APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Order in the State of Minnesota in Supreme Court (August 6, 2019) . . . . . App. 1

Appendix B Opinion in the State of Minnesota in Court of Appeals (May 6, 2019) . . . . . App. 2

Appendix C Order in the State of Minnesota District Court, County of Hennepin, Fourth Judicial District (February 22, 2018) . . . . . App. 27

Appendix D Order in the State of Minnesota District Court, County of Hennepin, Fourth Judicial District (February 17, 2017) . . . . . App. 39

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

A18-0646

[Filed August 6, 2019]

Jun Xiao,	)
Petitioner,	)
	)
vs.	)
	)
Dr. Raquel Rodriguez, individually	)
and in her official capacity, et al.,	)
Respondents.	)
	)

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Jun Xiao for further review be, and the same is, denied.

Dated: August 6, 2019

BY THE COURT:
/s/
G. Barry Anderson
Associate Justice

GILDEA, C.J., took no part in the consideration or decision of this case.

APPENDIX B

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS

A18-0646

[Filed May 6, 2019]

Jun Xiao, Appellant, vs. Dr. Raquel Rodriguez, individually and in her official capacity, et al., Respondents.	)

Filed May 6, 2019
Affirmed
Florey, Judge

Hennepin County District Court
File No. 27-CV-16-12740

Zorislav R. Leyderman, The Law Office of Zorislav R. Leyderman, Minneapolis, Minnesota (for appellant)

Douglas R. Peterson, General Counsel, Dan Herber, Senior Associate General Counsel, Brian J. Slovut,

Deputy General Counsel, University of Minnesota, Minneapolis, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

Appellant Dr. Jun Xiao appeals the dismissal of his contractual and constitutional claims against respondents Dr. Raquel Rodriguez, Dr. Todd Johnson, and Vice President Brooks Jackson. He argues that, because the district court had subject-matter jurisdiction over the matter, his complaint included claims upon which relief could be granted, and respondents were not entitled to qualified immunity, the district court erred by dismissing his claims. We affirm.

FACTS

Appellant Dr. Jun Xiao is a graduate of the University of Minnesota ("UMN") College of Pharmacy ("the program"). He enrolled in the program in 2009, was dismissed in 2013, and eventually completed the program at a later date. Appellant is a Chinese immigrant. He speaks with an accent, but passed the UMN's English-proficiency exam. He has a disability that impacts his mood, energy, and ability to interact with others.

Appellant's initial complaint stems from academic difficulties he experienced beginning in September of 2012, which led to his dismissal from the program. The

following are the facts as alleged by appellant in his complaint, and recited, as alleged facts, by the district court.

Facts as alleged

Appellant earned a 3.1 grade-point average in the first three years of the program. In his final year, appellant was required to take eight courses, which were comprised of rotations, lasting five weeks or 200 hours, at different pharmacies and supervised by pharmacists or "preceptors."

Appellant alleges several wrongdoings by the program's faculty members. He claims that, at some point during his fourth year, he requested a course syllabus from Dr. Rodriguez. She did not provide him with one, or, when she did, she provided the syllabus for a different course. Further, during his rotations, appellant claims his preceptor, Dr. Johnson, as well as two other preceptors, treated him in a disparate fashion because of his disabilities, national origin, and race.

Appellant alleges that, in August 2012, he asked Dr. Rodriguez and another professor to move him from the Medication History (PHAR 7126) class into the Leadership Administration class, because that class did not involve patient interaction. Appellant states that, despite his request, he was enrolled in the 7126 course anyway.

Appellant also alleges that, in August of 2012, one of his preceptors gave him a "C" grade at his midterm evaluation for 7126 without first consulting with his supervising pharmacist. As a result, appellant asked

the supervising pharmacist to give him "good feedback." This led, at least in part, to his ejection from the course for attempting to interfere with the supervising pharmacist's evaluation of appellant's work. Appellant claims he was never instructed how to interact as a pharmacist, so he should not have been punished for not having the skills that were to be acquired from taking the class. Appellant alleges other wrongdoings with regard to this course, including being placed at a hospital where he had already worked, which, therefore, did not provide him with a "diverse mixture of sites" for his rotations and that the course was an elective that UMN faculty treated as required, contrary to school policy.

