# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

WILLIAM T. MALONE,

Plaintiff.

VS.

DES MOINES AREA COMMUNITY COLLEGE, FRED GILBERT, SIEW SAN WONG, SANDY TRYON, PEPPER COZY, and ECHOE LACAILLE,

Defendants.

No. 4:04-cv-40103

ORDER ON DEFENDANTS'
MOTIONS FOR
SUMMARY JUDGMENT

Currently pending before the Court are Defendants' motions for summary judgment (Clerk's Nos. 40, 42). Plaintiff is acting pro se; attorneys for Defendants are Mark J. Weidenfeld and Joseph P. McLaughlin for Defendant Fred Gilbert and Andrew J. Bracken for Defendants Des Moines Area Community College, Siew San Wong, and Sandy Tryon.<sup>1</sup> Oral argument on these motions was not requested, and the Court considers the motions fully submitted and ready for ruling.

# PROCEDURAL HISTORY

Plaintiff, William Malone ("Malone"), brought this action against Defendants,

Des Moines Area Community College ("DMACC" or "the College"), Fred Gilbert

<sup>&</sup>lt;sup>1</sup> Defendants Pepper Cozy and Echoe Lacaille have not appeared in this case.

("Gilbert"), Sandy Tryon (Tryon"), Siew San Wong ("San Wong"), Pepper Cozy ("Cozy"), and Echoe Lacaille ("Lacaille"). Malone alleges violation of, *inter alia*, Title VII, the Fifth Amendment's Due Process Clause, and the Eighth Amendment's prohibition against cruel and unusual punishment, thereby meeting this Court's jurisdictional requirements under 28 U.S.C. § 1331. His state law claims are appropriate under this Court's supplemental jurisdiction. Defendants, in two separate motions,<sup>2</sup> have moved for summary judgment on all claims asserted by Plaintiff. Malone has resisted these motions.

#### BACKGROUND FACTS

William Malone, an African American student at DMACC, was hired by the College as an employee in the computer lab. His job responsibilities included helping other students in the lab. On February 16, 2004, DMACC discharged Malone for allegedly inappropriate conduct toward female students.

DMACC is an Iowa public community college organized and existing under Iowa Code Chapter 260C. DMACC operates a number of campuses, including the

<sup>&</sup>lt;sup>2</sup> The first motion was brought by DMACC, Tryon, and Wong, with Gilbert filing a second motion shortly thereafter. Defendant Gilbert later joined in the other Defendants' reply to Plaintiff's resistance. Because the arguments are virtually identical, the Court will discuss Defendants' motions as if they were one, highlighting any arguments that relate solely to only one of the Defendants. The Court finds it is possible on this record to assess any and all claims against Defendants Cozy and Lacaille even though they have yet to enter an appearance in this case.

Urban Campus located in Des Moines, Iowa. Fred Gilbert is Dean of the DMACC Urban Campus. Siew San Wong is Associate Dean of the DMACC Urban Campus. Sandy Tryon is Director of Human Resources for DMACC. Apparently Pepper Cozy and Echoe Lacaille are DMACC students involved in making the complaint against Malone and the subsequent investigation undertaken by the College.

Malone had been hired by the College on multiple occasions beginning in September 2001. He was most recently hired by DMACC on October 13, 2003, as a temporary DMACC employee. According to DMACC, as a temporary employee, Plaintiff was hired as an "employee hired into an unauthorized nonfaculty position, for whom there is no expectation of ongoing employment, and who is ineligible for benefits." In addition, DMACC asserts Malone had no individual contract of employment and was not employed in a position governed by a collective bargaining agreement. Malone, however, asserts he was a continuous employee of the College since September 2001.

On January 28, 2004, Associate Dean San Wong spoke with a student regarding a complaint against Malone<sup>3</sup> and another employee of the computer lab at the Urban Campus. The student submitted a general complaint form and spoke with

<sup>&</sup>lt;sup>3</sup> In his resistance, Malone makes some argument that this complaint may not have referred to him as "there were other 'Bill's' working around the computer labs at the same time." The record clearly indicates, however, that the "Bill" complained about was in fact the Plaintiff, William Malone.

San Wong about the complaint. Specifically, the student alleged that Nori Hassoun, Malone's co-worker and friend, asked her if she would go out with Malone, but that she needed to understand that Malone did not want any kind of relationship as he sleeps with several different women at the same time. Hassoun also requested the student ask a friend of hers, also a DMACC student, if she would go out with Hassoun with the understanding it would be a one-night stand since Hassoun is married.

During the discussion with San Wong, the student stated she was afraid of retaliation and wanted to remain anonymous. She was uncomfortable and began to avoid the computer lab where Malone and Hassoun worked. She made the complaint because she was concerned that Malone and Hassoun were using their employment positions to take advantage of other DMACC students. San Wong assured the complainant that she would talk to both Malone and Hassoun about the inappropriateness of such behavior in regard to female students in the computer lab.

