

NO. A06-0627

State of Minnesota
In Court of Appeals

Gregory Phillips,

Appellant,

vs.

State of Minnesota, the Minnesota State College and
University Systems, the Board of Trustees of the
Minnesota State Colleges and Universities,
Minneapolis Community and Technical College,
Josephine Reed-Taylor and Philip Davis,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Did the trial court err in determining that a Public College does not have to follow its own Mandatory Policy designed to safeguard the Due Process rights of those accused of Discrimination or Harassment?
- II. Did the trial court err in determining that the Plaintiff was not entitled to any Constitutional Due Process rights?
- III. Did the trial court err in not imposing sanctions for the Spoilation of Evidence?
- IV. Can the dismissal of the plaintiff stand when the college based its decision on a process that violated the plaintiff's due process rights?

STATEMENT OF THE CASE

Plaintiff, Gregory Phillips, served a lawsuit (App 3-11) upon the defendants on August 19, 2004 alleging a violation of his due process rights and race discrimination.¹ Both the plaintiff and the defendant brought motions for summary judgment. The trial court in Findings of Fact, Conclusions of Law and Order (App 84-92) found that "in several ways the college failed to follow its internal rules and procedures" but granted summary judgment for the defendant because the college did not publicly announce the reason it was terminating the plaintiff. The trial court

¹ Appellant is not appealing the dismissal of the race discrimination claim. The trial court denied Appellant's motion to compel the production of the investigative file of a white faculty member who admitted to having sex with a student who was not terminated from his employment at the College making it difficult to pursue the race claim. The trial

determined there was no liberty interest implicated unless the college publicly announced the reason for the non retention. The trial court denied plaintiff's motion for summary judgment.

The trial court granted defendant's motion for summary judgment on January 23, 2006. Judgment was entered on January 25, 2006. The instant appeal followed. (App 1-2)

STATEMENT OF THE FACTS

Plaintiff, Gregory Phillips (hereinafter "Phillips") began his employment as an instructor at Minneapolis Community Technical College (hereinafter "MCTC") in January of 2001. Professor Phillips is a Black male and was the only Black professor in the English Department. About 40 percent of the 11,000 students at MCTC are students of color while between 8 to 10 percent of the faculty are faculty of color. (App 74, Davis Dep. p. 6.) Beginning in January of 2001 and continuing, prior to the beginning of each semester, Phillips would be furnished a list of courses that it was proposed that he would teach and he would indicate which of the courses he wanted to teach. In addition, he would be provided with a notice of appointment stating that in accordance with the Employment Contract between Minnesota State Colleges and Universities (hereinafter "MnSCU") and the Minnesota

court did provide counsel for the appellant with the name of the student complainant and

Community College Faculty Association, he was being informed of an official appointment. He taught each semester including summer. (App 13, Phillips Aff. at ¶ 4.)

The first semester he taught three courses. However, he taught a full load of five courses per semester for the remainder of his time at MCTC. (App 13 Phillips Aff. at ¶ 5.) His evaluations were good and there was an understanding that he would be considered for the first available full time tenure track position in the English Department. (App 13, Phillips Aff. at ¶6.) Professor Phillips had gone through the process described above and was scheduled to teach the Spring Semester of 2004. He had checked off the courses he would teach on the list he received from his department as he had in every other semester. He ordered books that his students would have to purchase at the Campus bookstore for these courses. The courses were listed in the College's catalog and the College's Registrar's Office. (App 13, Phillips Aff. at ¶ 7.) Based on the College's course of conduct, he had an expectation of continued employment as long as he wanted it and at bare minimum an expectation of teaching the Spring Semester 2004. (App 13, Phillips Aff. at ¶ 8.)