Appellant claims that, on September 12, 2012, Dr. Rodriguez informed him that a patient had complained about him based on his "national dialect." Appellant alleges that he was immediately removed from his Infusion (PHAR 7211) course and prohibited from completing it. At the time he was removed from the course, he had worked at the rotation location for about three-and-a-half days. Shortly after appellant's removal, he requested details regarding the patient's complaint. Appellant was told that he was removed from the course due to the affiliated pharmacy's concern that he had compromised patient safety, and that his removal was allowed under the affiliation agreement between the pharmacy and UMN. Appellant requested a copy of the affiliation agreement, but never received one.

Appellant claims that he requested further information regarding his ejection from the two

courses, but did not receive these documents until more than a year after he requested them. Appellant asserts that this delay violated UMN policy and did not afford him due process. Further, appellant states that he paid over $17,700 for three courses at the hospital pharmacy to which he was assigned and never received a refund for the 7126 course from which he was ejected or from the two courses he was allegedly prevented from taking. In total, appellant claims he had paid UMN more than $163,000 for program-related tuition and expenses at the time of his dismissal from the program.

Appellant also alleges that he was removed from 7126 and 7211 without notice and given two "F" grades instead of "Incomplete" or "Withdrawn" grades. He claims this allowed UMN to keep his tuition instead of reimbursing him or reapplying the fees to other courses. Appellant states that UMN placed him on academic probation after he received the two failing grades. He insists that, because it was a violation of UMN policies to fail him, it was also a violation to place him on probation.

Appellant claims that respondents' actions violated his Fourteenth Amendment right to equal protection. Specifically, he alleges that non-disabled, American-born, non-minority students were given one to two extra weeks to complete their rotations, were given syllabi when requested, were allowed to access patients' medical records, were allowed to treat the "Fagron Compounding" course as a 7211 course, and were allowed to graduate without taking a "patient care" elective. Appellant alleges that he was denied these opportunities.

Appellant alleges that, in December 2012, Dr. Rodriguez and appellant came to a written agreement regarding the "time and manner" in which he would complete courses qualifying as 7211 and 7126 and receive grades of "incomplete." In January 2013, the Academic Standing Committee ("ASC") informed appellant that, once he successfully completed the two courses, he would be removed from academic probation. Likewise, appellant alleges that Dr. Rodriguez told appellant that he would be "automatically" removed from academic probation once he passed 7126, which was scheduled to end on March 29, 2013. Appellant states that in February 2013, he received a grade of "A" in his 7211 course. However, he alleges the course was registered as 7213 in his enrollment, while it was registered as 7211 for other students. According to appellant, this was because all electives are the same. Appellant successfully passed 7126 on March 29, 2013.

In April 2013, appellant began Acute Care I (PHAR 7122) with Dr. Johnson as the preceptor. Appellant alleges that, on April 25, 2013, Dr. Johnson, in the presence of another student, held up appellant's marked exam, called him "one of the worst students he has had in 35 or 36 years of teaching," and accused appellant of unprofessional behavior. Additionally, Dr. Johnson, in front of others, allegedly accused appellant of cheating, forced appellant to acknowledge the accusation, and threatened to send appellant to a separate "small room." Appellant alleges that Dr. Johnson's behavior violated UMN's policy to "be respectful, fair, and civil" and also discriminated against him because of his disability. Appellant reported Dr. Johnson directly to UMN, rather than

reporting the incident to Dr. Johnson's supervisor, Dr. Rodriquez. Appellant claims that his decision to bypass Dr. Rodriguez resulted in her initiating numerous retaliations against him.

