

NO. A08-765

State of Minnesota
In Court of Appeals

James R. Williams,

Appellant,

vs.

The Board of Regents of The University of Minnesota,
and Joel Maturi, individually and in his capacity as the
Athletic Director for the University of Minnesota,

Respondents.

RESPONDENTS' BRIEF

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LEGAL ISSUES

1. Claims that require examination of University employment decisions may only be brought by writ of certiorari to the Minnesota Court of Appeals. Williams's claims for promissory and equitable estoppel and negligent misrepresentation relate to, and require inquiry into, the University's employment decision with respect to Williams. Did the trial court lack jurisdiction over these claims?

The trial court concluded that it lacked jurisdiction over Williams's estoppel and negligent misrepresentation claims. The most apposite cases are *Shaw v. Board of Regents of University of Minnesota*, 594 N.W.2d 187 (Minn. Ct. App. 1999); *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996); *Kobluk v. Regents of University of Minnesota*, No. C8-97-2264, 1998 WL 297525 (Minn. Ct. App. June 9, 1998); and *Michurski v. City of Minneapolis*, No. C8-02-238, 2002 WL 1791983 (Minn. Ct. App. Aug. 6, 2002). The most apposite statute is section 606.01 of Minnesota Statutes.

2. Public employees must avail themselves of the process offered by their public employers before claiming a lack of due process. Williams contends he was an employee, but did not utilize the University's grievance process. Does his due process claim fail?

The trial court concluded that Williams's failure to avail himself of the grievance process was fatal to his due process claim. The most apposite cases are *Winkowski v. City of Stephen*, 442 F.3d 1107 (8th Cir. 2006); *Smith v. Sorensen*, 748 F.2d 427 (8th Cir.1984), *cert. denied*, 471 U.S. 1054, (1985); and *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707 (8th Cir. 1996).

3. A required element of a liberty interest claim is that there be a material factual dispute about the stated reason for the discharge. Williams does not dispute the stated reason for the employment decision. For this and additional independent reasons, does his liberty interest claim fail against Athletic Director Maturi?

The trial court concluded that Williams failed to allege a viable liberty interest claim because of the lack of dispute over the truth of the statement and because the statement, as a matter of law, was not stigmatizing. The most apposite cases are *Codd v. Velger*, 429 U.S. 624 (1977); and *Coleman v. Reed*, 147 F.3d 751 (8th Cir. 1998).

4. Do the constitutional claims against Athletic Director Maturi for damages fail on the additional ground of qualified immunity?

The trial court concluded that Athletic Director Maturi was entitled to qualified immunity. The most apposite cases are *Elwood v. County of Rice*, 423 N.W.2d 671 (Minn. 1988); and *Monroe v. Arkansas State University*, 495 F.3d 591 (8th Cir. 2007).

STATEMENT OF THE CASE

James Williams brought this action in the district court contending that the University's men's basketball coach offered him a position as an assistant coach, that he accepted the offer, and that an employment contract was formed. He further contended that the University breached that contract when the University's Athletic Director, Joel Maturi, decided that the University should not employ Plaintiff because of his history of significant NCAA violations while previously employed by the University in the very same job. Based on these allegations, Williams initially asserted claims against the University and Maturi for breach of contract, promissory and equitable estoppel, intentional interference with contractual relations, negligent misrepresentation, negligence, and defamation. Later, he added constitutional claims against the University and Maturi. The Amended Complaint seeks injunctive relief—ordering the University to employ Williams as an assistant coach—and damages.

The Honorable Regina M. Chu granted defendants' motion to dismiss, dismissing all claims.¹ The non-constitutional claims were dismissed on jurisdictional grounds and the constitutional claims were dismissed for failure to state a claim. Williams appealed with respect to some of the claims, but has abandoned his claims for breach of contract, intentional interference with

¹ Appellant's Appendix at 1-12 [hereinafter App.].

contractual relations, negligence, and defamation, and, with respect to the University, the constitutional claims.

STATEMENT OF THE FACTS²

Williams contends that the University offered and he accepted a position as an assistant coach for the men's basketball team.³ He contends that, as a result, "an enforceable contract was formed between" him and the University.⁴ He further contends that the University "breached its contract with Williams by denying its existence and prohibiting Williams from assuming the position of assistant coach for the University men's basketball team."⁵ Williams also contends that after the breach of contract, he repeatedly requested a meeting with Athletic Director Maturi and that his requests were denied.⁶

Williams does not allege in his Amended Complaint that he signed an employment contract with the University; that he ever appeared on campus to work or actually performed any work for the University; or that he received any

² Because this is an appeal from the district court's granting of a motion to dismiss, the allegations of the Amended Complaint are assumed to be true.

³ App. 14 (Am. Compl. ¶ 10-11).

⁴ *Id.* at 15 (Am. Compl. ¶ 16).

⁵ *Id.* at 19 (Am. Compl. ¶ 38).

