appointments for less than one year provide operational opportunities for flexible work schedules to meet the needs of departments.
- Key Features of these non-traditional appointments are:
 - Salary is prorated based upon the appointment schedule
 - Benefits entitlements and employee premium sharing will be identical to other 75% and greater appointments
 - Retirement contributions will be deducted throughout the entire year and retirement credit earned according to current guidelines.

The following charts provide an overview and appointment highlights of reduced appointment length scenarios for non-exempt and exempt positions:

Reduced Appointment Length Scenarios for Exempt Positions	Appointment Highlights
9 Month Regular Unclassified Appointments	<ul style="list-style-type: none"> • Effective Pay 9/16 through 9/15 or 10/1 through 9/30 with corresponding work dates of 9/16 through 6/15 or 10/1 through 6/30 • Paid over twelve-month period at a rate equal to 9/12 of the annual rate • FTE is equivalent to the percentage of time worked or 75% • Eligible for full range of health benefits • Employees earn 75% of the full time rate of vacation and sick leave accruals



**Office of
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**Payroll Processing Requirements
Non-Faculty Appointments**

Reduced Appointment Length Scenarios for Exempt Positions (continued)	Appointment Highlights
10 Month Regular Unclassified Appointments	<ul style="list-style-type: none"> ● Effective Pay 9/1 through 8/31 or 8/16 through 8/15 with corresponding work dates of 9/1 through 6/30 or 8/16 through 6/15 ● Paid over twelve-month period at a rate equal to 10/12 of the annual rate ● FTE is equivalent to the percentage of time worked or 83% ● Eligible for full range of health benefits ● Employees earn 83% of the full time rate of vacation and sick leave accruals
11 Month Regular Unclassified Appointments	<ul style="list-style-type: none"> ● Effective Pay 8/1 through 7/31 or 7/16 through 7/15 with corresponding work dates of 8/1 through 6/30 or 7/16 through 6/15 ● Paid over twelve-month period at a rate equal to 11/12 of the annual rate ● FTE is equivalent to the percentage of time worked or 92% ● Eligible for full range of health benefits ● Employees earn 92% of the full time rate of vacation and sick leave accruals
Reduced Appointment Length Scenarios for Non Exempt Positions	Appointment Highlights
40 Week Regular A & P Appointments	<ul style="list-style-type: none"> ● Effective Pay Period 7 through 26 ● Paid over 26 pay periods at a rate equal to 40/52 of the annual rate ● FTE is equivalent to the percentage of time worked or 77% of the annual rate ● Eligible for full range of health benefits ● Employees earn 77% of the full time rate of vacation and sick leave accruals
42 Week Regular CCS Appointments	<ul style="list-style-type: none"> ● Effective pay period 6 through 26 ● Paid over 26 pay periods at a rate equal to 42/52 of the annual rate ● FTE is equivalent to the percentage of time worked or 81% ● Eligible for full range of health benefits ● Employees earn 81% of the full time rate of vacation and sick leave accruals
44 Week Regular CCS Appointments	<ul style="list-style-type: none"> ● Effective pay period 5 through 26 ● Paid of 26 pay periods at a rate equal to 44/52 of the annual rate ● FTE is equivalent to the percentage of time worked or 85% ● Employees earn full range of health benefits ● Employees earn 85% of the full time rate of vacation and sick leave accruals
46 Week Regular CCS Appointments	<ul style="list-style-type: none"> ● Effective pay period 4 through 26 ● Paid of 26 pay periods at a rate equal to 46/52 of the annual rate ● FTE is equivalent to the percentage of time worked or 89% ● Employees earn full range of health benefits ● Employees earn 89% of the full time rate of vacation and sick leave accruals
48 Week Regular CCS Appointments	<ul style="list-style-type: none"> ● Effective pay period 3 through 26 ● Paid of 26 pay periods at a rate equal to 48/52 of the annual rate ● FTE is equivalent to the percentage of time worked or 92% ● Employees earn full range of health benefits ● Employees earn 92% of the full time rate of vacation and sick leave accruals



Office of Business and Finance

Payroll Processing Requirements Non-Faculty Appointments

HELPFUL LINKS:

- [HR Policy 6.27 – Paid Leave Programs](#)
- [Ohio Public Employees Retirement System](#)
- [Alternative Retirement Plan](#)
- [Employee Tuition Assistance](#)

What must I do when setting up a non-faculty appointment?