Soon after these events, Dr. Johnson gave appellant a "D" for PHAR 7122. Appellant requested to be moved from Dr. Johnson's rotation. Dr. Rodriguez denied appellant's request and told him that if he did not remain with Dr. Johnson, appellant would need to go before the ASC and that Dr. Rodriguez would propose appellant's dismissal from the program. The next week, Dr. Johnson allegedly sent appellant two text messages instructing appellant to move out of his apartment and contacted appellant's landlord to discuss the same topic. He then allegedly went to appellant's apartment, confronted appellant in a parking lot, and ordered him to move out.

Appellant alleges that Dr. Rodriquez made false statements that adversely affected his enrollment in the program. He claims that, in May 2013, Dr. Rodriguez falsely informed UMN that appellant had "never repeated 7211" because "the three elective courses are treated substantially different." He alleges that Dr. Rodriquez's statement caused him to be kept on probation past March 29, 2013. In June 2013, appellant was allowed to briefly address the ASC regarding his potential dismissal from the program. At the hearing, and outside the presence of appellant, Dr. Rodriguez allegedly proposed that appellant be dismissed from the program. Consequently, according to appellant, he was dismissed from the program in June 2013.

On July 22, 2013, appellant filed his first internal complaint with UMN. Appellant alleged respondents violated university rules, policies, and established practices by removing him from 7211 and 7126, issuing non-passing grades, improperly continuing his probation beyond March 29, 2013, and dismissing him from the pharmacy program. UMN upheld Dr. Rodriguez's finding that appellant never repeated the failed course.

On November 4, 2013, appellant requested extra time for completing rotations as a disability accommodation. His request was denied, and no UMN employees engaged appellant in "the interactive process."

On April 30, 2014, appellant filed a second internal complaint with UMN. He asserted that, because UMN violated its own rules, policies, and established practices, particularly in regard to its anti-racial discrimination measures, he was entitled to a tuition refund, monetary reimbursements, and an apology from respondents.

In September 2014, UMN held a nine-hour evidentiary hearing to address appellant's allegations. On October 8, 2014, the ASC found that UMN and its employees did not violate any rules, policies, or established practice in relation to appellant's enrollment or education. Appellant appealed the decision to UMN Vice President Brooks Jackson. Vice President Jackson reviewed the complaints and denied appellant's appeal.

District court procedural history

In August 2016, appellant filed a complaint in district court based on the same allegations presented to UMN. Respondents filed a motion to dismiss for failure to state a claim and lack of subject-matter jurisdiction. *See* Minn. R. Civ. P. 12.02(a), (e). The district court dismissed all claims except appellant's claim against respondents Rodriguez and Johnson for retaliation.

In November 2017, respondents filed a motion for summary judgement on the remaining retaliation claims. After a hearing, the district court granted respondents' summary-judgment motion, thus dismissing appellant's last remaining claim. Appellant appeals from the final judgment.

D E C I S I O N

I. The district court did not err in dismissing, for lack of subject-matter jurisdiction, appellant's state-law claims for breach of contract, unjust enrichment, and promissory estoppel.

Subject-matter jurisdiction refers to a court's authority to consider an action or issue a ruling that will decide the issues raised by the pleadings. *See Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). Without subject-matter jurisdiction, a court must dismiss a claim. *See Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 427 (Minn. 2005) (holding that the district court erred by failing to dismiss a claim for lack of subject-matter

jurisdiction). Whether subject-matter jurisdiction exists presents an issue of law, which we review de novo. *Id.* at 428.

The district court concluded that it did not have subject-matter jurisdiction over appellant's state-law claims for breach of contract, unjust enrichment, and promissory estoppel. It ruled that the law required appellant to pursue these claims through a writ of certiorari to the court of appeals. It reasoned that appellant's claims implicated review of an administrative body's quasi-judicial decisions, which necessitated a deferential test, not a de novo review. The district court determined that the two complaints appellant brought before UMN contained the same claims that he brought in his complaint filed in district court. We conclude that appellant's failure to appeal UMN's decision via a writ of certiorari is fatal to the state-law claims in the matter before us.