On January 29, 2004, San Wong met with Malone<sup>4</sup> to discuss the complaint received by the College. In this meeting, San Wong informed Malone of the nature of the complaint, told him that the behavior described was unacceptable, and provided him with a copy of DMACC's sexual harassment policy. Malone denied any such

<sup>&</sup>lt;sup>4</sup> She also met with the other employee named in the complaint.

behavior occurred. San Wong noted this and warned Malone that any future allegations of sexual harassment may lead to disciplinary action, up to and including termination of his employment. A memo of this meeting was prepared and delivered to Malone on February 4, 2004. Plaintiff responded to this memo in writing and requested a copy of his letter be placed in his file.

On February 12, 2004, the College received another complaint from the same student regarding the conduct of Malone and Hassoun in the computer lab. In this complaint, the student indicated she felt she was being retaliated against because of her previous complaint. Following this complaint, Dean Gilbert questioned whether Plaintiff's services were still needed at the Urban Campus, and the College proceeded to investigate the complaint made.

On February 17, 2004, San Wong again met with Malone, informing him the College had received an additional complaint. San Wong heard Plaintiff's denial of the alleged misconduct, but ultimately the College decided to terminate Malone's employment and memorialized the decision in a memo to Malone. The other employee complained about was also terminated for the alleged misconduct. On February 19, 2004, Plaintiff initiated this action by filing a pro se complaint, asserting multiple causes of action.

In addition, on February 26, 2004, Plaintiff filed a claim of harassment with the College. In response, Director of Human Resources Tryon met with Malone on February 26, 2004 to discuss his complaint. Tryon reviewed the information

provided by Malone and interviewed Dean Gilbert, Associate Dean San Wong, and other witnessed identified by Malone. Defendant Tryon concluded Malone's complaint was unfounded for lack of substantive evidence.

#### **ANALYSIS**

On August 4, 2004, Plaintiff amended his Complaint, describing his claim as follows: breach of contract; constructive discharge; due process (Amend. V)/right to confront accusers; cruel and unusual punishment (VII); equal protection (XIV); discrimination by gender (Title VII); retaliation; and defamation of character. Defendants contend each of these claims should be dismissed as a matter of law.<sup>5</sup>

# A. Standard for Summary Judgment

"[C]laims lacking merit may be dealt with through summary judgment under Rule 56." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be rendered

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c)). To avoid summary judgment, the nonmoving party must make a sufficient showing on every essential element of its case for which it has the

<sup>&</sup>lt;sup>5</sup> As an initial matter, the only claims that seemingly apply to Defendants Cozy and Lacaille are Malone's claimed right to confront accusers and defamation of character. Plaintiff has provided no evidence that any of the remaining claims are applicable to these Defendants.

burden of proof at trial. <u>See Celotex v. Catrett</u>, 477 U.S. 317, 322-23 (1986); <u>Wilson v. Southwestern Bell Tel. Co.</u>, 55 F.3d 399, 405 (8th Cir. 1995); <u>see also Reeves v. Sanderson Plumbing Prods., Inc.</u>, 530 U.S. 133, 142 (2000) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (quoting <u>Texas Dept. of Cmty. Affairs v. Burdine</u>, 450 U.S. 248, 253 (1981)).

The nonmoving party must go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. While the quantum of proof that must be produced to avoid summary judgment is not precisely measurable, it must be enough evidence for a reasonable jury to return a verdict in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

In considering a motion for summary judgment, the Court must view all of the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (citations omitted); Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1280 (8th Cir. 1996). The question before this Court is whether the record, when viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. See Mansker v. TMG Life Ins.

<u>Co.</u>, 54 F.3d 1322, 1326 (8th Cir. 1995) (citing <u>Celotex</u>, 477 U.S. at 322-23, and <u>Anderson</u>, 477 U.S. at 249-50).

The Court notes that a generous reading is to be given pleadings filed by pro se litigants. Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (noting that allegations in a pro se complaint are held to less stringent standards); see also Ouzts v. Cummins, 825 F.2d 1276, 1277 (8th Cir. 1987) ("A pro se complaint is to be liberally construed and should not be dismissed unless the plaintiff can prove no set of facts to support the claim."). Despite this "generous reading", the Court will dismiss a complaint in the absence of a basis for jurisdiction or if the complaint otherwise lacks merit.<sup>6</sup>

#### B. Breach of Contract

To establish a breach of employment contract claim, Plaintiff must demonstrate the following: (1) an employment contract existed between the parties; (2) the terms and conditions of the contract; (3) that Plaintiff fulfilled the terms and conditions of the contract; (4) that Defendants breached the contract in some manner; and (5) that Plaintiff suffered damages as a result of the breach. Kish v. Iowa Cent. Cmty. Coll.,

<sup>&</sup>lt;sup>6</sup> After filing one resistance to Defendants' motions for summary judgment, to which Defendants had replied, Plaintiff filed an amended resistance that more fully complied with the local and federal rules. Defendants contend that the Court should disregard this amended resistance as it does not add any substantial facts or issues to his existing claims or his previously filed objection. Due to Plaintiff's pro se status, and Defendants' opportunity to respond to the amended resistance, the Court will consider this material in rendering a decision on the pending motions to dismiss.