The Mandatory Policy for Investigating Complaints of Sexual Harassment

MnSCU has developed a system wide policy called the 1B.1 policy which mandates how investigations of discrimination and harassment complaints are to be handled by the various colleges² in the system. (App 18-28)³ (App 70-71, Reed-Taylor Dep. pp. 20-22.) According to the President of the college, the mandatory policy applies to all individuals associated with the College and is to be used when a complaint of sexual harassment is made at the college. (App 76, Davis Dep. pp. 13-15.) The policy “is intended to protect the rights and privacy of both the complainant and respondent.” (App 75-76, Davis Dep. pp. 11-15; App. 29) According to Vice-President of the college Josephine Reed-Taylor, the policy allows for due process for those involved. (App 72, Reed-Taylor Dep., p. 21.) The College was required to afford Professor Phillips the procedures set forth in the 1B.1 policy. *Id.* at p. 22 (App 72). According to both the President and Vice-President of MCTC, the designated investigator had no discretion on whether or not to follow these procedures. (App 76, Davis p. 16; App 71-72, Reed-Taylor Dep. pp. 20-22.)

² MCTC is a college in that system.

³ The College maintains a separate version of the MnSCU policy entitled 2.01.01 Investigating complaints of Discrimination and Harassment. (App 29-35)

The MnSCU policy (App 18-28) and MCTC policy (App 29-35) set forth information that must be provided to the respondent at the time initial contact is made. The policy states that the designated officer or investigator⁴ shall:

a.) inform the respondent **in writing** (emphasis added) of the existence and general nature of complaint and the provisions of the non-discrimination policy;

b.) provide a copy of the policy and the report/complaint procedure to the respondent;

c.) advise the respondent of other options such as alternative dispute resolution or mediation;

d.) explain to the respondent that in addition to being interviewed by the designated officer, the respondent may provide a written response to the allegations.

The policies also require that the investigator provide a Tennessee warning in accordance with state law (App 23,33(Tennessee Warning) and a copy of the investigative report (App 24.)

⁴ The designated officer in this case was Diana Cusik, an attorney and Director of Legal Affairs for MCTC. (App 60, Cusick Dep. p. 7.) She was charged with conducting the

The Investigation

The College did not follow these mandatory procedures in the investigation of an allegation of sexual harassment against Phillips. On or about December 12, 2003, Phillips was orally informed by Cusick (hereinafter "Cusick"), the Designated Investigator under the policy, that a complaint of sexual harassment had been lodged against him by someone in the College bookstore and that he should stay out of the bookstore. (App 13, Phillips Aff. at ¶ 9.) This is the sum total of what Phillips was told.

At the time of the initial contact, Phillips was not informed in writing of the existence and general nature of the complaint in violation of MCTC's mandatory policy. (App 32) He was not provided a copy of the MCTC policy and the report/complaint procedure in violation of MCTC's mandatory policy. (App 32; App 14, Phillips Aff. at ¶ 11.) He was not provided with anything in writing about the complaint or the process for investigating the complaint. (App 63, Cusick Dep. p. 27.)

Phillips was also not advised of options such as alternative dispute resolution or mediation in violation of MCTC's mandatory policy. (App 32); (App 14, Phillips Aff. at ¶ 12.) Further, it was not explained to him that in addition to being interviewed by Ms. Cusick, he could provide a written

response to the allegations⁵. (App 32; App 14, Phillips Aff. at ¶ 13.) The MnSCU and MCTC Policies provide that Phillips could have other individuals present during the interview but he was not informed of this right. (App 14, Phillips Aff. at ¶ 14.)

Other violations of the MCTC policy, as well as the MnSCU policy, followed including the fact that he was not provided with a written or oral Tennessee warning in violation of MCTC policy and state law. (App 14, Phillips Aff. at ¶ 15) (App.63, Cusick Dep. p. 26.) The Tennessee warning tells a witness what his rights are before he gives testimony and answers any questions. It warns a witness that what they say can be used against them. Phillips was also not asked if there were any witnesses who should be questioned on his behalf. (App 14, Phillips Aff. at ¶ 16.)