Absent "an adequate method of review or legal remedy, judicial review of the quasi-judicial decisions of administrative bodies, if available, must be invoked by writ of certiorari." *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). "Because it mandates nonintrusive and expedient judicial review, certiorari is compatible with the maintenance of fundamental separation of power principles, and thus is a particularly appropriate method of limiting and coordinating judicial review of the quasi-judicial decisions of executive bodies." *Id.*

"If a writ of certiorari . . . is the exclusive method by which to challenge an [administrative body's] decision, then the district court lacks subject-matter jurisdiction

to hear the case." *County. of Washington v. City of Oak Park Heights*, 818 N.W.2d 533, 538 (Minn. 2012) (citation omitted)*; see Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187, 190-92 (Minn. App. 1999) (holding that "[a] breach of contract claim based on a termination decision by the University of Minnesota is reviewed only on a writ of certiorari" and affirming the district court's determination that it lacked subject-matter jurisdiction to review the claim), *review denied* (Minn. July 28, 1999); *see also Maye v. Univ. of Minn.*, 615 N.W.2d 383, 385-87 (Minn. App. 2000) (affirming a district court's determination that it lacked subject-matter jurisdiction to review a breach-of-contract claim based on the university's failure to promote the appellant). A party must apply to the court of appeals for a writ of certiorari "within 60 days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed thereby." Minn. Stat. § 606.01 (2018). And, when a litigant aggrieved by a quasi-judicial decision fails to obtain a timely writ of certiorari, that litigant is not entitled to review on the merits of the challenge by way of some other remedy. *See in re Occupational License of Haymes*, 444 N.W.2d 257, 259 (Minn. 1989) (reversing review on the merits of quasi-judicial decision because of failure to timely petition for writ of certiorari).

Appellant argues that, contrary to the district court's ruling, the court had subject-matter jurisdiction over the matter. He contends that the court had jurisdiction for several reasons: the complaint filed in district court alleged facts sufficient to establish a claim for breach of educational contract, the contractual violations were not substantially related to

his dismissal from the program, the district court's review of the claims would not necessarily require a determination as to whether dismissal was appropriate, and that such a review would not result in a substantial intrusion or challenge to UMN's internal decision-making process.

We are not persuaded. The district court properly dismissed appellant's state-law claims for lack of subject-matter jurisdiction. The allegations made by appellant in his district court complaint, although he attempts to distinguish them, are substantially the same as the claims adjudicated by UMN.

Further, UMN's decision-making process was quasi-judicial in nature and, thus, necessitated certiorari review to maintain separation of powers principles. *See id*. Quasi-judicial actions include the following: "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim." *Minn. Ctr. for Env't Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999). Appellant's UMN complaints highlighted factual allegations, disputed by respondents, which were then reviewed and weighed by an administrative panel. Appellant was represented by counsel, presented evidence, and cross-examined witnesses. The prescribed standard to which the facts were applied at the hearing were the rules, policies, and established practices of the program. The panel issued a decision, and appellant sought review. Vice President Jackson then reviewed the matter and issued a final, binding decision denying appellant's appeal.

Appellant's assertion that the district court's review of his claims would not result in an intrusion upon UMN's decision is without merit. The district court is not equipped to review the types of academic decisions appellant asserts could be reviewed, such as the program's choice of rotation locations, the tasks appellant was assigned on rotation, appellant's access to patients' medical records, or whether courses satisfied graduation requirements. *See Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 246 (Minn. App. 2011) (concluding courts are not equipped to analyze the goals of a UMN degree program), *review denied* (Minn. Aug. 16, 2011).

Appellant further argues that the district court had subject-matter jurisdiction over his claims because it could grant certain monetary damages that UMN does not have the authority to award. This distinction does not extinguish the policy concern that a district court should not be conducting a de novo review of issues already adjudicated before an administrative body through a quasi-judicial proceeding. We, therefore, discern no error by the district court in dismissing appellant's state-law claims for lack of subject-matter jurisdiction.

II. The district court did not err in dismissing appellant's 42 U.S.C. § 1983 Fourteenth Amendment equal-protection claims for failure to state a claim upon which relief could be granted.