142 F. Supp. 2d 1084, 1093 (N.D. Iowa 2001). According to Defendants, Malone is unable to make a sufficient showing on these essential elements.

In the absence of a written employment contract, the employee is an at-will employee, and an employer may discharge an at-will employee at any time, for any reason, or for no reason whatsoever, under Iowa law. Huegerich v, IBP, Inc., 547 N.W.2d 216, 219-20 (Iowa 1996) (citations omitted). There are two "narrow" exceptions to this general rule: first, where "a contract is created by an employer's handbook or policy manual;" and second, where the discharge clearly violates a "well-recognized and defined public policy of the state." Id. (citations omitted); see also Bradshaw v. Brown Group, Inc., 258 F.3d 847, 849 (8th Cir. 2001).

Defendants contend there is no genuine issue of material fact regarding the existence of an employment contract between Malone and DMACC. According to Defendants, the contemporaneous documentation and all of the circumstances indicate that Malone was employed as a temporary employee who had no reasonable expectation of continued employment. In other words, Plaintiff was an at-will employee, and neither of the aforementioned exceptions apply.

The "Personnel Action Notice" form authorizing Malone's employment explicitly states Malone was an "employee hired into an unauthorized nonfaculty

<sup>&</sup>lt;sup>7</sup> "Under Iowa law, employment relationships are presumed to be at-will." Bradshaw v. Brown Group, Inc., 258 F.3d 847, 849 (8th Cir. 2001) (citing Fogel v. Trs. of Iowa Coll., 446 N.W.2d 451, 455 (Iowa 1989)).

position, for whom there is no expectation of ongoing employment, and who is ineligible for benefits" (emphasis added). In addition, the form further provided a maximum duration for Malone's employment, i.e., not to exceed 1000 hours. Thus, according to Defendants, Malone cannot show DMACC breached a minimum term of employment as none was indicated. Because Malone had no contract of employment with DMACC, Defendants argue that his breach of contract claim must fail.

Plaintiff contends he was a continuous employee since September 2001. He further contends that by requiring him to follow the rule book, including not working more than 1000 hours, and providing him with a copy of the College's sexual harassment policy, they created an implied contract. He claims this implied contract was breached by Defendants when they failed to follow their own policy for handling sexual harassment claims.

Defendants deny Malone's assertions regarding his employment relationship with the College. They state that while he was employed multiple times beginning in September 2001, each separate employment was as a temporary employee. They further assert that the employment did not entitle Malone to any reasonable expectation of continuous employment as evidenced in the forms detailing his employment. The October 13, 2003, notice was the most recent engagement and the one that covered the events relevant to this lawsuit.

Whether an employer's writing "binds the parties in contract is a question of law, unless the document is ambiguous." <u>Bradshaw</u>, 258 F.3d at 849. The writing

may create a unilateral contract if "'(1) the handbook is sufficiently definite in its terms to create an offer; (2) the handbook has been communicated to and accepted by the employee so as to create an acceptance; and (3 the employee has continued working, so as to provide consideration.'" <u>Id.</u> (quoting <u>Fogel v. Trs. of Iowa Coll.</u>, 446 N.W.2d 451, 456 (Iowa 1989)).

Defendants argue that there is no evidence that Malone relied on or even saw the "Personnel Action Notice" form at any time during his employment. Moreover, Defendants argue the form is not sufficient to be considered an offer, nor does it guarantee the employees will be discharged only under certain conditions or for cause. To the contrary, the form expressly states there is "no expectation of ongoing employment." Likewise, Defendants contend that the sexual harassment policy does not create a binding contract, and that even if it did, the College followed the procedures set out in its policy when it undertook an investigation into the complaints made against Malone.

The Court finds Malone was an at-will employee. Therefore, Plaintiff's breach of contract claim fails for the reasons set forth in Defendants' briefs. As an at-will employee, Plaintiff had "no expectation of continued employment" and could be fired at any time for any lawful reason. Furthermore, the documents in this case did not give rise to a unilateral contract between DMACC and Malone. Thus, DMACC did not breach any contract in discharging Plaintiff for the reasons stated. Accordingly, summary judgment must be granted on this claim.

# **C.** Constructive Discharge

Constructive discharge occurs when an employer deliberately creates an intolerable working environment in order to force an employee to quit. Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467, 472 (8th Cir. 1990); Schwarz v. Northwest Iowa Cmty. Coll., 881 F. Supp. 1323, 1338 (N.D. Iowa 1995). Thus, Plaintiff must demonstrate (1) that a reasonable person similarly situated to Malone would find the working environment intolerable, and (2) that DMACC acted with the intention of forcing him to resign. Smith, 895 F.2d at 472; Schwarz, 881 F. Supp. at 1338.