⁶ *Id.* at 17 (Am. Compl. ¶ 26). The University and Maturi deny all of these allegations; for purposes of the Motion to Dismiss only, we must accept them as true. Defendants note, though, that the evidence would show that the University did not offer any job to Williams. In fact, the men's basketball coach does not have hiring authority. The University decided not to hire Williams because of his NCAA violations while he was previously employed by the University. Also, as to the claimed lack of a meeting with Maturi, the evidence would show that Williams's attorney both spoke on the telephone and met in person with Maturi.

compensation from the University. And, although he alleges he was a University employee and that his employment contract was wrongfully terminated, he does not allege that he made any effort to pursue an employee grievance through the University conflict resolution process before filing suit. And he does not deny that the NCAA found him, on two separate occasions, to have committed serious violations of numerous NCAA rules, while previously serving as an assistant basketball coach at the University.

ARGUMENT

This is a case that should never have been brought. The University made a decision not to employ Williams as an assistant coach when Athletic Director Maturi learned that Williams was found by the NCAA Committee on Infractions—on two separate occasions—to have committed serious violations of NCAA rules and regulations while serving as an assistant basketball coach at the University many years ago. At the time the decision was made, Williams had not yet signed a contract, had not performed any work for the University, had not received any compensation from the University, and had not even appeared on campus.

On a motion to dismiss, the question is “whether the complaint sets forth a legally sufficient claim for relief.”⁷ Dismissal may be based on a dispositive issue of law,⁸ including lack of jurisdiction.⁹ According to the Minnesota Supreme Court, complaints relating to Section 1983 claims are held to a heightened pleading standard.¹⁰ When asserting Section 1983 claims against public officials, plaintiffs “should supply in their complaints or other supporting materials greater

⁷ *Elzie v. Comm’r. of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980) (quoting *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 670 (Minn. 1955)).

⁸ *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

⁹ See, e.g., *Tischer v. Hous. & Redevelopment Auth.*, 693 N.W.2d 426, 427 (Minn. 2005).

¹⁰ *Elwood v. Rice Cty.*, 423 N.W.2d 671, 675 (Minn. 1988).

factual specificity and ‘particularity’ than is usually required.”¹¹ This is because “[q]ualified immunity questions should be resolved at the earliest possible stage to shield [officials] from the disruptive effects of broad-ranging discovery and effects of litigation.”¹² The district court applied these standards and dismissed the Amended Complaint in its entirety.¹³

With respect to the non-constitutional claims, the district court concluded that inquiry into those claims would require examination of facts involving the University’s employment decision and, therefore, the court lacked jurisdiction over the claims.¹⁴ As discussed below, and as recognized by the district court, unambiguous Minnesota case law mandates that challenges to University employment decisions—regardless of how they are characterized in a complaint—may only be brought by writ of certiorari to this Court. Williams’s claims for estoppel and negligent misrepresentation all relate to the University’s employment decision. The district court’s dismissal of these claims should be affirmed.

With respect to the constitutional claims, the district court correctly concluded that Williams has not alleged facts showing a violation of his

¹¹ *Elwood*, 423 N.W.2d at 625.

¹² *Id.*

¹³ App. 1-12.

¹⁴ *Id.* at 7-8.

constitutional rights by Athletic Director Maturi.¹⁵ Williams’s property interest claim fails on its face because Williams chose not to take advantage of the complaint process available at the University. The law is clear that an individual who fails to utilize a public employer’s complaint process cannot then claim a deprivation of due process. Williams’s liberty interest claim fails, primarily, because the alleged stigmatizing statement—that the NCAA found him to have committed NCAA violations—is not disputed. It happened. For these reasons, Williams has not stated a viable constitutional claim against Maturi.

I. THIS DISTRICT COURT PROPERLY CONCLUDED THAT IT LACKED JURISDICTION OVER WILLIAMS’S NON-CONSTITUTIONAL CLAIMS.

As the district court correctly noted, a petition for writ of certiorari to the Court of Appeals pursuant to section 606.01 of Minnesota Statutes is the exclusive means by which employment decisions of the University may be challenged.¹⁶ The Minnesota Supreme Court has stated that the certiorari rule is “founded on separation-of-powers considerations”¹⁷ and has explained that this requires that “discretionary decisions be granted deference by the judiciary to avoid usurpation

¹⁵ App. 9-11.

¹⁶ See, e.g., *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187, 191 (Minn. Ct. App. 1999) (holding that as general rule certiorari is “the only method available for [judicial] review of a university decision”).

