

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.

BRIEF OF RESPONDENTS

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## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	II
LEGAL ISSUES .....	4
INTRODUCTION AND STATEMENT OF THE CASE.....	5
STATEMENT OF FACTS.....	5
I. APPELLANT’S DUE PROCESS RIGHTS WERE NOT INFRINGED BY MCTC’S ALLEGED FAILURE TO FOLLOW INTERNAL GUIDELINES. ....	6
II. SUMMARY JUDGMENT IS APPROPRIATE FOR APPELLANT’S DUE PROCESS CLAIM. ....	9
A. Appellant Has No Property Interest In A Future Position. ....	9
B. Because MCTC’s Decision Was Not Public It Did Not Violate Appellant’s Liberty Rights.....	11
IV. RESPONDENTS DID NOT ENGAGE IN SPOILIATION.....	14
CONCLUSION .....	16
RESPONDENT’S APPENDIX.....	R. App. 1 - R. App. 39

## TABLE OF AUTHORITIES

**Page**

### FEDERAL CASES

<i>Anderson v. City of Philadelphia</i> , 845 F.2d 1216 (3rd Cir. 1988) .....	10
<i>Baker v. McDonald Corp.</i> , 686 F. Supp. 1474 (S.D. Fla. 1987), <i>aff'd</i> , 865 F.2d 1272 (10th Cir. 1998), <i>cert. denied</i> , 493 U.S. 812 (1989).....	12
<i>Batra v. Board of Regents of the University of Nebraska</i> , 79 F.3d 717 (8th Cir. 1996).....	passim
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564, 92 S. Ct. 2701 (1972).....	9
<i>Buhr v. Buffalo Public School District No. 38</i> , 509 F.2d 1196 (8th Cir. 1974).....	12
<i>Cleveland Bd. of Education v. Loudermill</i> , 470 U.S. 532, 105 S. Ct. 1487 (1985).....	12
<i>Codd v. Velger</i> , 429 U.S. 624, 97 S. Ct. 882 (1977).....	12
<i>Coleman v. Reed</i> , 147 F.3d 751 (8th Cir. 1998).....	11, 12
<i>Ferguson v. Veterans Admin.</i> , 723 F.2d 871 (11th Cir. 1984).....	8
<i>Geddes v. Northwest Mo. State Univ.</i> , 49 F.3d 426 (8th Cir. 1995).....	4, 9
<i>Gibson v. Caruthersville Sch. Dist. No. 8</i> , 336 F.3d 768 (8th Cir. 2003).....	4, 13
<i>Hutson v. McDonald Douglas Corp.</i> , 63 F.3d 771 (8th Cir. 1995).....	14
<i>Jones v. Intermountain Power Project</i> , 74 F.2d 546 (10th Cir. 1986).....	12

<i>Liao v. Tennessee Valley Authority</i> , 867 F.2d 1366 (11th Cir. 1989).....	4, 7
<i>Lounsbury v. U.S. Postal Service</i> , No. 4-87-283, 1988 WL 84812, *3 (D. Minn. Aug. 12, 1988).....	10
<i>Page v. Bolger</i> , 645 F.2d 227 (4th Cir.) ( <i>en banc</i> ) <i>cert. denied</i> , 454 U.S. 892, 102 S. Ct. 388 (1981).....	8
<i>Paul v. Davis</i> , 424 U.S. 693, 96 S. Ct. 1155 (1976).....	13
<i>Pearson v. I.S.D. No. 2142</i> , No. 00-779 PAM/JGL, 2001 WL 1640071, *3 (D. Minn. Aug. 22, 2001) .....	10
<i>Singleton v. Cech</i> , 155 F.3d 983 (8th Cir. 1998).....	12
<i>Speer v. City of Wynne</i> , 276 F.3d 980 (8th Cir. 2002).....	12
<i>Stevenson v. Union Pacific R. Co.</i> , 354 F.3d 739 (8th Cir. 2003).....	4, 15
<b>FEDERAL STATUTES</b>	
42 U.S.C. § 1983 .....	5, 6
<b>STATE STATUTES</b>	
Minn. Stat. § 14.05 .....	8

## LEGAL ISSUES

- I. Whether Appellant's due process rights were violated when MCTC allegedly did not follow its internal affirmative action policy.

The court held in the negative.