The United States and the Minnesota Constitutions guarantee citizens equal protection of the laws. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2. 42 U.S.C. § 1983 (2018) provides a private right of action for violations of constitutional provisions, including the Equal Protection Clause, and a party bringing a section 1983 claim may seek monetary damages for violations of their constitutional rights. An equal-protection challenge requires an initial showing by the plaintiff that "similarly situated persons have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (quotation omitted). In determining whether two groups are similarly situated, we focus on "whether they are alike in all relevant respects." *Id.* at 522. Appellate courts routinely reject equal-protection claims of parties who fail to establish that they are similarly situated to those from whom they contend to be treated differently. *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012).

A complaint must "contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Minn. R. Civ. P. 8.01. A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. *See* Minn. R. Civ. P. 12.02(e). "We review de novo whether a complaint sets forth a legally sufficient claim for relief." *Walsh v.*

U.S. Bank, N.A., 851 N.W.2d 598, 606 (Minn. 2014). We must accept the allegations contained in the complaint as true; whether the plaintiff can prove the alleged facts is immaterial to our analysis. *See Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980). We will not uphold a dismissal "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (quotation omitted).

The district court concluded that there was an insufficient basis for an equal-protection claim. The district court ruled that appellant had not alleged a direct motive of discrimination, failed to identify similarly situated persons who received accommodations or passing grades that he did not receive, and did not provide precise descriptions of facts explaining how non-disabled and non-minority students were treated more favorably. The district court's conclusion was not error.

Appellant disputes that he failed to allege sufficient facts to sustain his equal-protection claim. Appellant points to allegations from his complaint of Caucasian students being treated favorably. For example, the complaint alleged that appellant was not given extra training on patient interaction when compared to other students, was denied access to patient profiles while white students' access was not similarly barred, was not given a course schedule while white students received those materials, and was required to take a "patient care" elective while other students were not. Appellant's argument, however, does not adequately

address the district court's conclusion that the allegations are too vague and do not identify how the students in question were similarly situated to himself.

Our review of the complaint is consistent with the district court's ruling. Appellant failed to sufficiently allege that other students treated more favorably were similarly situated to appellant and alike in all relevant ways. Therefore, the district court did not err in dismissing appellant's equal-protection claims pursuant to Minn. R. Civ. P. 12.02(e).

III. The district court did not err in dismissing appellant's 42 U.S.C. § 1983 Fourteenth Amendment due-process claims for failure to state a claim upon which relief can be granted.

Appellant argues the district court's dismissal of his due-process claims was error because his complaint sufficiently alleged that he was deprived of both a property and liberty interest. The state cannot "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 7. However, the United States Supreme Court has held that "far less stringent procedural requirements" are necessary "in the case of an academic dismissal." *Bd. Of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86, 98 S. Ct. 948, 953 (1978).

The district court determined that appellant failed to plead facts sufficient to support a section 1983 due-process claim because he was afforded more than the prescribed constitutional procedures require. We agree.

A. Property interest

Appellant concedes that, to show he was deprived of a property interest, he must establish that UMN failed to provide him with written notice and an opportunity to be heard prior to taking adverse action against him. However, he contends that he was deprived of a property interest because he did not receive notice of his removal from two courses or notice of receiving failing grades. Appellant cites to no authority that qualifies these actions as depriving him of a property interest and consequently deserving of due-process protections.

Regarding his dismissal, appellant was provided with notice, was represented by counsel, was allowed to present evidence and cross-examine witnesses, and was allowed a nine-hour hearing prior to being dismissed from the program. This was sufficient due process to protect appellant's constitutional rights. Therefore, the district court did not err in ruling that appellant failed to state a claim upon which relief can be granted.

B. Liberty interest

Appellant cites *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975) to support the proposition that students attending public universities have a protected liberty interest in their good name and reputation—both of which, according to appellant, he was deprived. He alleges that both Dr. Johnson and Dr. Rodriguez made several false statements about him. Specifically, he alleges that Dr. Johnson falsely accused him of cheating and taking a patient profile without permission. He alleges that Dr. Rodriguez falsely

stated that he had "never repeated 7211," that failed rotations were placed "at the end of all scheduled rotation[s]," and that appellant needed to complete a "patient care" elective in order to be removed from academic probation.