¹⁷ *Tischer*, 693 N.W.2d at 429 (citing *Willis*, 555 N.W.2d 227, 280 n.2 (Minn. 1996)).

of the executive body's administrative prerogatives."¹⁸ The Court further explained that "[b]ecause a direct action in the district court would contemplate de novo review, we have concluded that review by certiorari is required to provide appropriate deference and to minimize the judicial intrusion into administrative decision-making."¹⁹

The employment decisions covered by the certiorari rule include, but are not limited to, those relating to hiring, firing, and refusals to reinstate. The Minnesota Supreme Court has held that claims involving termination may only be brought by writ of certiorari to the Minnesota Court of Appeals.²⁰ Similarly, the Minnesota Supreme Court, in its 1990 *Dokmo* decision, held that the only avenue for challenging a denial of a request for reinstatement was by certiorari.²¹ This Court has specifically held that a challenge to a decision not to hire may only be brought by certiorari.²² Indeed, another decision of this Court illustrates how an applicant rejected for a coaching position followed the correct path—writ of

¹⁸ *Tischer*, 693 N.W.2d at 429 (Minn. 2005) (citing *Dietz v. Dodge Cty.*, 487 N.W.2d 237 (Minn. 1992)).

¹⁹ *Id.*

²⁰ *See, e.g., id.* at 432.

²¹ *Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d at 671, 677-78 (Minn. 1990).

²² *Michurski v. City of Minneapolis*, No. C8-02-238, 2002 WL 1791983, at *3-4 (Minn. Ct. App. Aug. 6, 2002).

certiorari to this Court—to challenge a school board’s decision.²³ The Minnesota Supreme Court and the Minnesota Court of Appeals consistently and uniformly require all challenges that implicate employment decisions of public bodies be brought exclusively by certiorari.

The Minnesota Supreme Court has declared it irrelevant how a plaintiff characterizes a challenge to an employment decision: “[r]egardless [of how] the claim is cloaked,” the claim is limited to certiorari review when it “involve[s] any inquiry into the [agency’s] discretionary decision to terminate.”²⁴ Thus, the district court lacks jurisdiction, whether a challenge is characterized as a claim for defamation,²⁵ intentional interference with prospective economic advantage,²⁶ intentional infliction of emotional distress and intentional interference with contract,²⁷ misrepresentation,²⁸ or wrongful termination.²⁹

²³ *Hartzberg v. Rosemount-Apple Valley-Eagan Indep. Sch. Dist. No. 196*, No. C8-96-1878, 1997 WL 292175, at *1 (Minn. Ct. App. June 3, 1997).

²⁴ *Willis v. Cty. of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996).

²⁵ *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 332–333 (Minn. Ct. App. 2007); *Springer v. City of Marshall*, No. CX-94-81, 1994 WL 396324, at *2 (Minn. Ct. App. Aug. 29, 1994).

²⁶ *Grundtner*, 730 N.W.2d at 333.

²⁷ *Narum v. Burrs*, No. C8-97-563, 1997 WL 526304, at *2 (Minn. Ct. App. Aug. 26, 1997) (dismissing claims against county supervisors because certiorari review was only avenue for review of termination decision).

²⁸ *Hansen v. Indep. Sch. Dist. 820*, No. C4-96-2476, 1997 WL 423567, at *2 (Minn. Ct. App. July 29, 1997).

Two University cases illustrate the scope of the doctrine: *Kobluk v. Regents of the University of Minnesota*, No. C8-97-2264, 1998 WL 297525 (Minn. Ct. App. June 9, 1998), and *Grundtner v. University of Minnesota*, 730 N.W.2d 323 (Minn. Ct. App. 2007).

In *Kobluk*, the plaintiff was a University faculty member who, after being denied tenure, sued the University alleging tortious interference with contract and breach of contract.³⁰ In finding the district court lacked jurisdiction over Kobluk's claims, this Court reasoned that his claims all arose "out of incidents surrounding" the tenure review process:

Kobluk's contract claims and fraud claims *arise out of incidents surrounding* the tenure review process. Similarly, his defamation claims on appeal are too difficult to extract from the University's internal management process. . . . The internal management of the University has been constitutionally placed in the hands of the regents alone. Because these claims cannot be examined without examining the University's internal management process, the only manner of review is by writ of certiorari to this court.

. . . .

The district court does not have jurisdiction over Kobluk's claims of breach of contract, tortious interference with contract, fraud, and defamation because they arise out of the University's internal management processes.³¹

²⁹ *Bechtold v. City of Rosemount*, No. C3-94-2366, 1995 WL 507583, at *2, 4 (Minn. Ct. App. Aug. 29, 1995).

³⁰ *Kobluk v. Regents of Univ. of Minn.*, No. C8-97-2264, 1998 WL 297525, at *1 (Minn. Ct. App. June 9, 1998).

³¹ *Id.* at *3-4 (emphasis added) (citations omitted).

In *Grundtner*, a former University architect alleged his employment contract was unlawfully not renewed because he reported the University's intent to engage in an illegal procurement practice.³² In addition to his statutory whistleblower claim, he also asserted tortious interference with contract against his supervisor, and defamation against the University. This Court affirmed the dismissal of the defamation claim, stating that "because the statements at issue here directly pertain to the reason for appellant's termination, an inquiry into the facts surrounding appellant's claim would require reviewing the university's discretionary decision to terminate appellant."³³ This Court affirmed the dismissal of the interference claim because "addressing the facts surrounding this claim [would] necessitate inquiring into the university's discretionary decision to terminate appellant."³⁴

Here, Williams's remaining non-constitutional claims—promissory estoppel, equitable estoppel, and negligent misrepresentation—fall squarely within the certiorari doctrine described above. As the district court correctly concluded, each claim would require inquiry into the facts surrounding the University's discretionary employment decision.³⁵

³² *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 328 (Minn. Ct. App. 2007).