Apposite authority: *Batra v. Board of Regents of the University of Nebraska*,  
79 F.3d 717,720 (8th Cir. 1996)

*Liao v. Tennessee Valley Authority*, 867 F.2d 1366, 1369  
(11th Cir. 1989)

- II. Whether Appellant's due process rights were violated when Appellant had no property interest in continued employment and when no one had been informed of the reason for MCTC's decision not to rehire him.

The court held in the negative.

Apposite authority: *Batra v. Board of Regents of the University of Nebraska*,  
79 F.3d 717,720 (8th Cir. 1996)

*Geddes v. Northwest Mo. State Univ.*,  
49 F.3d 426, 429 (8th Cir. 1995)

*Gibson v. Caruthersville Sch. Dist. No. 8*,  
336 F.3d 768, 773 (8th Cir. 2003)

- III. Whether MCTC engaged in spoliation of evidence when an investigator destroyed notes after reducing them to typed form.

The court held in the negative.

Apposite authority: *Stevenson v. Union Pacific R. Co.*,  
354 F.3d 739, 746 (8th Cir. 2003)

## INTRODUCTION AND STATEMENT OF THE CASE

On or about August 19, 2004, Appellant Gregory Phillips, a former temporary part-time employee of Respondent Minneapolis Community and Technical College (“MCTC”), filed and served his Complaint in the above-captioned case alleging counts of racial discrimination in hiring pursuant to the Minnesota Human Rights Act and federal statutes, and denial of due process pursuant to 42 U.S.C. § 1983. Respondents Philip Davis and Josephine Reed-Taylor are MCTC’s President and Vice-President for Academic Affairs respectively. Following Respondents’ Motion for Summary Judgment and Appellant’s Motion for Partial Summary Judgment, the District Court issued its Order on January 23, 2006, denying Appellant’s motion and granting Respondents’ motion in its entirety. Appellant’s notice of Appeal was timely.<sup>1</sup>

## STATEMENT OF FACTS

From January, 2001 until December 18, 2003, Appellant was employed as a temporary part-time instructor of English at MCTC. According to the collective bargaining agreement, as a temporary part-time instructor, Appellant was employed pursuant to a semester long contract. Reed-Taylor Aff., ¶ 6. R. App. 2. Appellant’s then current contract expired on December 19, 2003. *Id.* On or about December 8, 2003, a student complained that Appellant had been bothering her. Cusick Dep. p. 17. R. App. 23. MCTC performed an investigation into the internal complaint, interviewing

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<sup>1</sup> While Appellant plead and litigated a Human Rights Act claim based upon racial discrimination and various federal race based counts, Appellant has not raised these issues or claims on appeal.

the complainant, Appellant and three witnesses. Cusick Dep. Ex. 2. R. App. 4. According to MCTC's policy, the investigation report was forwarded to MCTC's Vice President for Academic and Student Affairs, Josephine Reed-Taylor. Reed-Taylor adopted the factual findings in the investigative report, determining that Appellant's conduct had violated MCTC policy. Reed-Taylor Aff., ¶ 3. R. App. 1. Reed-Taylor concluded that:

The evidence supports that you told a female student in your class that you were attracted to an employee in the Bookstore and asked her to approach the Bookstore employee for you. Evidence supports that you met the Bookstore employee and that over the past several months you repeatedly asked her out socially and that she rejected your requests. Evidence supports that after she rejected you requests, you visited and walked past the Bookstore many times a day, made attempts to talk with the employee, and stared into the store at the employee. Several witnesses have indicated that on certain days you walked by the store 20 to 30 times, staring at the employee. Evidence further indicates that in an investigatory interview, you provided false information by denying that you asked a student in your class to introduce you to the Bookstore employee.<sup>2</sup>

Reed-Taylor Dep. Ex. 4. R. App. 21. Consequently, Reed-Taylor determined that Appellant should not be hired for future temporary part-time positions. *Id.* ¶ 5.

**I. APPELLANT'S DUE PROCESS RIGHTS WERE NOT INFRINGED BY MCTC'S ALLEGED FAILURE TO FOLLOW INTERNAL GUIDELINES.**

Appellant moved the trial court for partial summary judgment on his Due Process claim based upon an alleged failure of Respondents to follow the Minneapolis

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<sup>2</sup> Appellant is expected to argue that these conclusions are inaccurate because only one witness, the complainant, stated that Appellant walked by the store 20-30 times. This is an immaterial difference because another witness stated he walked by ten times in the period he was paying attention. Cusick Dep., Ex. 2, p. 4. R. App. 8. Another witness stated he passed by the Bookstore four times in an hour and a half period. *Id.*, p. 5.