As an initial matter, *Greenhill* is not controlling as it predates *Horowitz*. Additionally, *Greenhill*'s holding does not support appellant's due-process claim. 519 F.2d at 8. The *Greenhill* court held that the plaintiff, who had been dismissed from medical school, without the opportunity to be heard, was entitled to an administrative hearing based on the broad and damaging dissemination of information denigrating his academic ability. *Id*. at 7-8. The *Greenhill* court cautioned, however, that most academic dismissals do not require more than "an informal give-and-take," between the student and the administration, and that "trial-type procedures" should be reserved for only particular circumstances. *Id*. at 8-9. Appellant's circumstances are distinguishable from *Greenhill*, and, further, the amount of due process appellant received, including a lengthy evidentiary hearing before an administrative panel, was sufficient under *Horowitz*. *See* 435 U.S. at 86, 98 S. Ct. at 953; 519 F.2d at 8-9. We, therefore, conclude that the district court did not err in dismissing, pursuant to Minn. R. Civ. P. 12.02(e), appellant's due-process claims.

IV. The district court did not err in dismissing appellant's 42 U.S.C. § 1983 First Amendment retaliation claims.

Appellant argues that the district court erred in dismissing his retaliation claims. To successfully

establish a prima facie case of retaliation under the First Amendment, plaintiffs must demonstrate that (1) they engaged in statutorily protected conduct; (2) the defendant committed an adverse action; and (3) a causal connection exists between the two. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983).

A. Vice President Jackson

Appellant argues that Vice President Jackson's denial of his administrative appeal was retaliatory in nature. Specifically, appellant alleged, in his district court complaint, that Vice President Jackson issued his decision on appellant's appeal past the 30-day deadline provided by UMN policies and that this delay demonstrated a conspiracy to prevent appellant's complaint from reaching the next level of the UMN administrative process.

Rejecting appellant's allegations, the district court determined that he had not pleaded sufficient facts to implicate Vice President Jackson in a retaliation claim. The district court's rationale was that there were insufficient allegations that Vice President Jackson acted adversely toward appellant, beyond denying his appeal on its merits. The district court reasoned that, if such allegations were enough to support a retaliation claim, then any student who appealed UMN decisions would have a retaliation claim. Because appellant failed to allege that Vice President's adverse action was malicious in nature, or outside the purview of his duties as vice president, the district court concluded that qualified immunity was a bar to appellant's claim against him. We agree.

Qualified immunity is intended to shield, in certain circumstances, government officials from liability and the burdens of litigating a section 1983 claim for damages. *Robbins v. Becker*, 794 F.3d 988, 993 (8th Cir. 2015). "State officials are entitled to qualified immunity when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Elec. Fetus Co., Inc., v. City of Duluth*, 547 N.W.2d 448, 452 (Minn. App. 1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)), *review denied* (Minn. Aug. 6, 1996). A clearly established right is one that is "sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). We review the applicability of immunity de novo. *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599 (Minn. 2016).

The "allegations in a complaint *may* provide the basis for denying an immunity defense." *Gleason v. Metro. Council Transit Operations*, 563 N.W.2d 309, 318 (Minn. App. 1997) (emphasis in original), *aff'd in part*, 582 N.W.2d 216 (Minn. 1998). Cases implicating immunity, however, are subject to a somewhat heightened pleading standard. *See Elwood v. Rice Cty.*, 423 N.W.2d 671, 676 (Minn. 1988). That is, plaintiffs "should supply in their complaints or other supporting materials greater factual specificity and particularity than is usually required." *Id.* (quotation omitted). And, immunity should be determined "at the earliest possible stage to shield officers from disruptive effects of broad-ranging discovery and effects of litigation." *Id.* at 675.