According to Defendants, it is legally impossible for Malone to prevail on this claim. He did not resign; rather, Malone was terminated from his employment with the College. Accordingly, Plaintiff is unable to make any showing on the necessary elements of this claim. Moreover, even assuming Malone resigned, Defendants assert he cannot recover on this claim as "a constructive discharge is actionable only when an express discharge would be actionable in the same circumstances." <u>Balmer v. Hawkeye Steel</u>, 604 N.W.2d 639, 643 (Iowa 2000). Defendants contend that Malone's claim thus fails for the same reasons his breach of contract claim fails.

The Court finds that Plaintiff's constructive discharge claim fails, as he was terminated by the College and did not resign. Even had he resigned, his constructive discharge claim fails because he was an at-will employee who could be terminated at

any time for any reason. Accordingly, summary judgment must be granted on this claim.

### D. Due Process

The Fifth Amendment, applied to states through the Fourteenth Amendment, provides that a person may not be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Property interests must be created by existing rules, understandings, or state law, but are not created by the Constitution.

Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). A property interest entitling an employee to procedural due process may be created by implied contract, derived from customs, practices, or de facto policies. Perry v. Sindermann, 408 U.S. 593, 601-02 (1972). An employee is only entitled to the protections of procedural due process if the employer has deprived the employee of a protected property or liberty interest. Simonson v. Iowa State Univ., 603 N.W.2d 557, 561 (Iowa 1999); see also Roth, 408 U.S. at 570-71.

Defendants assert that Plaintiff's due process claim fails because he had no individual contract of employment, and his work was not governed by a collective bargaining agreement. The employment documentation showed Malone's status as a "temporary employee" that had "no expectation of ongoing employment." As an atwill employee, Malone could be discharged at any time, for any reason, or for no reason at all. See Borschel v. City of Perry, 512 N.W.2d 565, 566 (Iowa 1994) (citations omitted).

Under Iowa law, an at-will public employee is not vested with a property interest in continuing employment. <u>Davis v. Horton</u>, 661 N.W.2d 533, 535 (Iowa 2003); see also <u>Johnson v. West Memphis</u>, 113 F.3d 842, 843 (8th Cir. 1997). An at-will employment relationship does not create an interest in continued employment, and an employer is permitted to terminate an at-will employee at any time for any lawful reason and without a pre-termination hearing. <u>See Lockhart v. Cedar Rapids Cmty. Sch. Dist.</u>, 963 F. Supp. 805, 818 (N.D. Iowa 1997); <u>Lockhart v. Cedar Rapids Cmty. Sch. Dist.</u>, 577 N.W.2d 845, 846 (Iowa 1998).

Thus, according to Defendants, as an at-will employee, Malone was not entitled to any due process such as a pre-termination hearing or the opportunity to confront his accusers. Despite the fact that the Fifth Amendment's due process clause was not implicated, Malone was given notice and an opportunity to be heard by the College after each of the complaints was received. Defendants contend this more than satisfied any possible due process concerns.

Malone resists summary judgment on this claim by repeating the allegations that Defendants failed to follow the policy for investigating sexual harassment complaints. Plaintiff misses the point that an at-will employee does not enjoy the protection he

<sup>&</sup>lt;sup>8</sup> Moreover, the constitutional right to confront accusers is limited to criminal defendants. U.S. Const. amend. VI; <u>Brands v. Sheldon Cmty. Sch.</u>, 671 F. Supp. 627, 630 (N.D. Iowa 1987) ("Because the Constitution limits the scope of Sixth Amendment rights to 'all criminal prosecutions,' . . . that argument must be rejected.").

seeks. As discussed above, Malone has not adequately shown he was not an at-will employee of the College. He fails to present any evidence giving rise to a genuine issue of material fact regarding the nature of his employment relationship with DMACC. In addition, Malone has presented no facts from which the Court can conclude Defendants Cozy and Lacaille have any potential liability on Plaintiff's due process claim.

Furthermore, even if he had some protectable due process rights in his employment with DMACC, his conclusory allegations that the complaint was not handled by an Affirmative Action Officer and were not kept confidential, both in violation of DMACC's policy, are rebutted by Defendants and ultimately are insufficient to support a due process claim. Plaintiff has a responsibility to state facts, not conclusions, in support of his claims. He has failed to do this. For these reasons, the Court finds that Plaintiff's due process claim fails and must be dismissed as a matter of law.

## E. Cruel and Unusual Punishment

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const.

<sup>&</sup>lt;sup>9</sup> Conclusory allegations by the nonmovant will not be adequate to defeat a motion for summary judgment. <u>Hedberg v. Indiana Bell Tel. Co., Inc.</u>, 47 F.3d 928, 931 (7th Cir. 1995). "[I]n order to defeat a motion for summary judgment, the nonmoving party cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit." <u>Carter v. St. Louis Univ.</u>, 167 F.3d 398, 400 (8th Cir. 1999).

amend. VIII. The Eighth Amendment is intended to protect persons convicted of crimes from cruel and unusual punishment, <u>United States v. Lovett</u>, 328 U.S. 303, 317-18 (1946), and does not apply to civil actions. <u>Ingraham v. Wright</u>, 430 U.S. 651, 667-68 (1977) ("In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable."); <u>see also Brands v. Sheldon Cmty. Sch.</u>, 671 F. Supp. 627, 630 (N.D. Iowa 1987).