Most critical was the fact that he was not provided with sufficient information to allow him to adequately respond to the substance of the complaint. (App 14, Phillips Aff. at ¶ 17.) He was not provided the name of the individual who was making accusations against him nor the names of any witnesses who were interviewed and what they were saying. (App 14, Phillips Aff. at ¶ 18.) For example, if he knew that the witnesses were

⁵ Although, it is impossible to respond verbally or in writing when you do not know the detail of what you are charged with.

stating that he came into the bookstore he could respond that he was there to check on the books for his next semester courses.⁶

All Phillips could say was that he didn't do anything wrong. It's impossible to provide a defense when you do not know the details of what you are alleged to have done. (App 15, Phillips Aff. at ¶ 19. He was also not provided with a reasonable time and opportunity to present testimony in his defense. (App 15, Phillips Aff. at ¶ 20.) Phillips was not provided with a hearing before an impartial board or tribunal. (App 15, Phillips Aff. at ¶ 21; App 67, Cusick Dep. p. 61.) Finally, Phillips met with the investigator only one time for approximately ten minutes. (App 15, Phillips Aff. at ¶22.)

The Investigative Report prepared by Cusick

Under the MnSCU and MCTC Policy, the designated officer is required to create, gather and maintain investigative documentation. (App 23: App 33) During the course of her investigation, Cusick took notes during her interviews of the complainant, the respondent, and the witnesses. (App 61, 63, 68, Cusick Dep. pp.19-21, 27-28, 65-66; App 79, Student⁷ Depo. pp. 31, 52-53.) All of these notes were destroyed and not maintained in the file as required by the policy. (App 61, Cusick Dep. pp. 20-21.)

⁶ There had been a problem with books in the previous semester.

These interview notes indicated the date witnesses were interviewed on, the questions they were asked and the answers that they gave to these questions as well as who was present during the questioning. (App 61, 63, Cusick Dep. pp. 20, 27; App 79, Student Dep. p. 31.)

On or about January 9, 2004, President of the College, Phillip Davis (Davis) informed Cusick that there had been questions raised regarding problems with the procedures that had been used to investigate the complaint against Phillips. (App 77, Davis Dep. p. 27.) At that time, Davis requested that Cusick investigate whether the student had asked Phillips to write a take home history paper for her⁸. (App 77, Davis Dep. pp. 25,27.) Any notes of the subsequent investigation were also destroyed.

During the course of the investigation, the Student Complainant provided lists of all of the places and times that she saw Professor Phillips. (App 82-83, Student Depo. pp. 52-54.) According to the testimony of the Student Complainant, Cusick informed her that the lists she had provided indicated that Professor Phillips must be leaving his regularly scheduled classes to view her in the bookstore (App 83, Id. at p. 53.) Professor

⁷ The student making the complaint against Professor Phillips is referred to as student or student complainant.

⁸ A discussion of this portion of the investigation will be discussed below, The testimony of the Student was that she did tell Phillips that she wanted someone to write the paper.

Phillips was not provided with a copy of the lists or informed of their existence so that he could show he was in class when the student was alleging he came into the bookstore. Cusick did not provide Phillips with the name of his accuser (App 63, Cusick Dep. p. 28) or the names of witnesses testifying against him or what they were saying. (App 63, Cusick Dep. p. 28; App 14, Phillips Aff. at ¶ 18.) At no time during the investigation did Cusick ask Phillips if there were any witnesses she should interview on his behalf. (App 15, Phillips Aff. at ¶ 16.)

At the conclusion of her so-called investigation, Cusick prepared a written report. (App 38-43) Not only was nothing provided to Phillips at the beginning of the investigation, after Cusick concluded her investigation she did not provide Phillips with a copy of the investigative report. (App 65, Cusick Dep. pp. 45-46.) This too was a violation of the College's policy

Decision to Terminate Phillips based on Cusick Investigative Report

On or about December 18, 2003, Phillips received a letter (App 44) from Senior Vice President Josephine Reed-Taylor, the decision maker under the policy, terminating his employment. (App 15, Phillips Aff. at ¶ 23.) The letter contained information that Phillips had not been informed of

However this fact was missing from the investigative report and President Davis

or questioned upon and it also contained false information. (App 15, Phillips Aff. at ¶ 24.)