³³ *Id.* at 333.

³⁴ *Id.*

³⁵ App. 7-8.

The estoppel claims are based explicitly on an alleged offer or promise of employment to Williams and the University's alleged failure to fulfill the terms of that offer or promise.³⁶ Just as in *Kobluk*, this claim arises "out of incidents surrounding" the hiring process, and the district court therefore lacked jurisdiction over this claim.

Williams faults the district court for citing to *Michurski* as support for dismissing the estoppel claims; but *Michurski* is directly on point. In *Michurski*, the plaintiff sought to enforce an oral promise of employment, exactly what Williams is attempting to do in this case.³⁷ The plaintiff contended that he had been promised the job by the employer and sued after his application for the job was rejected.³⁸ And, just as Williams does here, the plaintiff claimed that he was not challenging the employment decision, but only seeking compensation for the alleged breach of the promise.³⁹ This Court rejected the plaintiff's argument, concluding that the contract claim based on the alleged promise could not be separated from the employment decision.⁴⁰ Williams's claims, as the district court

³⁶ App. 8-10 (Am. Compl., ¶¶ 48-60).

³⁷ *Michurski v. City of Minneapolis*, No. C8-02-238, 2002 WL 1791983, at *1 (Minn. Ct. App. Aug. 6, 2002).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

properly concluded, are no different. Williams's claims cannot be separated from the employment decision.⁴¹

Evaluating plaintiff's negligent misrepresentation claim necessarily requires inquiry into facts surrounding the University's employment decision. The alleged false representations involve whether the University offered Williams an assistant basketball coach position.⁴² Simply using the label of "misrepresentation" does not change the jurisdictional analysis.⁴³ In *Hansen*, this Court cited *Willis* for the proposition that a "court is not bound by the labels attached to the plaintiff's claims, rather it focuses on what the plaintiff is really claiming."⁴⁴ This Court then concluded that the claim, labeled as misrepresentation, was one that would require scrutiny of how "the school district discharged its administrative duties" and therefore a writ of certiorari was necessary.⁴⁵ Here, Williams's misrepresentation claim would require scrutiny of how the University discharged its duties specifically surrounding its employment decision. For this reason, the district court correctly dismissed the claim.

⁴¹ App. at 7.

⁴² See, e.g., App. 11-12 (Am. Compl., ¶¶ 67, 68).

⁴³ *Hansen v. Indep. Sch. Dist. 820*, No. C4-96-2476, 1997 WL 423567, at *2 (Minn. Ct. App. July 29, 1997).

⁴⁴ *Id.*

⁴⁵ *Id.*

Facing a lack of any supporting case law, Williams argues that this is a case of first impression because the alleged misrepresentations were made to a non-employee.⁴⁶ However, the status of the individual subject to the public body's decision is irrelevant under the certiorari doctrine applicable here, which is rooted in separation of powers principles. The Minnesota Supreme Court has stated that the certiorari rule requires that "discretionary decisions be granted deference by the judiciary to avoid usurpation of the executive body's administrative prerogatives." The status of the plaintiff as a non-employee is an irrelevant factor. Moreover, the Minnesota Supreme Court and this Court both have made clear that deference is owed not just to termination decisions, but to hiring decisions as well.⁴⁷ Hiring decisions, of course, usually will involve non-employees. Williams's argument that this is a case of first impression is simply wrong.

This case presents a straightforward application of the certiorari rule. The Amended Complaint—which specifically seeks an order directing the University to employ Williams—is a challenge to the University's discretionary employment decision. All of Williams's non-constitutional claims would require judicial

⁴⁶ Appellant's Brief at 11.

⁴⁷ See *Foesch v. Indep. Sch. Dist. No. 646*, 223 N.W.2d 371, 375 (Minn. 1974) (stating that deference is owed to a board of education's hiring decisions); *Michurski v. City of Minneapolis*, No. C8-02-238, 2002 WL 1791983, at *3 (Minn. Ct. App. Aug. 6, 2002) (stating that "certain employment decisions by an administrative body, such as hiring or termination, have been subject to review only by writ of certiorari.").

scrutiny of that decision and the University's hiring process. Accordingly, the district court's dismissal of the non-constitutional claims should be affirmed.