The Court finds that Plaintiff's Eighth Amendment claim fails for the reasons set forth in Defendants' briefs. Simply put, the prohibition on cruel and unusual punishment does not apply in the present case. In any event, Plaintiff has provided no evidence whatsoever of the punishment he considered cruel and unusual. Surely having one's employment terminated due to allegations of misconduct is not cruel and unusual, especially when Malone had no expectation of continued employment due to his status as an at-will employee. Accordingly, summary judgment must be granted on this claim.

## F. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment states that no state can "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. In essence, this requires that all similarly situated persons must be treated alike under the law. <u>Bogren v. Minnesota</u>, 236 F.3d 399, 408 (8th Cir. 2000); <u>Lockhart</u>, 963 F. Supp. at 816. It is clear, however, that "state actors

may . . . treat dissimilarly situated people dissimilarly without running afoul of the protections afforded by the clause." <u>Bogren</u>, 236 F.3d at 408.

To prevail on an equal protection claim, Plaintiff must demonstrate (1) that he was singled out and treated differently from similarly situated persons, and (2) that he was singled out on the basis of a prohibited characteristic such as race or gender. Ellebracht v. Police Bd. of Metro. Police Dept. of St. Louis, 137 F.3d 563, 566 (8th Cir. 1998). Thus, the threshold inquiry is whether Malone was treated differently than another similarly situated person. Id. Plaintiff has no viable equal protection claim absent such a showing. See Mummelthie v. City of Mason City, Iowa, 873 F. Supp. 1293, 1333 (N.D. Iowa 1995) (citing Klinger v. Dept. of Corrs., 31 F.3d 727, 731 (8th Cir. 1994)) ("Dissimilar treatment of dissimilarly situated persons does not violate equal protection.").

The test of whether identified employees are similarly situated is whether the employees are "similarly situated in all relevant aspects," see Williams v. Ford Motor Co., 14 F.3d 1305, 1309 (8th Cir. 1994), and not just whether they were accused of the same conduct. Lynn v. Deaconess Med. Ctr.-West Campus, 160 F.3d 484, 487-88 (8th Cir. 1998); Ward v. Proctor & Gamble Paper Prods. Co., 111 F.3d 558, 560 (8th Cir. 1997). It is the Plaintiff's burden to make this showing. Lynn, 160 F.3d at 488. According to Defendants, Plaintiff fails to make the requisite showing to sustain his equal protection claim.

Malone's employment was terminated after DMACC received two complaints of inappropriate conduct in the computer lab. Another employee, of a different race than Plaintiff, was also implicated in the two complaints and was also terminated. Defendants assert Malone's equal protection claim must be dismissed because he can produce no evidence that he was singled out and treated differently than a similarly situated individual.

Malone does make some allegations that his supervisor, who was Caucasian, was also the subject of a complaint by this same student but that the supervisor is still working at DMACC. Malone also asserts that this supervisor allowed and participated in harassing him because of his race. Malone fails, however, to present any evidence in support of this allegation. Furthermore, he is unable to meet the requirement that he show the other employee is similarly situated. Malone merely describes this other individual as a "white supervisor," without any additional evidence being given.

On the other hand, Defendants counter with evidence that this other employee was a full-time employee and was not the subject of two separate complaints within a few short weeks. Again, Malone fails to present evidence that gives rise to a genuine issue of material fact that his equal protection rights were violated. Instead, he rests on the conclusory allegations made, without providing the Court any facts to support his suppositions.

<sup>&</sup>lt;sup>10</sup> The racial harassment claims made by Malone are discussed <u>infra</u>, at sections H and K.

The Court finds that Plaintiff's equal protection claim fails as he provides no evidence that he was treated differently than similarly situated persons. To the contrary, it is undisputed that another similarly situated individual was included in the complaints of misconduct against Plaintiff and that this other employee was also terminated despite being a different race than Malone. In short, Plaintiff presents no evidence giving rise to a genuine issue of material fact on his equal protection claim. As a result, the Court must grant summary judgment on this claim.

## G. Title VII Gender Discrimination<sup>11</sup>

## 1. Failure to Exhaust Administrative Remedies

Defendants assert that Malone's Title VII claim against DMACC must be dismissed because he failed to timely exhaust his administrative remedies. Title VII provides that a complainant must file a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1). The only exception to this time limit is if the complainant instituted proceedings with a state or local agency with authority to grant the complainant relief from such practice. <u>Id.</u> In such cases, the complainant has 300 days after the alleged unlawful employment practice occurred to file a charge

<sup>&</sup>lt;sup>11</sup> Defendants assert that Malone has abandoned his Title VII claim in an effort to avoid the exhaustion requirements of Title VII. The Court need not decide whether Plaintiff abandoned this claim in his recent filings with the Court. Given Malone's pro se status, the Court finds it appropriate to give Plaintiff the benefit and analyze his claim on its merits.

with the EEOC. <u>Id.</u> The time period for filing with the Iowa Civil Rights Commission ("ICRC") is also 180 days after the alleged discriminatory practice occurred. Iowa Code § 216.15-(12).