Vice-President Reed Taylor, based her decision to terminate Phillips solely on the investigative report (App 38-43) of Cusick. She did not talk to the investigator or any of the witnesses or review any other documents. (App 70, Reed-Taylor Dep. pp. 11-12.)

The investigative report relied upon by the College in terminating Professor Phillips contained numerous factual inaccuracies. Cusick admitted to some of these in her deposition testimony including the fact that items that she said had been corroborated by other witness in fact had not been corroborated. (App 64,66,68, Cusick Dep. pp. 41-43, 56, 65.) The investigative report (App 39) also lists as facts items that are contradicted by the handwritten complaint of the Student Complainant. (App 37) For example the handwritten complaint made by the student on December 8, 2003 (App 37) states that the student met Phillips in mid November while the Cusick investigative report (App 39) states that the harassment continued through October, November and December. *Id.* The decision makers, vice-president Reed-Taylor and President Davis never viewed the student's handwritten complaint and therefore were unable to determine that there was

understood that there was no evidence that the student asked Phillips to write the paper.

a contradiction between the student's complaint and what appeared in the investigative report that they based the decision to terminate Phillips on.

The testimony of the Student Complainant at her deposition also contradicts what is in the investigative report. She testified that all the alleged harassment happened in a two-week period. (App 79a, Student Dep. pp. 35-36.) Therefore the statement in the letter terminating Phillips that "the evidence supports that you (Phillips) met the Bookstore employee and over the last several months" harassed her is untrue. In addition the student's testimony (App 80-81, Dep. pp. 44-46) contradicts the investigative report that he continued to harass her after she told him to stop talking to her. In fact she never saw Phillips again after December 2004. (App. 82, Student Dep. p. 49).

Since Phillips was not provided with the full investigative report or the specifics of the allegation prior to the decision to terminate him and therefore he could not raise the inconsistencies and untrue statements in his defense.

If the mandatory procedures had been followed and Gregory Phillips had been given his due process rights he could have refuted the investigative report and its conclusions. He could have pointed out the discrepancies

between the conclusions of the report and what was attributed to individual witnesses. He could have defended himself in a meaningful way.

After the December 18th Termination

After receiving the termination letter, Phillips wrote a letter to MCTC President Davis dated January 2, 2004 (App 45-46) informing him that the accusations of sexual harassment were untrue and that the letter terminating him contained inaccurate facts and that a student had asked him to write a take home history exam for her and that he had refused. (App 45-46; App 15, Phillips Aff at ¶25) He further explained that he believed that this student had made false accusations against him after he had refused to engage in her improper request. *Id.*

In fact at her deposition, the Student complainant admitted that she said to Phillips “I wish that there was someone that could do my paper” and that she reported this fact to the investigator. (App 82, Student Dep. pp. 50-51) This fact did not appear in the investigative report nor was it communicated by the investigator to President Davis. See App 55-56 in which President Davis said there was no evidence of this fact. Through counsel, Phillips also informed President Davis in early January that the College’s policy on investigating complaints had been violated in numerous ways and that Phillips had been denied both his constitutional due process

rights and his rights under the mandatory MnSCU and MCTC policies (App 48-49; App 15, Phillips Aff. at ¶ 26.)

On or about January 26, 2004 and over a month after he had been terminated, Phillips received a letter (App 50) from President Davis. Enclosed in the letter were some of the documents Phillips should have been provided before the investigation was initiated and the decision to terminate him completed. These documents included a written notice that a complaint of sexual harassment had been made against him (App 51-52)(the notice contained no specifics or details), a notice of his right to make a written response to the complaint (App 52), a one page summary of the investigation of the complaint (App 53), and a written Tennessen warning (App 54). See also App 16, Phillips Aff. at ¶ 28. A Tennessen warning is to be given before being questioned, not afterwards. The letter from President Davis prefaced his letter by saying that “our records⁹ indicate that the complaint against you was investigated in a through and fair manner” but that he was sending Phillips the material to address any procedural concerns. (App 51; App 16, Phillips Aff. at ¶ 29.) Phillips was never provided with a copy of the College policy setting forth his rights regarding the investigation of the

⁹ Were these alleged records the ones that were destroyed by Diana Cusick?

sexual harassment complaint. (App 58, Phillips Dep p. 27) Phillips was also never furnished with the full investigative report. (App 16, Phillips Aff. at ¶ 30.)