II. WILLIAMS HAS FAILED TO STATE A VALID CONSTITUTIONAL CLAIM.

On appeal, Williams has abandoned his dismissed constitutional claims against the University; here, he only asserts constitutional claims against Athletic Director Maturi. In his Amended Complaint, Williams contends Maturi violated his constitutional rights by not meeting personally with him after making the employment decision, and also allegedly by saying that the employment decision was based on Williams's history of NCAA violations.⁴⁸

Williams has sued Maturi in his personal capacity for damages and in his official capacity for injunctive relief. As a public official, Maturi is entitled to qualified immunity from claims brought against him for damages. But, as Williams points out, qualified immunity does not apply against claims brought against public officials for injunctive relief in their official capacities.

Nonetheless, the analysis required for qualified immunity shows that the claims against Maturi fail both for damages and for injunctive relief. The United States Court of Appeals for the Eighth Circuit has articulated a two-part inquiry to determine if qualified immunity applies—first, whether a plaintiff has alleged a constitutional violation, and, second, whether the right allegedly violated was

⁴⁸ App. 16, 29-31 (Am. Compl. ¶¶ 23, 101, 102, 106, 107).

clearly established.⁴⁹ With respect first to the property interest claim and second to the liberty interest claim, defendants demonstrate in this section that Williams has failed to allege a violation of his rights and, in addition, that the rights allegedly violated were not clearly established.

A. THE LAW OF QUALIFIED IMMUNITY

As stated by the Minnesota Supreme Court, qualified or “good faith” immunity protects public officials from personal liability on constitutional claims when the officials acted in an objectively reasonable fashion.⁵⁰ The qualified immunity doctrine, as held by the United States Supreme Court, provides government officials with an affirmative defense to damages claims “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁵¹ The reasonableness of an official’s conduct is viewed in light of the legal rights that were “clearly established” at the time the action was taken.⁵² For a right to be “clearly established,” “[t]he contours of the right must be sufficiently clear that a

⁴⁹ *Monroe v. Ark. State Univ.*, 495 F.3d 591, 594 (8th Cir. 2007).

⁵⁰ *Elwood v. Cty. of Rice*, 423 N.W.2d 671, 674 (Minn. 1988) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)).

⁵¹ *Harlow*, 457 U.S. at 818.

⁵² *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 818-19).

reasonable official would understand that what he is doing violates that right.”⁵³

The United States Supreme Court has interpreted qualified immunity as

“protecting all but the plainly incompetent or those who knowingly violate the law.”⁵⁴

Even if a right is clearly established, an individual defendant is protected by qualified immunity if, based on the knowledge available at the time, a reasonable official would not know that his or her actions would clearly violate the right.⁵⁵ In other words, an official will lose qualified immunity only if the law that he or she violated was clearly established at the time of the violation and the particular application of the law to the situation at hand was evident.⁵⁶ An official’s actions will not be found to have clearly violated the right where reasonable public officials in the same situation would have followed the same course of action or where officials of reasonable competence would disagree on the appropriate course of action to follow.⁵⁷

Thus, a two-part inquiry is required with respect to Williams’s Section 1983 claims against Maturi: (1) whether Williams has alleged facts showing a

⁵³ *Anderson*, 483 U.S. at 640.

⁵⁴ *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

⁵⁵ *Foster v. Basham*, 932 F.2d 732, 735 (8th Cir. 1991).

⁵⁶ *Greiner v. City of Champlin*, 27 F.3d 1346, 1351 (8th Cir. 1994).

⁵⁷ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

violation of his constitutional rights, and (2) if so, whether “the right was clearly established such that a reasonable person would have known that his conduct violated the law.”⁵⁸

Contrary to Williams’s argument, the issue of qualified immunity is appropriately decided on a motion to dismiss. On many occasions, the Eighth Circuit has dismissed claims on motions to dismiss based on qualified immunity.⁵⁹ This makes sense given the United States Supreme Court’s admonition that “the defense [of qualified immunity] is meant to give government officials a right, not merely to avoid “standing trial,” but also to avoid the burdens of “such *pretrial* matters as discovery . . . , as “[i]nquiries of this kind can be peculiarly disruptive of effective government.”⁶⁰

B. THE PROPERTY INTEREST CLAIM FAILS.

1. WILLIAMS HAS NOT STATED PROPERTY INTEREST CLAIM.

a. THE CLAIM, AS PLEADED IN THE AMENDED COMPLAINT, FAILS.

The district court correctly concluded that Williams was required to utilize the University’s grievance process before alleging a deprivation of his due process

⁵⁸ See *Monroe v. Ark. State Univ.*, 495 F.3d 591, 594 (8th Cir. 2007).

⁵⁹ See, e.g., *Dornheim v. Sholes*, 430 F.3d 919, 926 (8th Cir. 2005) (affirming dismissal for failure to state a claim in civil rights suit); *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005) (reversing denial of motion to dismiss based on qualified immunity).

⁶⁰ *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (emphasis added) (quoting from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

rights.⁶¹ The Amended Complaint does not allege that Williams pursued that process (and, as is clear from his brief, in fact, he did not pursue that process). As shown in multiple decisions of the Eighth Circuit, an individual cannot claim a deprivation of due process when that individual fails to take advantage of the process available to him. Thus, the district court decision must be affirmed.

