

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION**

FAZLUL H. SARKAR, PH.D.

PLAINTIFF

v.

CIVIL ACTION NO. 3:15-CV-83-NBB-SAA

THE UNIVERSITY OF MISSISSIPPI, ET AL.

DEFENDANTS

**BRIEF OF DEFENDANT LARRY WALKER
IN SUPPORT OF HIS MOTION TO DISMISS**

This matter concerns the rescinding of an offer of employment to Plaintiff Fazlul H. Sarkar when The University of Mississippi learned of serious and material allegations of research fraud. Sarkar, a faculty member at Wayne State University in Detroit, Michigan, seeks injunctive and monetary relief against The Board of Trustees of State Institutions of Higher Learning, the University, and Dr. Larry Walker (a University employee), in his official and individual capacities, under federal law (Section 1983 due process) and state law (breach of contract and promissory estoppel). IHL, the University and Walker in his official capacity have answered Sarkar's Complaint.¹ Walker requests that this Court dismiss the claims against him in his individual capacity.

Regarding Sarkar's federal law claim, the qualified immunity doctrine bars relief against Walker in his individual capacity. Walker was not the final decision-maker as to rescission of Sarkar's employment offer. Walker's actions were also objectively reasonable under the circumstances. As to the state law claims, Sarkar has failed to sufficiently state any right to recovery against Walker for breach of contract or promissory estoppel. This Court should dismiss all claims against Walker in his individual capacity.

¹ Defendants' Answer and Affirmative Defenses [Doc. 8].

FACTS ALLEGED BY SARKAR²

Until June 2014, Sarkar was on track to receive an IHL employment contract.³ He had received a conditional offer of employment from the University⁴ and had reached an understanding on the general terms and conditions of his prospective employment.⁵ Sarkar's employment and prospective tenure would begin on July 1, 2014,⁶ a date later extended to August 1.⁷ The correspondence expressly contemplated the future execution of an employment contract, **"You will not be allowed to sign your contract until that office [Human Resources] has received your transcript."**⁸

In June 2014, the University learned of dozens of allegations that Sarkar had engaged in research misconduct.⁹ The University reviewed the allegations based on the information available and concluded the allegations had merit.¹⁰ On June 19, 2014, Walker notified Sarkar that the University was rescinding its offer of employment and requested that Sarkar provide information and otherwise explain the allegations against him.¹¹

² Defendant Walker denies Sarkar's factual allegations. However, solely for purposes of this motion, he accepts the well-pled allegations of the Complaint.

³ Compl. ¶ 9 [Doc. 1].

⁴ Letter from Allen to Sarkar (March 11, 2014) [Doc. 1-2, pgs. 18-19].

⁵ Letter from Stocks to Sarkar (April 8, 2014) [Doc. 1-2, pgs. 22-24].

⁶ *Id.* [Doc. 1-2, pg. 23].

⁷ Notice of Claim, 2 [Doc. 1-2, pg. 12].

⁸ Letter from Stocks to Sarkar (April 8, 2014) [Doc. 1-2, pg. 23] (emphasis in original).

⁹ Letter from Walker to Sarkar (June 19, 2014) (Ex. "A" to Motion). Sarkar's Complaint refers to a letter from Walker. Compl. ¶ 9 [Doc. 1]. When the complaint introduces evidence as a basis for suit, "a court can properly consider such documents on a motion to dismiss, even when the opposing party actually submits them to the court." *Williams v. Travelers Ins. Co.*, 96-20420, 99 F.3d 1135 (5th Cir. 1996); *see also Little v. USAA Cas. Ins. Co.*, 09-30948, 2010 WL 4909869, at *2 (5th Cir. Apr. 2, 2010) ("In reviewing dismissal under Rule 12(b)(6), the court may consider . . . documents that a defendant attaches to its motion to dismiss if those documents are referred to in the plaintiff's complaint and are central to the plaintiff's claim.").

¹⁰ Letter from Walker to Sarkar (June 19, 2014) (Ex. "A" to Motion).

¹¹ *Id.*

Rather than respond to the fraud allegations, Sarkar accused Walker of lacking the authority to rescind the offer. On June 27, 2014, Chancellor Dan Jones formally communicated the University's rescission of Sarkar's offer of employment.¹² Sarkar never worked at the University. His prospective employment and tenure rights, which would have otherwise begun on August 1, 2014, extinguished before their effective date.