During the course of these proceedings, President Davis met with the student complainant approximately five times. He did not meet with Gregory Phillips at all. (App 81, Student Dep. pp. 47-48; App 76, Davis Dep. p. 13.) Despite the failure to follow the College's mandatory procedures and afford Gregory Phillips his due process rights, President Davis upheld the termination. (App 55-56)

On or about March 4, 2004, Phillips received a second letter (App 55-56) from President Davis stating that he backed the decision of Vice President Reed-Taylor terminating his employment. The letter mentioned that there were witnesses against Phillips who had confirmed what the student complainant had said¹⁰ but Phillips was never informed who these witnesses were or what they had said. (App 16, Phillips Aff. at ¶ 33.)

¹⁰ During the course of discovery in this case and with the ability to question witnesses and review the investigative report, we were able to learn that the witnesses did not corroborate what the student complainant had state, that the students written complaint was contradicted by the investigative complaint, that the student 's deposition testimony was contradicted with what was said in the investigative report, and that the investigator herself admitted that there were key mistakes in the investigative report relied upon by the President and Vice-President in making their decision to terminate the employment of Professor Phillips.

Phillips was never given sufficient information to defend himself nor a timely opportunity to do so. (App 16, Phillips Aff. at ¶ 34.)

Phillips did not sexually harass any student or employee at the College. A student¹¹ at the College did ask him to write her take home History paper. He said no. The next thing he knew he was charged with sexual harassment. (App 16, Phillips Aff. at ¶ 35.) During the course of Phillips teaching, he had such a diverse background of students that he thought it was important to share the stories with his classes so that the students could understand their similarities opposed to their differences. For this reason, he was always seeking out the stories of international students,¹² male and female, to share with his classes. (App 16-17, Phillips Aff. at ¶35.)

A full time, tenure track position opened up in the English Department in the beginning of 2004. Phillips applied. He was not even given an interview despite the earlier assurances that the first opening would be for him. (App 17, Phillips Aff. at ¶ 36). He has attempted to obtain other teaching positions since being terminated from MCTC. Except for a semester in Louisiana, he has been unsuccessful. (App 17, Phillips Aff. at ¶37.) Some of his colleagues at MCTC asked him why he was let go so

¹¹ The student was one of a group of students that would take their smoking breaks outside where Phillips also went to smoke.

abruptly. He truthfully explained what the college had charged him with and why they let him go. (App 17 Phillips Aff. at ¶ 38.

ARGUMENT

I. The Trial Court erred in determining that a Public College does not have to follow its own Mandatory Policy designed to safeguard the Due Process Rights of those accused of Discrimination or Harassment.

When any public entity, whether it is the state, a municipality, a county, MnSCU or a College in the MnSCU system, enacts rules those rules must be complied with. As the courts have long held:

Once a rule is established. . . there must be at least substantial compliance with the laws and rules appertaining thereto if it is to be of any value. . . .Confusion results when authorities seek to circumvent the established rules or to ignore them.

State ex. Rel Kruse v. Webster, 231 Minn. 309, 43 NW 2d 116, 120 (Minn. 1950).

An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, L.Ed., 681 (1954.) See also *Red School House, Inc. v. Office of Economic Opportunity*, 386 F. Supp.

¹² The Student Complainant is Albanian.

1177. (D. Minn. 1974) President Davis and Vice President Reed-Taylor recognized this basic principle when they testified that the rules are mandatory and must be followed. (App 75-76, Davis Dep. pp.11-16; App 71-72, Reed-Taylor Dep. pp. 20-22.)