Williams's argument before the district court was that he had a constitutional right—after the employment decision—to meet personally with Athletic Director Maturi, and that he was not required to pursue his grievance through the available process. But there is no law supporting this argument; to the contrary, the Eighth Circuit has made clear that an individual must take advantage of the process available, stating that “a governmental employee cannot recover for a due process violation where the employee simply fails to avail himself of the post-termination process that was available.”⁶² The Eighth Circuit has followed the same reasoning in both liberty and property interest settings, dismissing due process claims when a public employee has failed to take advantage of the employer's grievance procedures.⁶³ Here, Williams has not alleged that he

⁶¹ App. 9-10.

⁶² *Winkowski v. City of Stephen*, 442 F.3d 1107, 1110-11 (8th Cir. 2006) (finding that failure to request a name clearing hearing was fatal to a liberty interest claim).

⁶³ *See, e.g., Riggins v. Bd. of Regents of Univ. of Neb.*, 790 F.2d 707, 711-12 (8th Cir. 1996) (finding that the employee's failure to pursue a grievance through the university's grievance process was fatal to his due process claim) (citing *Smith v. Sorensen*, 748 F.2d 427, 434-36 (8th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)).

pursued his claim through the University grievance process and, therefore, as the district court concluded, his claims fail.

In this Court, Williams presents two arguments relating to his failure to take advantage of the University's grievance process—that he was “arguably unaware of it,” and that he would not have been allowed to pursue an internal grievance. Both arguments fail.

First, there is no law to suggest that an individual's claim of unawareness of the available process (or “arguable” unawareness) excuses his duty to pursue it before suing for failure to provide adequate process. Williams claims he was a University employee, and as such, he was expected to know and follow University policies. Moreover, as is clear from Williams's submissions to this Court, he was represented by counsel at the very time he could and should have pursued his grievance. The University grievance process is a matter of public record, and has been discussed in at least two decisions of this Court.⁶⁴

Second, Williams's futility argument is unavailing. Williams argues that, had he sought to pursue an internal grievance, “it would have no doubt been denied” and, therefore, “was never really available to Williams.”⁶⁵ Williams is correct that the University's position (outside this motion) is that he was not hired

⁶⁴ *Univ. of Minn. v. Woolley*, 659 N.W.2d 300, 306 (Minn. Ct. App. 2003); *Stephens v. Bd. of Regents of Univ. of Minn.*, 614 N.W.2d 764, 774 (Minn. Ct. App. 2000).

⁶⁵ Williams Brief at 28.

as an assistant basketball coach. But Williams's due process claim depends upon him being a public employee, and there is no law to suggest that public employees can bypass a grievance procedure just because they believe they will be unsuccessful. To the contrary, as discussed above, the law mandates that individuals pursue available process before claiming a denial of process.

Williams's property interest claim fails.

b. THE CLAIM, AS ALTERED FOR THIS APPEAL, FAILS.

On appeal, and in response to the district court's decision, Williams now attempts to change his property interest claim. Now he argues that this case is governed by the United States Supreme Court's *Loudermill* decision.⁶⁶ *Loudermill* stands for the general proposition that a public employee normally is entitled to some form of a hearing prior to employment termination. Notably, neither a pretermination right nor the *Loudermill* decision itself was even mentioned to the district court. For the reasons discussed below, this Court should reject this new argument.

First, Williams did not plead that he was deprived a pretermination hearing. The Minnesota Supreme Court has stated that Section 1983 claims against public officials are held to a heightened pleading standard, and greater specificity and particularity is required.⁶⁷ The Amended Complaint only focuses on the Athletic

⁶⁶ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

⁶⁷ *Elwood v. Rice Cty.*, 423 N.W.2d 671, 675 (Minn. 1988).

Director's alleged refusal to meet with him after the alleged breach of the employment contract:

101. Subsequent to the breach of his employment contract with the University, and Maturi's defamatory per se statements to local media outlets, Williams repeatedly requested an opportunity to meet with Maturi to discuss the matter and the alleged NCAA infractions. These repeated requests were denied.
102. The University and Maturi, individually and/or in the course and scope of his employment as Athletic Director for the University, have deprived Williams of his constitutionally protected property rights without due process of law.

If Williams intended to base his due process claim on an alleged deprivation of a pretermination hearing, he was required to plead this claim in his Amended Complaint.

Second, Williams never argued before the district court that he was deprived of any pretermination hearing and he never cited *Loudermill* to the court. The Minnesota Supreme Court has stated that "the general rule is that appellate courts will not consider questions which were not presented to or decided by the district court."⁶⁸ Williams should not be allowed to fundamentally change his claim from what he alleged in his Amended Complaint and argued to the district court.

⁶⁸ *Watson v. United Serv. Auto Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997).