Community and Technical College internal investigatory procedure. Appellant contends that Respondents' affirmative action officer did not follow alleged "mandatory" aspects of the college's procedure for investigating complaints of discrimination. Appellant also claims that the investigator did not provide him a written Tennessen Warning, did not provide him with a copy of the anti-discrimination policy and a complaint procedure, did not discuss alternative dispute resolution, did not discuss the nature of the complaint, and did not advise him of the opportunity to provide a written response.<sup>3</sup> The district court held that an alleged failure of an employer to observe internal investigatory procedures did not create due process rights, citing *Batra v. Board of Regents of the University of Nebraska*, 79 F.3d 717, 720 (8th Cir. 1996).

Appellant has identified no authority that violations of an internal affirmative action policy or procedure creates a private cause of action. Indeed, case law affirmatively holds that alleged violations of such policies are not actionable. *See Liao v. Tennessee Valley Authority*, 867 F.2d 1366, 1369 (11th Cir. 1989) (failure to give a preference under an affirmative action plan cannot support claim of discrimination). Thus, neither failure to adopt a remedial plan nor failure to adhere to such a plan creates a

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<sup>3</sup> These are *de minimis* departures from the written procedure, at best. Appellant was given an oral Tennessen Warning. The anti-discrimination policy is available to all students and faculty online. The availability of alternate dispute resolutions is plainly inapplicable to the student's claim of harassment in this case. Appellant's responses to questions in his interview reveal that he was appraised of the nature of the complaint. Appellant and his attorney made written responses during the appeal procedure. Hence, Appellant cannot show that he was prejudiced by the alleged failures to follow the college's internal procedure.

civil rights cause of action. *Ferguson v. Veterans Admin.*, 723 F.2d 871, 872 (11th Cir. 1984); *Page v. Bolger*, 645 F.2d 227 (4th Cir.) (*en banc*) *cert. denied*, 454 U.S. 892, 102 S. Ct. 388 (1981). Rather, Appellant bears the burden of showing unconstitutional conduct exclusive of non-adherence to a remedial plan. *Ferguson*, 723 F.2d at 872.

Similarly, Appellant has failed to identify any case authority that constitutional Due Process is defined or even affected by an entity's internal procedures. None of the cases identified by Appellant hold that internal processes define due process nor does any such authority exist.<sup>4</sup> Indeed, as the district court held, the authority is opposite. Thus, in *Batra v. Board of Regents of the University of Nebraska*, 79 F.3d 717, 720 (8th Cir. 1996), the Eighth Circuit rejected an untenured professor's due process claim based upon violation of internal rules holding that "the University's alleged failure to follow its own procedural rules and regulations did not, without more, give rise to a protected liberty or property interest."

Since the alleged failure to follow internal procedures does not give rise to protected interests under the Due Process clause, the decision of the district court should be affirmed.

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<sup>4</sup> The simplistic premise of Appellant's argument that rules must be followed is factually inapplicable. The policies and procedures identified by Appellant are neither rules or regulations adopted pursuant to the State's Administrative Procedure Act, Minn. Stat. § 14.05 *et seq.*

## **II. SUMMARY JUDGMENT IS APPROPRIATE FOR APPELLANT'S DUE PROCESS CLAIM.**

Appellant claims that he was denied due process when MCTC determined not to hire him. The district court held since he has neither a property interest nor a liberty interest in a future position, his due process rights were not violated. Order at p. 5-6.

### **A. Appellant Has No Property Interest In A Future Position.**

Appellant apparently claims that he was denied due process when he was not rehired because the College did not hold a hearing on a student's complaint of sexual harassment. Appellant's claim fails because as an employee on an expired first term contract, he did not have a property interest in continued employment.

In order for a property interest to exist, a government employee must have a "legitimate claim of entitlement" to continued employment as opposed to a more subjective expectancy. *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972). In the university or college setting, the expectation is normally very clear. "Absent unusual circumstances, a teacher in a position without tenure or a formal contract does not have a legitimate entitlement to continued employment." *Geddes v. Northwest Mo. State Univ.*, 49 F.3d 426, 429 (8th Cir. 1995). In *Batra v. Bd. of Regents of the Univ. of Nebraska*, 79 F.3d at 720, Appellants were assistant professors working under a specific term contract who applied for tenure. They were denied tenure and notified that their fixed-term appointments would not be renewed. The professors brought suit, alleging in part, that the university denied them procedural due process by failing to provide them with a document that established the criteria for promotion and

tenure. The Eighth Circuit held that the professors did not have any property interest in continued employment due to the fixed-term nature of their contracts. *Id.* at 720. Therefore, there was no Fourteenth Amendment violation.