Malone has not filed a charge with the EEOC at all, nor has he filed a charge with the ICRC, the state agency with the authority to grant him relief. The last alleged discriminatory act was the day Malone was discharged, i.e., February 16, 2004. More than 180 days have passed since this date. Accordingly, Defendants assert Plaintiff's Title VII claims must be dismissed for failure to exhaust his administrative remedies.

Malone asserts that failure to exhaust does not restrict a complainant's right to sue, citing McDonnell Douglas Corp. v. Green. Plaintiff misinterprets this decision, however, as the Court is not allowing claimants to sue even though they failed to exhaust the administrative remedies available; rather, the Court states "that absence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). In that case, the complainant had filed a complaint with the EEOC, and the complainant was allowed to sue even though the EEOC failed to find reasonable cause on the complaint. Id. at 797, 798-99.

The Court finds that Plaintiff's Title VII claim fails as Plaintiff has failed to exhaust his administrative remedies. He made no attempt to file a complaint with either the ICRC or EEOC, and despite his protestations to the contrary, his complaint alleged employment discrimination. Because the Court finds exhaustion of

administrative remedies a requirement to pursuit of any Title VII claim, the Court must dismiss this claim as a matter of law.

## 2. No Individual Liability

In addition, there is no individual supervisor liability under Title VII. <u>See</u>

<u>Bonomolo-Hagen v. Clay Central-Everly Cmty. Sch. Dist.</u>, 121 F.3d 446, 447 (8th

Cir. 1997) (citing <u>Spencer v. Ripley County State Bank</u>, 123 F.3d 690, 691-92 (8th

Cir. 1997)). Because the Court finds no individual liability exists under Title VII,

Malone's Title VII claim must also be dismissed to the extent he is suing Defendants in their individual capacities.

## H. Section 1983 Race and/or Gender Discrimination

Although not specifically pled, Defendants acknowledge that Plaintiff seems to be alleging race and/or gender employment discrimination claims pursuant to section 1983. However, the Supreme Court has held that Title VII violations cannot be remedied through 42 U.S.C. § 1985(3), as this would allow complainant to "completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 367 (1979). Indeed, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

Based on this reasoning, the Eighth Circuit has held that a plaintiff employee cannot enforce an otherwise time-barred Title VII sex discrimination claim through section 1983. Hervey v. City of Little Rock, 787 F.2d 1223, 1233 (8th Cir. 1986) (citing Greenwood v. Ross, 778 F.2d 448, 455 (8th Cir. 1985)). Defendants assert that given the fact Plaintiff failed to exhaust his administrative remedies under Title VII, any potential race or gender discrimination claims under section 1983 must also be dismissed.

Defendant Gilbert separately contends that Plaintiff's claims of race or gender discrimination against him are without merit. Gilbert is a male African American, like Plaintiff, and Malone was treated the same as his co-worker Hassoun, who is not similarly situated.

The Court finds that Plaintiff's section 1983 claims for race or gender discrimination fail for the reasons set forth in Defendants' briefs. Plaintiff cannot sue under section 1983 for claims that should have been brought under Title VII but were not due to procedural deficiency, and the Court has already determined that Plaintiff does not have a remedy under Title VII due to his failure to exhaust administrative remedies. Accordingly, summary judgment must be granted on this claim.

#### I. Defamation

Defamation is the act of making public written or oral statements that tend to damage a person's reputation. <u>King v. Sioux City Radiological Group, P.C.</u>, 985 F. Supp. 869, 877 (N.D. Iowa 1997); <u>Taggart v. Drake Univ.</u>, 549 N.W.2d 796, 802-03

(Iowa 1996). Generally, slander is the oral publication of defamatory matter and libel is defamation expressed in print, writing, signs, or pictures. <u>King</u>, 985 F. Supp. at 877; <u>Vinson v. Linn-Mar Cmty. Sch. Dist.</u>, 360 N.W.2d 108, 115 (Iowa 1984).

Ordinarily, to prevail on a defamation claim where the statements are not libel per se and Plaintiff is not a "public figure," Plaintiff must show the following: (1) that Defendants made the statements about Plaintiff; (2) the statements were false; (3) Defendants made the statements with malice; (4) Defendants communicated the statements to a party other than Plaintiff; and (5) a reasonable person would understand the statements to be an expression that would tend to injure a person's reputation, expose them to public hatred, contempt, or ridicule, or injure Plaintiff in the maintenance of his business. See Iowa Civil Jury Instructions § 2100.3 (Supp. June 2002); see Vinson, 360 N.W.2d at 115-16. To demonstrate malice, as distinguished from actual malice, Plaintiff must show Defendants knew the statements were false and or made them with reckless disregard as to the truthfulness of the statements. Vinson, 360 N.W.2d at 117.