Third, and most significantly, a *Loudermill* pretermination hearing simply does not apply in the context of Williams's allegations here. As discussed below, the concept of a pretermination hearing and the rationale for requiring it in other circumstances simply do not fit this case.

Loudermill involved an employee on the job for eleven months when he was terminated;⁶⁹ he was working and receiving benefits. The Supreme Court determined that a public employee has a significant interest in "retaining employment," and concluded that a pretermination hearing normally was necessary in such cases.⁷⁰ Similarly, Eighth Circuit decisions discussing *Loudermill* involve public employees on the job, working, and obtaining benefits.⁷¹ Notably, as stated by the Eighth Circuit, "the hearing does not have to precede the termination decision, but only must precede the termination of benefits."⁷² The message from these cases is clear—courts seek to protect the status quo by requiring a hearing before the status quo is interrupted and an employee is forced off the job without benefits.

⁶⁹ 470 U.S. at 535.

⁷⁰ *Id.* at 542-45.

⁷¹ See, e.g., *Schleck v. Ramsey Cty.*, 939 F.2d 638, 640 (8th Cir. 1991) (describing the plaintiffs as "longtime" employees); *Krentz v. Robertson*, 228 F.3d 897, 903 (8th Cir. 2000) (stating that employee became fire chief in 1987 and was discharged in 1997).

⁷² *Schleck*, 939 F.2d at 902 (quoting *Krentz*, 228 F.3d at 641-42).

Simply making the decision to terminate employment is not considered an interruption of the status quo.

In this case, at the time of the employment decision the status quo was that Williams had not yet begun performing any duties as assistant basketball coach and had not yet begun receiving any compensation or any benefits. Thus, a “pretermination” hearing called for in *Loudermill* and subsequent Eighth Circuit cases simply has no meaning in this case as pleaded. Upon learning of the employment decision, Williams could easily have availed himself of the University’s grievance process. Such process would have protected whatever property interest Williams had at that time, and would have fully satisfied his due process rights.⁷³

The district court’s dismissal of the property interest claim should be affirmed.

2. THE CLAIM AGAINST MATURI IN HIS PERSONAL CAPACITY ALSO FAILS BECAUSE THE ALLEGED RIGHT WAS NOT CLEARLY ESTABLISHED.

Even if Williams had stated a viable property interest claim, it would still fail as asserted against Athletic Director Maturi in his personal capacity because of his qualified immunity. The allegations do not show a violation of a clearly established right such that a reasonable public official would be have been aware

⁷³ Defendants do not agree that Williams was entitled to any process. As a job applicant, not an employee, he had no property interest in the position he was seeking at the University. *See Ellis v. City of Minneapolis*, 410 N.W.2d 77 (Minn. Ct. App. 1987) (citing *Vruno v. Schwarzwaldler*, 600 F.2d 124, 130 (8th Cir. 1979)).

that the alleged conduct would violate the constitutional right. The only alleged wrongful conduct is Maturi's failure to meet personally with Williams after the decision not to employ Williams as a basketball coach. The question then is would a reasonable public official be aware that this failure violated Williams's constitutional rights. Maturi made a decision relating to an individual who had not signed a contract with the University, not performed any work for the University, and not been compensated by the University. Further, Maturi is an official of an institution that has a fully developed, well publicized grievance resolution process. In these circumstances, a reasonable public official would not likely be aware that not meeting with Williams would violate his federal constitutional rights. The district court correctly concluded that Maturi was, in fact, entitled to qualified immunity.

C. THE LIBERTY INTEREST CLAIM FAILS.

1. WILLIAMS HAS FAILED TO ALLEGE A VIOLATION OF HIS LIBERTY INTEREST.

The Amended Complaint's sole allegation relating to any liberty interest is that Maturi "falsely den[ie]d that Coach Smith hired Williams as an assistant coach with the University men's basketball team, and suggest[ed] that it was due to alleged NCAA infractions that purportedly occurred three decades ago at the University."⁷⁴ As the district court held, these alleged statements, as a matter of law, do not amount to a violation of plaintiff's constitutional rights.

⁷⁴ App. 18 (Am. Compl.) ¶ 34.

The Eighth Circuit has held that a “liberty interest may be implicated when a governmental employer makes statements that may seriously damage the employee’s good name.”⁷⁵ There are three elements of this liberty interest claim: (1) the reason for the discharge must stigmatize the plaintiff; (2) the administrators must have made the reasons public; and (3) the plaintiff must establish that he or she “denied the charges for which she was terminated.”⁷⁶ With respect to this last element, the Eighth Circuit requires “a plaintiff to at least deny the substantial truth of the allegations.”⁷⁷ In addition, the Eighth Circuit has required a plaintiff to have requested a name-clearing hearing before asserting that his liberty interests have been violated.⁷⁸

First, there can be no finding of a violation of plaintiff’s liberty interest because he has not denied that the NCAA found him to have committed NCAA violations. The Eighth Circuit has made clear that a plaintiff must “at least deny the substantial truth of the allegations.”⁷⁹ The United States Supreme Court has reasoned that “there must be some factual dispute between an employer and a

⁷⁵ *Coleman v. Reed*, 147 F.3d 751, 754-55 (8th Cir. 1998) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 677 (1972)).