- 1. Ensure that the position has been created and approved in HRIS.

HELPFUL LINKS:

- [Assist Pages: Create a Position](#)
- [Assist Pages: Appointment Length Values](#)
- [Assist Pages: Hire an Employee](#)
- [OSU Department Composite Rates](#)

- 2. Hire the employee by entering the appropriate information in Job Data and Personal Data.

HELPFUL LINKS:

- [Assist Pages: Appointment Length Values](#)
- [Assist Pages: Hire an Employee](#)

- 3. Review proration of salary in respect to the appointment length to determine that the appointment length is accurate.

HELPFUL LINK:

- [Assist Pages: Appointment Length Values](#)

- 4. If any exceptions occur where the pay schedule needs to be adjusted, contact [Payroll Services](#).

Where can I obtain additional information?

Office of the Controller, [Payroll Services](#), payrolloffice@osu.edu, (614) 292-2311



**THE OHIO STATE
UNIVERSITY**

Appointments Policy 4.20

Office of Human Resources

Applies to: Staff

POLICY

Issued: 02/01/1999

Edited: 04/14/2014

Appointments are based upon the business needs of the employing unit and along with standard hours determine eligibility for benefits. Classified civil service (classified) appointments are pursuant to the provisions of The Ohio State University [Rules for Classified Civil Service](#).¹

Definitions

Term	Definition
Full-time equivalency (FTE)	The percentage of full time (40 hours per work week) worked during the period covered by a given appointment (for example, 10% full-time equivalency [FTE] equals four hours of work per work week).
Regular appointment	An appointment which may be classified or unclassified and may be full- or part-time at any percentage of FTE (0 to 100%). Regular classified appointments are an employment relationship between the university and the employee that is intended to be ongoing, subject to the needs of the employing unit and meeting the standards of job performance. Regular unclassified appointments are at will.
Reduced appointment	Regular classified or unclassified appointment in which the employee works less than 12 months with pay and benefits distributed over 12 months. Primarily used for reduced staffing during summer months.
Seasonal appointment	Regular classified or unclassified employment for which the service recurs for a specified period of time during a particular time of the year.
Temporary appointment	A classified or unclassified appointment for which the employment relationship between the university and the employee is intended for a specific, designated period of time. <ol style="list-style-type: none"> 1. Temporary appointments will not exceed 12 months, except in the case of intermittent appointments. 2. Temporary classified appointments are not eligible to be certified. 3. There must be a six month break in service when hiring the same person into the same position in which they previously served for a period of 12 months
Emergency appointment	A temporary classified appointment which serves at the discretion of the appointing authority, only used in cases of emergency and for which the appointment process may bypass University Rules for the Classified Civil Service.
Intermittent appointment	A temporary classified or unclassified appointment which serves at the discretion of the appointing authority and for which the employee works irregular hours or days on an as-needed basis. The employee must work less than 50% FTE over the appointment year.
Term appointment	An unclassified appointment for which the employment relationship between the university and the employee is intended for a designated period of time normally greater than one year but less than three years.

Policy Details

I. Reduced Appointment

- Non-exempt staff may hold 40-week appointments. Non-exempt is defined in accordance with [Fair Labor Standards Act](#) (FLSA) and is eligible for overtime pay.
- Exempt staff may hold 9-month, 10-month and 11-month appointments. Exempt is defined in accordance with the FLSA and is not eligible for overtime pay.

¹ Faculty appointments are not covered by this policy and are subject to the approval of the Office of [Academic Affairs](#). For additional information, refer to the [Faculty Appointments Policy](#) in the *Office of Academic Affairs Policies and Procedures Handbook*.