Similarly, undisputed evidence in the record establishes that Appellant had no objective expectation of employment and therefore no due process property interest. At all times relevant to this case, Appellant was employed by the College pursuant to a series of fixed-term contracts with the duration of a semester each. Phillips Dep. pp. 13-14. R. App. 26. Moreover, it is undisputed that Appellant's status according to the collective bargaining agreement in place was that of a temporary part-time instructor. Reed-Taylor Aff. at ¶ 6. R. App. 2. According to the collective bargaining agreement, the temporary part-time position terminates at the end of the stated appointment period. *Id.* Since Appellant's appointment ended on December 19, 2003, Appellant had no property interest in continued employment after that date. (*Id.*)

In addition, Courts, including in this jurisdiction, have held that an applicant for employment has no property interest in that employment. *See, e.g., Pearson v. I.S.D. No. 2142*, No. 00-779 PAM/JGL, 2001 WL 1640071, \*3 (D. Minn. Aug. 22, 2001); *Lounsbury v. U.S. Postal Service*, No. 4-87-283, 1988 WL 84812, \*3 (D. Minn. Aug. 12, 1988); *Anderson v. City of Philadelphia*, 845 F.2d 1216, 1220 (3rd Cir. 1988).<sup>5</sup> Accordingly, an applicant has no property interest protected by the Due Process Clause,

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<sup>5</sup> Copies of *Pearson, supra*, and *Lounsbury, supra*, are submitted with this Memorandum.

in a job which is only being sought, but not obtained. Consequently, Appellant has no property interest in being hired after his fixed-term appointment expired. Since Appellant did not have a property interest in an expired contract and had no property interest in future employment, the district court should be affirmed.

**B. Because MCTC's Decision Was Not Public It Did Not Violate Appellant's Liberty Rights.**

Appellant complains that MCTC violated his due process liberty interest by failing to provide a name-clearing hearing. As the district court concluded, since MCTC did not publicize its decision or the reasons for its decision, Appellant is not entitled to a name-clearing hearing. Order at 5. Pl. App. 9.

In addition to property interests discussed above, due process also protects liberty interests. "A liberty interest may be implicated when a governmental employer makes statements that may seriously damage the employee's good name." *Coleman v. Reed*, 147 F.3d 751, 755 (8th Cir. 1998) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701 (1972)). A deprivation of a liberty interest may be found where the nonretention of a teacher imposes upon him a "stigma or other disability foreclosing his future employment opportunities or resulting in significant damage to his standing and associations in the community." *Buhr v. Buffalo Public School District*

No. 38, 509 F.2d 1196, 1999 (8th Cir. 1974).<sup>6</sup> When a legitimate liberty interest is at stake, due process is required. “An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985) (citation omitted).

If an employee has a valid liberty interest, due process requires his employer to provide him an opportunity to clear his or her name through a public hearing. “The right to a name-clearing hearing protects the employee’s liberty interest in his or her good name and reputation, and it prevents a public employer from depriving an employee of that interest without due process.” *Speer v. City of Wynne*, 276 F.3d 980, 984 (8th Cir. 2002) (citation omitted); accord *Codd v. Velger*, 429 U.S. 624, 627, 97 S. Ct. 882, 884 (1977) (“The purpose of such notice and hearing is to provide the person an opportunity to clear his name.” (Citation omitted.)). An unconstitutional deprivation of the employee’s liberty interest occurs if he is not granted the opportunity to clear his name. *Coleman*, 147 F.3d at 755.

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<sup>6</sup> Appellant contends that the district courts analysis of Buhr is not the Eighth Circuit’s last word on the due process issue. Pl. Br. at 27. Appellant cites *Singleton v. Cech*, 155 F.3d 983 (8th Cir. 1998) for the proposition that a decision for a termination may be so frivolous that an employee’s substantive due process rights may be implicated. While there may be some small residual substantive due process in the employment arena, substantive due process is not implicated by the facts on this case. Courts have recognized that reasonable belief that an employee has sexually harassed another is a legitimate reason for termination. *Jones v. Intermountain Power Project*, 74 F.2d 546, 555 (10th Cir. 1986); *Baker v. McDonald Corp.*, 686 F. Supp. 1474, 1482 (S.D. Fla. 1987), *aff’d*, 865 F.2d 1272 (10th Cir. 1998), *cert. denied*, 493 U.S. 812 (1989).