While the trial court agreed with the plaintiff/appellant that the College did not follow its own policy, the court erroneously came to the conclusion that the college does not have to follow its own rules. These rules were implemented to assure that plaintiff, Gregory Phillips was treated fairly. In failing to follow the rules set forth by MnSCU and the College to safeguard the rights of the Gregory Phillips, the plaintiff was clearly denied his rights and was terminated from his employment as a result. Therefore the dismissal of Phillips cannot stand. The trial court erred in denying Plaintiff's Motion for Summary Judgment after it determined that the College had violated its own mandatory policy.

II. The Trial Court erred in determining that the Plaintiff was not entitled to any Due Process Rights.

The Due Process Clause of the U.S. Constitution provides that a state shall not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend XIV, § 1. The due process protection provided by the Minnesota Constitution is identical to the process guaranteed under

the Constitution of the United States. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988) Procedural due process protections restrain government action which deprives individuals of “liberty” or “property” interests within the meaning of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Minnesota Constitution. *Humenansky v. Minn. Bd. of Med. Examiners*, 525 N.W,2d 559, 565 (Minn. App. 1994).

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct 2701 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct 2694 (1972), the Supreme Court has held that a non-tenured teacher is entitled to procedural due process upon termination if that termination will deprive him of an interest in property or liberty.

This is consistent with the facts of this case. In fact it even could be argued that there was a property interest as well as a liberty interest. Beginning in January of 2001 and continuing until December of 2003, prior to each semester Phillips received a list of courses that he could teach. He would check off the courses he wanted to teach and later would receive confirmation that he had been appointed pursuant to the contract between the

Union and the College.¹³ Unless affirmative action¹⁴ was taken to terminate his employment, his teaching appointment was automatically renewed each semester. He did not have to sign a new contract each semester but instead check off the courses he wanted to teach. There had even been talk about his applying for the first tenure tract position that became available. (App 14, Phillips Aff. at ¶ 6. It was made clear to Professor Phillips that they were pleased with his teaching, he got good reviews, and that he could stay as long as he liked.

The courts have held that public college professors and staff members dismissed during the terms of their contracts. . . have interests in continued employment that are safeguarded by due process. *Roth*, supra. Professor Phillips had been presented with a list of courses just like he had every other semester, he had selected which courses he would teach during the spring Semester 2004, his courses were listed in the College Catalog and at the College Registrars Office, and he had ordered the books that his students would use in those courses. (App 13, Phillips Aff. at ¶ 7.) Courts have recognized that due process applies to a teacher without tenure or a formal contract if there is a clearly implied promise of continued employment. *Roth*

¹³ That contract is usually in effect for several years at a time.

at 576-578. Therefore, even if Professor Phillips was not in the middle of the 2003-2004 academic year, he would still be protected as there was a clear promise of continued employment.

Court decisions have long recognized that a teacher's interest in liberty is sufficiently affected when the threatened termination is the result of a charge which will place a stigma upon him and impair his ability to obtain new employment. *Roth supra*, 408 U.S. at 573.; *Buhr v. Buffalo Public Sch. Dist.*, 509 F.2d 1196, 1199 (8th cir, 1974); See also *Freeman v. Gould, Special Sch. Dist.*, 405 F.2d 1153, 1161-67 (8th Cir. 1969). An allegation of a sexual harassment complaint in the teaching profession could not be more of one that places a stigma. Even President Davis admitted a charge of sexual harassment is a serious charge and would be looked on with concern and may eliminate a candidate for consideration. (App 74, Davis Dep. pp.6-7.)

Phillips in fact did apply for a tenure track position that opened up in the English Department at the College after he had been charged and found guilty of the sexual harassment. He was not even interviewed for the job that he had been indicated could be his before the allegation was made.

¹⁴ The affirmative action in this case was the December 18, 2003 letter terminating his employment at the College.

Since his termination based on the finding of sexual harassment, Phillips has sought to obtain a new teaching position. He has been unsuccessful except for a brief temporary position in Louisiana that was for a single semester. Despite sending in numerous applications, he has not even received any interviews.