**THE OHIO STATE
UNIVERSITY**

Appointments Policy 4.20

Office of Human Resources

Applies to: Staff

II. Multiple Appointments

- A. Employees may have multiple regular, temporary or term appointments provided the sum total of the appointments does not exceed 100% FTE and the appointment combination is consistent with the following principles.
 1. A combination of exempt and non-exempt appointments is not permitted.
 2. Classified appointments may be combined only with other classified appointments of the same exempt or non-exempt status.
- B. Employees who hold two or more distinct positions consistent with the above principles will have multiple appointments with separate employee records. It is not necessary to establish multiple appointments with separate employee records to distribute funding between two or more accounts.
- C. Benefit eligibility for multiple appointments.
 1. Multiple appointments of the same appointment type (regular, term or temporary) will be combined to determine benefit eligibility.
 2. Multiple appointments that have different appointment types (regular, term or temporary) cannot be combined to determine benefit eligibility. The benefit program offered is the one that is most advantageous to the employee.
 3. For the purpose of determining retirement contributions, employees with a split faculty/staff appointment will be considered to have a faculty appointment and must contribute to the State Teachers Retirement System of Ohio (STRS) or the Alternative Retirement Plan (ARP) based upon employee election.
 4. If a staff member has teaching duties of 33% or less, it is not necessary to establish multiple appointments. The appointment may remain a staff position and retirement contributions would be into the Ohio Public Employees Retirement System (OPERS) or the ARP based upon employee election.

PROCEDURE

Issued: 02/01/1999
Edited: 04/14/2014

Responsibilities

Position or Office	Responsibilities
Office of Human Resources	<ol style="list-style-type: none"> 1. Consult with units and employees on this policy. 2. Define appointments and their associated benefits. 3. Define benefit eligibility.
Office of Academic Affairs	Consult with units on faculty appointments.
College/VP Unit	<ol style="list-style-type: none"> 1. Enter employee appointment data in the HRIS. 2. Consult with employees regarding questions about their appointments.



**THE OHIO STATE
UNIVERSITY**

Appointments Policy 4.20

Office of Human Resources

Applies to: Staff

Resources

- Alternative Retirement Plan, hr.osu.edu/benefits/rb_arp
- Benefit Eligibility by Appointment, hr.osu.edu/Policy/empben
- Faculty Appointments Policy, oaa.osu.edu/assets/files/documents/facultyappointments.pdf
- Fair Labor Standards Act (FLSA), dol.gov/whd/flsa
- Ohio Public Employees Retirement System (OPERS), opers.org
- State Teachers Retirement System of Ohio (STRS), strsoh.org
- Student Employment Policy 10.10, hr.osu.edu/policy/policy1010.pdf
- University Rules for Classified Civil Service, hr.osu.edu/policy/CCS

Contacts

Subject	Office	Telephone	E-mail/URL
Policy interpretation	Compensation and Classification, Office of Human Resources	614-292-2800	ohrc@hr.osu.edu hr.osu.edu/ohrc
Benefits eligibility	Customer Service Center, Office of Human Resources	614-292-1050	service@hr.osu.edu hr.osu.edu/customerservice
Faculty appointments	Office of Academic Affairs	614-292-5881	oaa.osu.edu
HRIS data entry guidance	Office of the Controller, Division of Payroll Services	614-292-2311	payrollservices@osu.edu controller.osu.edu/pay/pay-home.shtm assist-erp.osu.edu/assisthr89/WebHelp/assisthr89.htm

History

Issued: 10/01/1973 (Issued as Appointment of Administrative and Professional Staff)
 Revised: 10/01/1980
 Revised: 03/01/1985
 Revised: 02/01/1999 (Renamed and issued as Appointments)
 Edited: 09/06/2002
 Revised: 11/01/2011
 Edited: 04/14/2014

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College of Arts and Sciences

**2013/14 Performance Review & 2014/15 Performance Plan
Performance Review for the period 4/1/2013 - 3/31/2014**

Employee Name: Jon Waters
Unit Name: School of Music
Classification: Senior A & P

Empl ID#: [REDACTED]
Reviewing Supervisor: Richard L Blatt
University Hire Date: 9/01/2000

Date of most recent position description review (recommand annually):

To enter text, place cursor in highlighted box and type. Use drop down menus to select the rating for each category and to provide an overall rating in the final section of the form.