⁷⁶ *Id.* (citations omitted).

⁷⁷ *Id.* (citation omitted).

⁷⁸ See *Winkowski v. City of Stephen*, 442 F.3d 1107, 1111-12 (8th Cir. 2006).

⁷⁹ See *Coleman*, 147 F.3d at 1998.

discharged employee which has some significant bearing on the employee's reputation."⁸⁰ Here, there is no such dispute as Williams has not denied and could not deny that the NCAA found him to have committed NCAA violations.

In his brief, Williams admits that the NCAA found him to have committed violations, but he asserts that the NCAA's findings were not correct. Whether the NCAA was correct or not is irrelevant. The NCAA did, in fact, find Williams to have committed NCAA violations and that is what Athletic Director Maturi allegedly said. Williams simply has not and could not dispute the basis for the employment decision—the NCAA's findings of serious violations. Thus, the claim fails.

In addition, the district court correctly concluded that the alleged statements are not of a character that could be considered stigmatizing. The Eighth Circuit has described the high standard for a statement to be considered stigmatizing as follows:

An employee's liberty interests are implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges. The requisite stigma has generally been found when an employer has accused an employee of dishonesty, immorality, criminality, racism, and the like.⁸¹

For example, the Eighth Circuit has found statements that a music professor

⁸⁰ *Codd v. Velger*, 429 U.S. 624, 627 (1977).

⁸¹ *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir. 1994).

misappropriated funds, encouraged events that had “inappropriate sexual overtones,” and made his chorale group look “cult-like” to be stigmatizing.⁸² In contrast, the Minnesota Supreme Court has stated that “discharge on grounds of poor performance, poor judgment, incompetence, unsatisfactory performance, or even insubordination is not stigmatizing.”⁸³ Here, the alleged statement does not accuse Williams of “dishonesty, immorality, criminality, racism and the like.” Rather, the alleged statement by Maturi simply provides the fact that “three decades ago” the NCAA found that Williams had committed NCAA violations. As the district court held, such an alleged statement cannot be considered stigmatizing as that term has been defined by the Eighth Circuit and the Minnesota Supreme Court.

Finally, the liberty interest claim also fails because Williams has not alleged in his Amended Complaint that he requested a public name-clearing meeting. The United States Supreme Court has stated that “the remedy mandated by the Due Process Clause of the Fourteenth Amendment is ‘an opportunity to refute the charge.’”⁸⁴ The Eighth Circuit has held that the failure to request the remedy from the government—a name-clearing hearing—is fatal to a liberty

⁸² *Putnam v. Keller*, 332 F.3d 541, 545-46 (8th Cir. 2003).

⁸³ *Johnson v. Indep. Sch. Dist. No. 281*, 494 N.W.2d 270, 275 (Minn. 1992).

⁸⁴ *Id.* (citation omitted).

interest claim.⁸⁵ As discussed above, Williams has not alleged that he sought to participate in the University's conflict resolution process to dispute the truth of the statement. Thus, he cannot claim that his liberty rights have been infringed.

For each of the above-described reasons, Williams has failed to allege a violation of his liberty rights and the district court properly dismissed the claims.

2. THE ALLEGED VIOLATED RIGHT WAS NOT CLEARLY ESTABLISHED.

With respect to the claim for damages against Maturi, that claim fails for the additional reason that the allegations could not be considered sufficient to show a violation of a clearly established constitutional right. A reasonable public official would not know that making a truthful statement that an individual had been found to have violated NCAA rules would violate that individual's constitutional rights. The liberty interest claim against Maturi in his personal capacity fails for this additional reason.

CONCLUSION

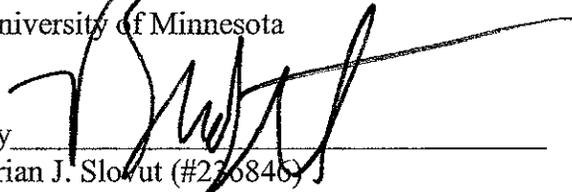
The University has the authority to decide whom it employs. In this case, a decision was made to not employ an individual who, when previously employed by the University, had been found to have committed serious violations of NCAA rules. Williams's challenges to that decision do not state viable causes of action. His state law claims fail because each would require inquiry into facts involving the University's employment decision and decision-making. Thus, the district

⁸⁵ *Winkowski v. City of Stephen*, 442 F.3d 1107, 1110-11 (8th Cir. 2006).

court lacked jurisdiction to hear those claims. The constitutional claims fail because, in short, they do not rise to a constitutional level. The Amended Complaint does not allege a viable claim against Athletic Director Maturi for violating Williams's constitutional rights. The University and Athletic Director Maturi respectfully request that the district court decision be affirmed.

Dated: July 17, 2008

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