Phillips also felt compelled to tell his colleagues the truthful reason for his abrupt termination from the College when they inquired.

Minimal Requirements of Due Process

Minimal requirements of due process are generally recognized to be:

- (1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
- (2) notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges;
- (3) a reasonable time and opportunity to present testimony in his or her own defense; and
- (4) a hearing before an impartial board or tribunal.

Brouillette v. Board of Directors of Merged Area IX, Alias Eastern Iowa Community College, 519 F.2d 126 (8th Cir. 1975). See also *King v.*

University of Minnesota, 774 F.2d 224 (8th Cir. 1985) In *Brouillette*, the Court made clear that if the School has devised rules and regulations setting

out more specifically the rights of the parties then those procedures must be followed. *Brouillette*, supra Fn1. Similarly, the procedures set forth by MnSCU and MCTC must be followed as set forth above.

Phillips did not receive sufficient details to enable him to present evidence. Phillips was told that he had harassed someone in the bookstore and to stay away from the bookstore. That is hardly the detail needed to defend yourself against such a serious charge. He was not told the specifics of the student's allegations, who the witnesses were, what the witnesses were saying, or provided the written documentation that he could have used to clear himself of the alleged charges made against him. During the course of this litigation we have been allowed to view the investigative report and the written complaint made by the student. A review of these documents shows numerous inaccuracies and contradictions between what the student wrote on her complaint form and what was in the investigative report. When we deposed the Student, we were able to learn of even more inaccuracies and contradictions. Yet none of this information was provided to Professor Phillips so that he could adequately defend himself and retain the job that he loved. Professor Phillips was denied all of the basic tenets of due process.

The trial court relies on the 8th Circuit decision in *Buhr v. Buffalo Public School District No. 38*, 509 F.2d 1196 to support its determination

that Phillips is not entitled to constitutional due process rights because the College did not publicly announce the reason for his dismissal. The reliance is misplaced. First, the case can be readily distinguished from the instant case. In *Buhr* a nontenured teacher brought action against a school district alleging violations of her 14th amendment rights to both procedural and substantive due process. The School Board had informed Buhr of the reasons for nonrenewal of her contract only upon her request at a closed meeting of the school board. In *Buhr*, the court held that she was not entitled to procedural due process because she was not being foreclosed from future employment opportunities. The case was based on the North Dakota statute which provides for no tenure system. There is no such state statute at play in the instant case.

Second, another panel of the 8th Circuit failed to follow *Buhr* in a later case stating that the *Buhr* court was incorrect when it held that substantive due process is a thing of the past. In *Singleton v. Cech*, 155 F.3d 983 (8th cir. 1998), the 8th Circuit held the Supreme Court believes otherwise and that substantive due process lives. If the government employer's decision is so irrational that it may be branded arbitrary an employee may plausibly assert that he has been denied his substantive due process rights under the 14th amendment. *Singleton*, supra citing *Kelley v. Johnson*, 25 U.S. 238, 248

(1976.) Certainly, in the case at hand, it could be determined to be irrational to find that an individual had sexually harassed a student by going to the bookstore where she worked when in fact the individual was in class and teaching other students at the times he is alleged to have entered the bookstore.

In reversing the trial courts grant of summary judgment, the *Singleton* court determined that there is substantive due process. The court held that when one has been discharged for a stigmatizing reason it makes good sense to hold that some sort of hearing is necessary in order to determine whether good cause for the discharge exists or whether the stigmatizing reason is a true one. *Singleton* at 989-990.

The trial court also misplaced its reliance on *Batra v. Bd of Regents of the University of Nebraska*, 79 F.3d 717 (8th cir. 1996.) In *Batra*, there were explicit bylaws promulgated by the regents of the University which precluded procedural due process for the denial of tenure.

The trial court erred when it determined that Phillips was not entitled to any due process.