- Exceptional** Performance consistently exceeded expectations. Demonstrated expertise. Modeled desired behaviors for others. Trained and led others in this area. Employee was an exceptional contributor to the success of the department, college, and university.
- Exceeds Expectations** Performance often exceeded expectations. Demonstrated advanced knowledge. Modeled desired behaviors for others. Trained or led others in this area. Employee was a major contributor to the success of the department, college, or university.
- Achieves Expectations** Performance consistently met expectations, and on occasion exceeded expectations. Employee is proficient and performance is satisfactory. Employee was a contributor to the success of the department, college, or university.
- Below Expectations** Performance short of standards. Employee either did not fully or did not consistently meet expectations. In some cases, employee is making progress but not yet proficient. Improvement needed in one or more areas of performance, behavior or results.
- Well Below Expectations** Performance repeatedly or significantly short of expectations. Immediate action toward improvement should be taken.

Service-Orientation

Representative expectations for this category.

- Effectively and respectfully serves varying needs faculty, staff, students and/or public. Professional and courteous.
- Effectively listens to team members and others.
- Responds quickly to inquiries and requests, and ensures completion/resolution.
- Takes ownership of work and does not pass/transfer work inappropriately.
- Identifies, takes action and solves problems at the point where they occur.
- Results oriented, focused on unit, college, and university strategic goals. Choose all item.

Rating for Category: EXCEEDS EXPECTATIONS

Comments

Examples of Effective Behaviors

Mr. Waters is consistently courteous, poised, and professional, regardless of stressful circumstances, demanding deadlines, and strong personalities. These qualities are critical due to the high visibility of this position and the breadth of the OSUMB's many constituencies. Jon is skilled at spinning many plates at once and delegates properly to a dedicated staff. Jon is a good listener and reacts to concerns and requests in a positive and timely manner.

Areas for Growth or Improvement:

Due to the ever-evolving scope of this position, and particularly in light of the additional duties re: speaking engagements, development opportunities, and public relations, I am concerned that the business of the director, namely running the band, designing the drills, teaching the shows, and rehearsing the music, is being overshadowed. It is my hope that these extras can be held to a minimum so the performance of the band remains the No. 1 Priority.

Collaboration and Teamwork

Representative expectations for this category.

- Embraces diversity - people, perspectives and contributors
- Displays integrity in interactions
- Consistently builds and enhances work relationships
- Works collaboratively and shares information
- Focuses on solutions instead of blame or rationalization
- Demonstrates a positive attitude. Choose all item

Rating for Category: EXCEEDS EXPECTATIONS

Comments

Examples of Effective Behaviors

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College of Arts and Sciences

**2013/14 Performance Review & 2014/15 Performance Plan
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Mr. Waters demonstrates a positive attitude consistently, makes a good first impression, and works hard at establishing relationships. 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 has tried very hard to keep the SOM informed of his world - an ever revolving, highly active, and interconnected sphere of decisions, protocols, and politics. Communication with the SOM and ACS has improved over the last year but could still be better, especially with regard to the frequency of reports to those who need to be in the know.

Areas for Growth or Improvement

Last year I made the statement that the philosophy of "ording the wagons" (as a coping mechanism for dealing with unwelcome news or problem situations) should yield to the practice of transparency and collaboration for all concerned. Jon has improved the situation, especially as the media has increased its interest in the band program, and he continues to put the students first in making the many decisions confronted by OSUMB leadership.

Change and Innovation

Representative expectations for this category.

- Displays adaptability, flexibility, and ability to work through changes within unit/division/college.
- Seeks new and innovative methods of completing assignments. Positively challenges the status-quo.
- Seeks candid feedback from others and integrates feedback, new knowledge and methodologies to advance self and university.
- Readily assumes additional or new responsibilities. Choose an item.