ARGUMENT

I. LEGAL STANDARDS

A. Rule 12(b)(6) - Failure to State a Claim

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim for relief that is plausible on its face.”¹³ “Plausible” refers to a moderately high likelihood of occurrence.¹⁴ Even if allegations supporting a claim might be true, this is not enough to save a complaint from dismissal; rather, the complaint must establish a significant probability of validity.¹⁵ When the complaint's well-pled allegations, however true, could not support a right to relief, “this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.”¹⁶

The plaintiff must state a plausible claim for relief without reliance on assumptions, inferences, or conclusions.¹⁷ While not required to prove its case at the pleading stage, the

¹² Sarkar alleges “subsequent communications made clear that Plaintiff's employment was terminated.” Compl. ¶10 [Doc. 1]. See Email from Sarkar to Walker (June 23, 2014) (Ex. “B” to Motion), and Letter from Jones to Sarkar (June 27, 2014) (Ex. “C” to Motion).

¹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

¹⁴ *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (Posner, J.)

¹⁵ *Id.*; *Twombly*, 550 U.S. at 555 (holding that complaint must allege enough facts raising right to relief to more-than-speculative level).

¹⁶ *Twombly*, 550 U.S. at 558.

¹⁷ *Iqbal*, 556 U.S. at 678-79 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

plaintiff must do far more than present conclusions or assumptions,¹⁸ which *even if proven later* would support his claims.¹⁹ Once the assumptions, inferences, and conclusory statements are disregarded, the remaining well-pleaded factual allegations cannot be compatible with, or more likely explained by, other lawful explanations.²⁰

B. Qualified Immunity

The assertion of qualified immunity raises an issue of law.²¹ Designed to protect “all but the plainly incompetent or those who knowingly violate the law,” the qualified immunity defense “requires courts to enter judgment in favor of a government employee unless the employee’s conduct violates ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”²² “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”²³

Once a defendant properly invokes the defense of qualified immunity, the burden falls on the plaintiff to prove its inapplicability.²⁴ Qualified immunity is an immunity from suit and not merely a defense to liability, and a court should resolve its applicability as early as possible.²⁵

¹⁸ See *Ballard v. Jackson St. Univ.*, -F.Supp.3d- -, 3:13-cv-672, 2014 WL 5339380, at *2 (S.D. Miss. Oct. 20, 2014) (“Ballard was not required to plead a prima facie case and made no such attempt. But he must say something. He must at least plead ‘enough facts to state a claim that is plausible on its face.’”).

¹⁹ *Twombly*, 550 U.S. at 561-62 (criticizing lower court’s approach that “prospect” of unearthing direct evidence was sufficient to preclude dismissal) (emphasis added).

²⁰ *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 567).

²¹ E.g., *Elder v. Holloway*, 510 U.S. 510, 515-16 (1994).

²² *Morse v. Frederick*, 551 U.S. 393, 429 (2007) (Breyer, J., concurring in part and dissenting in part) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

²³ *Wood v. Moss*, 134 S.Ct. 2056, 2067 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2083 (2011); *Stauffer v. Gearhart*, 741 F.3d 574, 583-84 (5th Cir. 2014).

²⁴ *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002).

²⁵ *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009); *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (“[Addressing] the defendant’s assertions of qualified immunity before discovery has taken place is *precisely* the point of qualified immunity . . .”).

II. FEDERAL CLAIMS

A. Qualified Immunity: Walker was not the final decision-maker.

Generally, Section 1983 limits individual liability to the final decision-maker as relates to claims arising from employment decisions.²⁶ Sarkar acknowledged that Walker was not the final decision-maker regarding the University's decision to rescind its offer and specifically requested a letter from the persons with appropriate authority.²⁷ Dr. Dan Jones, then Chancellor of the University, provided the requested formal rescission.²⁸ As no dispute exists about the lack of Walker's authority as the final decision-maker for the rescission of Sarkar's employment offer, this Court should dismiss the federal claim against Walker in his individual capacity.

B. Qualified Immunity: Sarkar failed to allege conduct by Walker that was objectively unreasonable.

The qualified immunity doctrine protects an official who acts objectionably reasonable, even if that conduct violates a constitutional right.²⁹ To defeat immunity, the plaintiff must allege that the defendant violated rights through conduct that the defendant knew or should have known was unlawful: "[W]e must ask whether the law so clearly and unambiguously prohibited his conduct that every reasonable official would understand that what he is doing violates the law."³⁰

²⁶ See *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 605 (5th Cir. 2001) (holding that individual defendants who "did not fire [plaintiff] directly, but merely recommended her termination to the board, which made the final decision," could not be liable for § 1983 violation "no matter how unconstitutional their motives"); accord, *DePree v. Saunders*, 588 F.3d 282, 288 (5th Cir. 2009); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 350-51 (5th Cir. 2006); *Johnson v. Louisiana*, 369 F.3d 826, 831 (5th Cir. 2004) (citing *Beattie* in holding only final decision-maker could be held liable under § 1983); but see *Culbertson v. Lykos*, 790 F.3d 608, 625-27 (5th Cir. 2015) ("[In *Beattie*] [w]e did not necessarily hold that there was no individual liability simply because the board made the decision.").