III. The Trial Court erred in not imposing any Sanctions for the Spoliation of Evidence

The Court has discretion to impose sanctions under its inherent disciplinary power for the spoliation of evidence. *Stevenson v. Union Pac. R.R. Co.*, 334 F.3d 739, 745 (8th Cir. 2004). Sanctions for spoliation are not limited to bad-faith destruction of evidence, but are appropriate when the party destroying the evidence knew or should have known that the evidence was relevant to potential litigation. *Dillion v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993.) When determining whether sanctions are appropriate, the Court must determine the relevancy of the evidence destroyed and whether the destruction prejudiced the opposing party. *Stevenson*, 354 F.3d at 748.

Not only did the College Policy require that Diana Cusick as the investigator maintain the investigation file but she also knew from President Davis that Gregory Phillips had hired an attorney and that there were questions regarding whether the College Policy regarding investigation of the complaint of sexual harassment was being followed or not. She also knew that Gregory Phillips was asking for more specific details regarding the charges against him¹⁵ yet she destroyed her notes and the documents that she received from the Student Complainant showing the alleged times and dates that she saw Gregory Phillips. Gregory Phillips is prejudiced by this

destruction in that the notes and documents could be evidence supporting his claim that the mandatory investigation procedures weren't followed, that key questions were not asked of the Student Complainant, that Gregory Phillips was not provided with the specifics of the claim against him, and that he was denied his due process rights.

Don't forget, the Student testified that the documents she gave to the investigator showed that Gregory Phillips was in class teaching at the time she alleged she saw him looking at her in the bookstore. If the decision makers, Vice President Reed Taylor and President Davis knew this evidence existed perhaps Gregory Phillips would not have been terminated. Similarly, if the notes showed additional discrepancies between what was in the investigative report and what the witnesses had actually testified to then Gregory Phillips could still have his job. Remember how the investigative report said the harassment had continued through October, November, and December. Yet when compared to the complaint form that the Student filled out, the complaint form in the students own handwriting showed that she did not even meet the professor until mid November and that she made her complaint on December 8th.

¹⁵ Phillips had written her directly asking for the specific details.

Unfortunately, the decision makers were not given a copy of the student's complaint form. They only received the investigative report. How many more discrepancies could we find if the documents had not been destroyed.

Courts have routinely held that an attempt to procure false evidence or destroy evidence of the main facts charged is to be construed as an admission of guilt. *Osborne v. Purdome*, 250 S.W.2d 19 (Mo. 1952). Similarly, when a party destroys or alters evidence, the trial court can properly draw inferences unfavorable to the destroyer. *Bird Provision Co. v. Owens County Sausage, Inc.*, 379 F. Supp. 744 (N.D. Texas, 1974). Plaintiff asked the trial court to consider that the destroyed notes and documents favored and supported the Plaintiff in his claims in this matter and are additional evidence of the defendant's liability. The trial court refused to do.

CONCLUSION

For all the reasons cited above, Mr. Phillips requests that this court reverse the grant of summary judgment and remand the matter so that so that it may be ascertained what his damages are for the failure of the College to follow it's own mandatory policies.

Dated: April 25, 2006

Respectfully submitted,

JUDITH K. SCHERMER PLLC

A handwritten signature in black ink, appearing to read "Judith K. Schermer", with a long horizontal line extending to the right.

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A06-0627

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Gregory Phillips,

Appellant,

v.

**CERTIFICATION
OF BRIEF LENGTH**

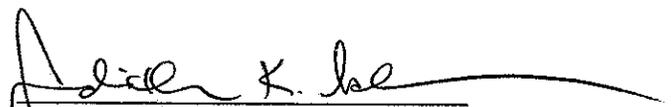
State of Minnesota, the Minnesota State College
And University Systems, the Board of Trustees of
The Minnesota State Colleges and Universities,
Minneapolis Community and Technical College,
Josephine Reed-Taylor and Philip Davis,

Respondents.

I hereby certify that this brief conforms to the requirements of Minn.
R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a
proportional font. The length of this brief is 6,481 words. The brief was
prepared using Word 8.

Dated April 25, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).