Rating for Category: EXCEPTIONAL

Comments

Examples of Effective Behaviors

Last year, I reported that "the innovation experienced by the Marching and Athletic Bands during the 2012-13 season was nothing short of remarkable. This point is even more significant when one realizes how challenging it is to introduce any changes into the culture of the bands, particularly where the alumni are concerned. 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 - the band continues to surpass everyone's expectations and the media coverage which has followed OSUMB this year is extraordinary.

Areas for Growth or Improvement

We continue to be challenged by the time and energy it takes to deal with the "media circus" and public inquiries which flood the Steinbrenner Band Center. We desperately need more administrative support to handle this escalation, either within our office or elsewhere at the university, e.g. Arts Communications.

Functional and Technical Skills (Evaluate based on specific expectations for the position. Expectations will vary with position.)

Representative expectations for this category.

- Demonstrates job knowledge and skill set necessary to perform job.
- Uses sound judgment.
- Uses effective communication skills and appropriate methods of communication.
- Accuracy and quality of work product.
- Complies with unit, college and university policies and procedures, and legal requirements.
- Keeps information and records organized and accessible to others, as appropriate.
- Proficient with equipment, systems and software necessary to function in current position.
- Accomplishes agreed upon workload.
- Attendance & punctuality. Choose an item.

Rating for Category: EXCEPTIONAL

Comments

Examples of Effective Behaviors

By artistic, musical, and educational standards, Jon is at the top of his game, he maintains the "machinery" of the operation well and is constantly trying to make it more efficient. The hiring of a new Operations Manager has certainly had a positive impact on this. Record keeping, compliance with university policy, and organization can all be pointed to with pride. The interface between funding sources, the evaluation by the Athletic Department, the Band Program, the College, and the School of Music, all point to an operations and a budget model which seems to be working efficiently.

Areas for Growth or Improvement

None

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College of Arts and Sciences

**2013/14 Performance Review & 2014/15 Performance Plan
Performance Review for the period 4/1/2013 - 3/31/2014**

Leadership (Complete for supervisors only)

Representative expectations for this category.

- Successfully manages established budget, employing cost-effective measures
- Integrates objectives, opportunities and resources, effectively prioritizes and balances workload
- Anticipates unit needs and takes action
- Provides direction, then empowers employees with the authority, responsibility and resources to achieve results
- Effectively coaches, develops, challenges and mentors team members
- Holds staff accountable through timely performance feedback, counseling or improvement plans. Choose an item.

Rating for Category: EXCEPTIONAL

Comments

Examples of Effective Behaviors

Jon 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.

Areas for Growth or Improvement

Some concern has been expressed that each and every member of the leadership team carry his/her share of the load; performance reviews for the year are in process and will, hopefully, address some of these concerns.

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College of Arts and Sciences

2013/14 Performance Review & 2014/15 Performance Plan
Performance Review for the period 4/1/2013 - 3/31/2014

Overall Performance Summary and Comments. Discuss results of objectives that were to be completed during the performance period, progress in areas for improvement that were noted on the previous evaluation, and professional development that was completed during the performance period.

Jon Waters is pursuing his dream as the director of the OSUMB and Athletic Bands; this is apparent in every engagement with the public, with administration, with the media, with the School of Music, and with the Athletic Department. He continues to fortify the precepts and tenets of our university band program and is working well with all constituencies. I am proud of the changes Jon has made in the way the OSUMB and Athletic Bands operate and look forward to an even healthier environment for our students than ever before.

CHOOSE AN ITEM.

Overall Rating **EXCEPTIONAL**

Employee Comments (Attach a separate sheet if necessary)

Signatures

My supervisor and I have met to discuss this evaluation. (Signing this form indicates only that the form has been reviewed with you and that you have received a copy. It does not imply agreement.)