²⁷ Email from Sarkar to Walker (June 23, 2014) (Ex. "B" to Motion).

²⁸ Letter from Jones to Sarkar (June 27, 2014) (Ex. "C" to Motion).

²⁹ *Yul Chu*, 901 F.Supp.2d at 776-77.

³⁰ *Id.* (citations omitted).

Sarkar alleges the following conduct by Walker: Walker notified Sarkar that the University was rescinding the employment offer,³¹ and Walker furnished Plaintiff an ambiguous letter.³² Sarkar has not described objectively unreasonable conduct. Instead, faced with serious allegations of research fraud by a person with whom the University did not yet have an employment relationship, Walker communicated the facts to Sarkar, explained the problems created by the allegations and the University's lack of access to the information needed to resolve the allegations and requested Sarkar make the needed information available to the University.³³ Sarkar's only response was to request communication from persons with appropriate authority to rescind the employment offer.³⁴ The University provided such communication from the Chancellor.³⁵

For either of these reasons, this Court should dismiss the federal law claim against Walker in his individual capacity based on the qualified immunity doctrine.

III. STATE CLAIMS

A. Walker was not a party to the employment contract.

Sarkar alleges breach of contract under state law.³⁶ However, he does not allege (because he cannot) that Walker was a party to any contract with Sarkar. "Only those who are parties to a contract may be held liable for a breach of that contract."³⁷ Sarkar pleads that he "entered a

³¹ Compl. ¶ 9 [Doc. 1].

³² *Id.*

³³ Letter from Walker to Sarkar (June 19, 2014) (Ex. "A" to Motion).

³⁴ Email from Sarkar to Walker (June 23, 2014) (Ex. "B" to Motion).

³⁵ Letter from Jones to Sarkar (June 27, 2014) (Ex. "C" to Motion).

³⁶ *Id.* at ¶ 14(a).

³⁷ *Welch Roofing & Const., Inc. v. Farina*, 99 So.3d 274, 279 & n.5 (Miss. Ct. App. 2012) (quoting *Beacon Syracuse Assocs. v. City of Syracuse*, 560 F.Supp. 188, 201 (N.D.N.Y. 1983)); *see also PDN, Inc. v. Loring*, 843 So.2d 685, 689-90 (Miss. 2003) (agent acting on behalf of employer not personally liable for breaching employer's contracts); *Gardner v. Jones*, 464 So.2d 1144, 1151 (Miss. 1985) (agent for disclosed principal incurs no individual liability).

contract with Defendants IHL and University of Mississippi”³⁸ The Complaint does not allege that Sarkar entered a contract with Walker, and Walker cannot incur personal liability for any alleged breach of contract to which he was not a party.

B. Walker made no promise upon which Sarkar relied.

Sarkar alleges promissory estoppel under state law.³⁹ However, he fails to adequately plead the claim against Walker personally. Sarkar does not allege that Walker made any promise to him related to employment or tenure. In the documents attached to Sarkar’s Notice of Claim, Walker’s signature appears only on one – related to a prospective endowment –which does not mention employment or tenure.⁴⁰

Conclusion

The qualified immunity doctrine bars Sarkar’s federal law claim against Walker in his individual capacity. Sarkar has failed to state a claim against Walker for breach of contract or promissory estoppel. This Court should dismiss Walker in his individual capacity.

This, the 25th day of August, 2015

Respectfully submitted,

LARRY WALKER

/s/ J. Cal Mayo, Jr.

J. CAL MAYO, JR. (MB No. 8492)

MATTHEW W. BURRIS MB No. 104195)

ATTORNEYS FOR DEFENDANT LARRY WALKER

³⁸ Compl. ¶ 6.

³⁹ Compl. ¶ 14(b).

⁴⁰ Letter of Support for Endowment (undated) to Sarkar [Doc. 1-2, pg. 20].

OF COUNSEL:

MAYO MALLETTE PLLC
5 University Office Park
2094 Old Taylor Road
Post Office Box 1456
Oxford, Mississippi 38655
Tel: (662) 236-0055
Fax: (662) 236-0035
cmayo@mayomallette.com

CERTIFICATE OF SERVICE

I, J. Cal Mayo, Jr., one of the attorneys for Defendant Larry Walker, do certify that I have electronically filed the foregoing Memorandum with the Clerk of the Court using the ECF system which sent notification of such filing to all attorneys of record.

This, the 25th day of August, 2015.

/s/ J. Cal Mayo, Jr. _____
J. CAL MAYO, JR. (MB No. 8492)