On appeal, we "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816 (1985). Rather, we must merely decide "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Id.*

Taking appellant's allegations as true, Vice President Jackson's alleged delay in the decision-making process does not imply impropriety on a level that would implicate him in retaliation against appellant or bar him from qualified immunity. The relevant portions of appellant's complaint do not raise these theories of impropriety, and the record does not support such an implication. As such, the district court did not err in dismissing appellant's retaliation claim against Vice President Jackson.

B. Dr. Johnson and Dr. Rodriguez

Appellant also argues that the conduct of Dr. Johnson and Dr. Rodriquez was retaliatory in nature. In his district court complaint, appellant alleged that respondents retaliated against him after he took the protected action of filing a complaint against Dr. Johnson without first bringing the matter to Dr. Rodriguez. Appellant claims that respondents' retaliatory actions included issuing him poor grades, advocating for his dismissal from the program, accusing him of cheating, ridiculing him in front of a peer, and attempting to force him to move out of his apartment.

The district court concluded that appellant had alleged enough facts that, if true, could potentially support a retaliation claim against Dr. Johnson and Dr. Rodriguez. Accordingly, the court denied their motion to dismiss and allowed the parties to proceed with discovery. Approximately one year later, however, the district court concluded that, "[w]hile some of [respondents'] conduct was questionable, there [were] no pliable facts establishing a retaliatory animus." Thus, the district court granted respondents' motion for summary judgment.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). A party moving for summary judgment may support the motion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Minn. R. Civ. P. 56.03(a)(1).

"The test for qualified immunity at the summary judgment stage is an objective one." *Elec. Fetus*, 547 N.W.2d at 452 (quotation omitted). "The district court's function on a motion for summary judgment is not to

decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH*, 566 N.W.2d at 70. As such, "a court deciding a summary-judgment motion must not make factual findings or credibility determinations or otherwise weigh evidence relevant to disputed facts." *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201 (Minn. App. 2010).

On appeal, we review de novo a district court's summary-judgment decision. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* We "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The district court properly granted respondents' summary-judgment motion, concluding that there were no genuine issues of material fact and respondents were entitled to qualified-immunity protection. In support of its decision, the court determined that (1) appellant was unable to demonstrate that respondents deprived him of a constitutional right and (2) the constitutional right was not clearly established at the time of the alleged violation. *See Elec. Fetus*, 547 N.W.2d at 452. The district court reasoned that, while appellant made allegations of "questionable conduct" by respondents, the alleged actions took place either before appellant's protected activity or the conduct was not of a type and quality definitive of a retaliatory animus. We agree.

Appellant filed with UMN an internal complaint against Dr. Johnson on April 26, 2013. The record shows that the complaint was not discussed with Dr. Johnson until on or about April 30, 2013, when Dr. Rodriquez relayed the allegations to him. Viewing the facts in the light most favorable to the nonmoving party, Dr. Johnson's alleged conduct of accusing appellant of cheating and ridiculing him in front of peers would have occurred before Dr. Johnson was made aware of appellant's complaint. Therefore, appellant's evidence of these claimed adverse events do not show actions that were taken during the pendency of his protected actions.

Dr. Johnson's issuance of poor grades to appellant do not support a retaliation claim either. Appellant received a grade of "D" from Dr. Johnson on May 3, 2013, the day grades were due, and there is no evidence in the record that this grade was influenced by appellant's complaint. Appellant's own allegation that Dr. Johnson considered him to be "one of his worst students" indicates that appellant was, in fact, struggling academically before his complaint was filed. Nor do appellant's allegations that Dr. Johnson contacted appellant's landlord and spoke condescendingly to appellant in a parking lot support a retaliation claim, as neither action would chill a person of ordinary firmness from continuing to engage in a protected activity. *See Bernini v. City of St. Paul*, 665 F.3d 997, 1007 (8th Cir. 2012).

Similarly, appellant's evidence against Dr. Rodriquez does not support a retaliation claim. While Dr. Rodriguez was present for the hearing before

the ASC, the record does not support the claim that she advocated for appellant's dismissal.