DocuSigned by:
Jon Waters
45DF0BD75CBA497

Employee Signature

Date

Supervisor Signature

Date

Chair/Director Signature

Unit HR Initials

Richard Blatti 6/2/14

Jon Waters 6/3/14

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College of Arts and Sciences

**2013/14 Performance Review & 2014/15 Performance Plan
Performance Plan for the period of 4/1/2013 – 3/31/2014**

Employee Name:

Empl ID#:

2014 – 2015 Performance Objectives

Supervisors – Use this tool to plan performance for the upcoming year. Examine the needs of the unit and review any areas for improvement you identified earlier in this performance evaluation and establish at least three SMART objectives below. Objectives can include behaviors for improvement, tasks or projects for completion, or stretch assignments. Discuss and agree to priority, resources and timelines and provide a copy of these goals to the employee. Objectives can be set during the performance evaluation discussion, or during a separate performance planning meeting, but should be completed no later than **May 31, 2014**. SMART Goals are as follows:

Specific - Objectives focus on specific results that are easily identified when they are achieved and when they are not.

Measurable - Establish metrics for the objectives - time, quality, quantity, etc.

Attainable - Objectives should be challenging yet realistic.

Relevant - Objectives should be relevant to the position and the individual employee, and **results-oriented**.

Time-bound - Objectives describe a clear time frame for completion OR can be broken down into steps with multiple due dates relevant to the position and the individual employee, and results oriented.

Objective 1	Develop a hiring strategy for additional administrative support
Result Desired	TBD
Timeline for Completion	1 year
Objective 2	Manage expectations of various university entities requesting service from the Director
Result Desired	TBD
Timeline for Completion	1 year
Objective 3	Manage professional staff for greater efficiency and delegation of specific assignments.
Result Desired	TBD
Timeline for Completion	1 year
Objective 4	
Result Desired	
Timeline for Completion	
Objective 5	
Result Desired	
Timeline for Completion	

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College of Arts and Sciences

2013/14 Performance Review & 2014/15 Performance Plan
Performance Plan for the period of 4/1/2013 - 3/31/2014

2014 - 2015 Professional Development Objectives

Development Opportunities	
Proficiency Expectations	
Timeline for Completion	

Signatures

My Supervisor and I have met to establish these performance objectives and I understand what is expected of me.

Employee Signature

Date

Supervisor Signature

Date

Chair/Director Signature

Unit HR Initials

Richard Blatti 6/2/14

[Signature] 6/3/14



SCHOOL OF MUSIC



THE OHIO STATE UNIVERSITY

ABOUT ADMISSIONS AREAS OF STUDY UNDERGRADUATE GRADUATE ENSEMBLES EVENTS OUTREACH ALUMNI / DONORS

Home » People > Waters

Jonathan Waters

Staff

Professional Staff

Jonathan Waters, Director of The Ohio State University **Marching and Athletic Bands**, served the bands for ten years as Assistant Director under the leadership of Emeritus Director, Dr. Jon Woods, and as Interim Director following Dr. Woods' retirement.

Jon Waters received his Bachelor of Music Education degree from The Ohio State University in 2000. He was a member of the OSU Marching Band from 1995-1999. He served as graduate assistant for the band for the 2000 and 2001 seasons and earned two Master's degrees, in Music Education and Conducting, from The Ohio State University.

Waters has written band shows for the Marching Band, Spring Athletic Band, and a number of high schools throughout the state. His other duties include teaching undergraduate conducting classes in the School of Music, as well as conducting various concert ensembles.

"Jonathan Waters Named Director," http://osumarchingband.com/cpt_news/2564/

* * * * *

[OFFICIAL OSUMB "Video Games" Halftime vs. Nebraska Oct. 6 ...](#)



waters.33@osu.edu

614 292-0360

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Tuttle Park Place
Columbus, OH 43210
(614) 292-2598

tbdbitl.osu.edu

Interim Assistant Director
Dr. Christopher Hoch

**Administrative Assistant
for OSU Bands**
Thomas Cook
(614) 292-7940

Areas of Expertise

- Associate Director of Bands
- Director of Marching and Athletic Bands

Education

- MA-Music Education and MM-Conducting, OSU
- BME, The Ohio State University

COLLEGE OF ARTS AND SCIENCES

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