Defendants may rebut the presumption of malice, falsity, or injury by raising a qualified privilege. Theisen v. Covenant Med. Ctr., Inc., 636 N.W.2d 74, 84 (Iowa 2001). To raise a qualified privilege, Defendants must show the following: (1) the statements were made in good faith; (2) they were upholding a legitimate interest; (3) the scope of the statements was limited to the identified interest; and (4) the statements were communicated on a proper occasion, in a proper manner, and to the

proper parties. <u>Id.</u> If the Court establishes defamation per se and Defendants are able to raise a qualified privilege, the burden shifts to Plaintiff to show actual malice. <u>Vinson</u>, 360 N.W.2d at 116. Actual malice requires a showing that Defendants made the statements with ill-will or wrongful motive. <u>Id.</u> at 117.

Defendants contend Plaintiff has not submitted evidence to establish that DMACC or its employees made any statements about him that were false. Defendants argue that the College received a complaint accusing Malone of misconduct at work, and that this allegation was repeated by DMACC staff members only insofar as it was necessary to make Plaintiff aware of the allegations against him or in investigation of those claims. Defendants only repeated the allegations brought by a student against Plaintiff and do not believe the statements were either false or made with malice.

Moreover, Defendants contend Plaintiff has presented no evidence that any communications made by them regarding the investigation of the complaints against Plaintiff were communicated to third parties not necessarily involved in a reasonable investigation of the matter. In other words, Defendants assert the qualified privilege applies to them, and Plaintiff has offered no evidence of actual malice on their part.

As to Defendants Cozy and Lacaille, the Court finds no facts giving rise to a defamation claim against them. The only statements attributed to either of them consist of complaints made to the College about perceived misconduct on the part of Plaintiff during the course of his employment at DMACC and during the subsequent investigation into those complaints. While Malone alludes to the possibility that one or

both of these Defendants discussed those complaints outside the investigation, he presents no facts either supporting this allegation or, fatal to his claim, that either of them made the statements with any malice against Malone. Accordingly, a defamation claim does not exist against these two Defendants.

In a case cited by Plaintiff, however, the court found a public employee's Fourteenth Amendment liberty interest may be implicated if, in dismissing the employee, the employer made public statements which imposed upon the employee "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Huff v. Butler County, 524 F. Supp. 751, 753-54 (W.D. Penn. 1981) (quoting Roth, 408 U.S. at 573); see also Mascho v. Gee, 24 F.3d 1037, 1039 (8th Cir. 1994) (citing Shands v. City of Kennett, 993 F.2d 1337, 1347 (8th Cir. 1993)). To establish such a claim, the employee must show "the defamation occurred in the course of the termination of employment." Mascho, 24 F.3d at 1039 (citing Paul v. Davis, 424 U.S. 693, 710 (1976)). However, unsatisfactory performance or general misconduct are insufficient to create such a stigma that implicates an employee's liberty interest in his reputation. Id. (citations omitted).

Defendants contend that Malone has presented no evidence that any DMACC official made public statements that were untrue and that stigmatized Plaintiff so seriously as to damage his standing and associations in the community to the extent that he was unable to take advantage of other employment opportunities. Instead, Malone's termination was based on allegations of misconduct during the course of his

employment. Defendants argue that such allegations, and the manner they were handled by the College, do not implicate Plaintiff's liberty interests.

The Court finds a dearth of evidence on Plaintiff's defamation claim. Malone fails to even specify the statements allegedly defaming his character and presents no evidence Defendants made false statements to third parties with malice and that could reasonably be deemed to cause injury. Moreover, the Court finds Defendants are subject to the qualified immunity insofar as the alleged defamatory statements were made during the investigation of the sexual harassment complaints made against Plaintiff. Again, Plaintiff fails to overcome this immunity by failing to present evidence of actual malice by Defendants. Finally, the Court finds that any such statements do not give rise to a stigma preventing Malone from pursuing other employment in the community, and Plaintiff has presented no evidence contrary to this finding. Accordingly, summary judgment is warranted on this claim.

# J. Retaliation/Wrongful Discharge

To establish a prima facie case of retaliation, Plaintiff must demonstrate the following: (1) he participated in a protected activity; (2) the employer subsequently committed an adverse employment act against him; and (3) there is a causal relationship between the participation in the protected activity and the subsequent adverse employment action. Trammel v. Simmons First Bank of Searcy, 345 F.3d 611, 615 (8th Cir. 2003); Channon v. United Parcel Serv., 629 N.W.2d 835, 862 (Iowa 2001).

Absent a showing of these elements, summary judgment is appropriate. <u>See Davis</u>, 661 N.W.2d at 536.

Defendants contend Plaintiff has utterly failed to make the requisite showing of these elements. The only potentially protected activity was the complaint of discrimination filed at the College on February 26, 2004. This activity, however, occurred approximately nine days after the date of Plaintiff's termination, clearly making it impossible to link this projected activity with the adverse employment action.