To establish the existence of a liberty interest entitling an employee to a “name-clearing hearing,” the aggrieved employee must show that:

1) the public employer’s reasons for the discharge<sup>7</sup> stigmatized the employee by seriously damaging his standing and association in the community or by foreclosing employment opportunities that may otherwise have been available; 2) the public employer made the reason or reasons public; and 3) the employee denied the charges that led to the employee’s firing.

*Gibson v. Caruthersville Sch. Dist. No. 8*, 336 F.3d 768, 773 (8th Cir. 2003) (citation omitted).

Assuming *arguendo* that Appellant can show that his standing in the community would be damaged by knowledge of his conduct with the complaining student and that he denied the reasons which led to the decision not to rehire him, Appellant’s liberty interest claim founders on the requirement that the employer publicized the reasons for its decision as the district court held. The undisputed facts in the record establish that MCTC has not publicized the reasons for its decision. Neither the letter informing Appellant of the decision nor the investigatory report have been made public. Reed-Taylor Aff. ¶ 8. R. App. 3. In addition, Appellant testified that he has not informed any prospective employers of the reasons for the College’s decision. Phillips Dep. pp. 19-20. R. App. 27. In the absence of any publication by MCTC of its reasons

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<sup>7</sup> Actions for the deprivation of an employee’s liberty interest in reputation typically are undertaken in the context of actual terminations. Indeed, there must be a change in employment status in addition to the loss of reputation to state a cognizable claim for deprivation of a liberty interest. *Paul v. Davis*, 424 U.S. 693, 711-12, 96 S. Ct. 1155, 1165-66 (1976).

for not hiring Appellant, his liberty interest claim fails. Consequently, the decision of the district court should be affirmed.

It is apparent from Appellant's mode of argument that the grievance of his cause of action is not due process but rather that he deserved to be rehired. App. Brief at 26 and 28. This is just the sort of employment question that courts are supposed to avoid. *See, e.g., Hutson v. McDonald Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) (stating that anti-discrimination laws "have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business decisions made by employers except to the extent that these judgments involve intentional discrimination.").

#### **IV. RESPONDENTS DID NOT ENGAGE IN SPOILIATION.**

Appellant suggests that Respondents engaged in spoliation because the investigator did not retain all items in the investigatory file. Specifically, MCTC's investigator disposed of her interview notes after transcribing them and the file did not contain a log that the complaining student thought she had provided the investigator. P. Mem. at 26. This is not spoliation. First, the interview responses were not destroyed. Rather, they were incorporated into the investigator's report. There is no legal requirement that a person must maintain his or her notes of conversations in any particular form. Investigators routinely destroy handwritten notes upon transcription into a more complete and desirable form. *Cusick Aff.* ¶ 3-4. R. App. 32. Since the transcriptions are maintained there is no destruction of evidence. With respect to the log,

the student testified that it supported her observations about Respondent. The investigator has no recollection of receiving this log.

Appellant requested that the court draw inferences from this alleged destruction of evidence. In order to draw an adverse inference a court must find that there was intentional destruction indicating a desire to suppress the truth. *Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 746 (8th Cir. 2003). First, there is no intent to suppress the truth because none of the alleged conduct indicates any malicious intent or bad faith. The investigator testified that she routinely disposes of handwritten notes once the notes are transcribed. Since she acted in accordance with her normal policy, no inference of bad faith can be drawn. Second, intentional destruction of evidence has not been proven. The interview findings still exist in transcribed form. With respect to the student log, the investigator did not receive a log from the complaining student. *Cusick Aff.* ¶ 5. R. App. 33. Thus, there is insufficient proof of destruction of this log. Therefore, no adverse inference is justified. Consequently, the decision of the district court should be affirmed.

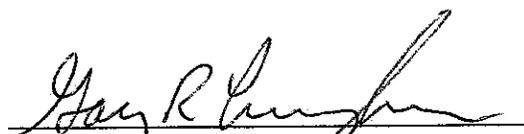
## CONCLUSION

For all of the reasons described above, Respondents respectfully request that the Court of Appeals affirm the decision of the district court.

Dated: 5-23-2006

Respectfully submitted,

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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).