Malone counters by arguing that the letter he wrote to College officials following his first meeting with Defendant San Wong regarding the complaint made against him was the protected activity.

The Court finds that Plaintiff's retaliation/wrongful discharge claim fails for the reasons set forth in Defendants' briefs. Plaintiff has failed to even make out a prima facie case of retaliation. Even if the Court considers his rebuttal letter the required protected activity, Plaintiff has not shown the requisite causal relationship between that letter and his subsequent termination, especially considering the College received a second complaint against Plaintiff which was the stated cause of his discharge. Accordingly, summary judgment must be granted on this claim.

#### **K.** Education Discrimination

In his resistance, Malone states that he filed his complaint as a "student" and not a "terminated employee" and that his complaints were investigated by Defendant Tryon, and following the College's investigation, Malone filed a complaint with the

Department of Education Civil Rights Office. In his amended resistance, Plaintiff asserts violations of Title VI and Title IX. Malone essentially asserts that he was discriminated against based on race, in that racial jokes or comments were made in his presence, and that he complained of this conduct but that the College did nothing to stop it.

Defendants contend that neither of these claims were raised in Plaintiff's original or amended complaint. They further note that the pleadings and discovery were closed on September 1, 2004, pursuant to this Court's order. These new claims were not raised until October 11, 2004, after the dispositive motion deadline. Consequently, Defendants assert that this attempt to amend the complaint via the backdoor should be denied.

Defendants also contend that Malone's claims should be dismissed on their merits. Defendants argue that the individual school officials cannot be sued in their individual capacity under Titles VI or IX, see Kinman v. Omaha Public Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999) (Title IX), as both Title VI and Title IX condition receipt of federal funds on a promise not to discriminate. See 42 U.S.C. § 2000d (Title VI); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 286 (1998) (Title IX).

To prevail under these Acts, <sup>12</sup> Plaintiff must essentially show the College was deliberately indifferent to the conduct at issue. <u>See Kinman</u>, 171 F.3d at 610 (citing

<sup>&</sup>lt;sup>12</sup> Defendants argue that for purposes of Title VI, the Court should apply a similar analysis as is applied under Title IX. See Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998).

Gebser, 524 U.S. at 290). "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . . ." Doe v. Dallas Ind. Sch. Dist., 153 F.3d 211, 219 (5th Cir. 1998). Indeed, "deliberate indifference' is a stringent standard of fault, requiring proof that the municipal actor disregarded a known or obvious consequence of his action." Bd. of Comm'rs of Bryan County v. Brown, 520 U.S. 397, 408, 410 (1997) (discussing the deliberate indifference standard as pertaining to municipal liability under section 1983) (citations omitted); see Gebser, 524 U.S. at 291 (comparing Title IX deliberate indifference standard to that under section 1983); see also Doe v. Gooden, 214 F.3d 952, 955 (8th Cir. 2000).

Defendants contend that at best, Plaintiff indicates there were some jokes of a racial nature in his working environment; however, Defendants argue the evidence indicates such jokes were mutually accepted. They further assert that Malone presents no evidence that he complained about these jokes prior to being terminated from his employment with the College. Accordingly, Malone is unable to show a racially hostile environment either in the workplace or in the education setting. Furthermore, Malone has failed to show that any DMACC official had actual notice of the alleged discriminatory conduct, or that any such official was deliberately indifferent to the conduct.

The Court is hesitant to allow Plaintiff to essentially amend his Complaint at this date through an amended resistance to the pending dispositive motions. Even a pro se litigant must be held to the proper constraints of court orders, and that is reason alone to disregard the recent claims. However, even briefly considering these claims, the

Court again readily finds Plaintiff fails to support the claims with facts, and both the Title VI and Title IX claims must be dismissed.

## L. Qualified Immunity

"[G]overnment officials performing discriminatory functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants assert that there is no basis on which to conclude that any of the individual DMACC staff members violated Plaintiff's statutory or constitutional rights.

Under these circumstances, the Court finds that DMACC staff, insofar as they were performing discretionary functions, are shielded from any liability under the doctrine of qualified immunity. Thus, even if any of Plaintiff's claims had any merit against the individual Defendants, the Defendants would be shielded from liability on grounds of this qualified immunity.

# **CONCLUSION**

Even with a "generous reading" of Plaintiff's filings, the Court is unable to find a genuine issue of material fact exists as to any of the asserted claims. For the reasons discussed above, the Court finds it appropriate to dismiss all of Plaintiff's claims against all Defendants. To that end, the Court hereby **grants** the motion by Defendants DMACC, Tryon, and San Wong for summary judgment (Clerk's No. 40) **and** 

the motion by Defendant Gilbert's for summary judgment (Clerk's No. 42). The above-entitled action is **dismissed**. The Clerk of Court is directed to enter judgment accordingly.

# IT IS SO ORDERED.

Dated this 26th day of January, 2005.

UNITED STATES DISTRICT COURT