Additionally, appellant's "right to speak out" had not been "clearly established" at the time of the alleged retaliation. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (reiterating the "longstanding principle that clearly established law should not be defined at a high level of generality") (quotations omitted). To show that a right is "clearly established," a plaintiff must identify a case where state officials, acting under similar circumstances, were held to have violated the right at issue. *See id*. at 552. Appellant has not met this burden. Instead of identifying a case in which state officials, acting under similar circumstances, were held to violate First Amendment rights through retaliation, he points to a Fourth Amendment case regarding an arrest and a claim regarding excessive force and retaliation in the prison system.

In sum, the district court did not err in granting summary judgment on appellant's First Amendment retaliation claims against Dr. Johnson and Dr. Rodriquez. There were no genuine issues of material fact, and both respondents were entitled to qualified-immunity protection.

Affirmed.

APPENDIX C

STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT

Judge Michael K. Browne
Case Type: Civil
Court File No.: 27-CV-16-12740

[Filed February 22, 2018]

Jun Xiao, Plaintiff, v. Dr. Raquel Rodriguez, individually and in her official capacity, and Todd Johnson, individually and in his official capacity, Defendants.	)

ORDER

APPEARANCES

The above-captioned matter came before the Honorable Michael K. Browne, Judge of District Court, on Defendant's Motion for Summary Judgment on December 14, 2017. The hearing was held at the Hennepin County Government Center, located at 300

South Sixth Street in Minneapolis, Minnesota, in courtroom 953. Jeffery Shiek, Esq., represented Plaintiff. Brian J. Slovut, Esq., represented Defendants.

PROCEDURAL HISTORY

On August 24, 2016, Jun Xiao (Plaintiff) filed his Complaint. Dr. Raquel Rodriguez and Todd Johnson (Defendants) filed a Motion to Dismiss on September 29, 2016. On November 21, 2016, the Court heard Defendants' Motion to Dismiss. On February 17, 2017, the Court granted, in part, and denied, in part, the Motion to Dismiss, which resulted in action against Vice President Jackson being dismissed. The parties stipulated to the dismissal of the Regents of the University of Minnesota.

The only claim remaining in this action was Plaintiff's § 1983 claim against Defendants Rodriguez and Johnson for retaliation. Defendants then filed their Motion for Summary Judgment on November 16, 2017, arguments were heard on December 14, 2017 and the Court took the issue under advisement and now issues this order to address the outstanding motion.

FACTUAL BASIS

This Court, having heard all arguments from counsel, and reviewed all relevant documents and memoranda, determined the following:

1. Plaintiff emigrated from China to the United States when he was 35 years old. He possesses a Ph.D. from the Institute of Biophysics, Chinese Academy of Sciences and

he completed some measure of his postdoctoral training at the Massachusetts Institute of Technology. Plaintiff was accepted in to the Doctor of Pharmacy program at the University of Minnesota. He took perquisite classes for the Doctor of Pharmacy program at the St. Louis Community College (Missouri), Schoolcraft College (Michigan) and Macomb Community College (Michigan) to prepare for enrollment.

2. Plaintiff began classes at the University of Minnesota on September 1, 2009. In his fourth year Plaintiff began his Advanced Pharmacy Practice Experiences (APPE) course work. The curriculum included Acute Care, Ambulatory Care, Patient Care, and Community Practice. In addition, there were three elective courses (12 credits) that were also required. Students are supervised in their rotations by preceptors (pharmacists).

3. On September 12, 2012, a patient complained about Plaintiff. In the investigation that followed it was concluded the complaint was valid and that Plaintiff lacked the requisite level of competency to complete the program.

4. On September 24, 2012, Plaintiff was informed he failed the Home Infusion APPE and that he had to repeat the class. It was also established that he had accrued six credits of D and F level work. Students who receive eight or more credits of D/F work are placed on academic probation.

5. Plaintiff was referred to the Academic Standing Committee (ASC), the goal of which is to monitor student performance and to help garner improvement. The ASC asked Plaintiff to meet with Dr. Rodriguez, the Director of Experimental Education Programs, at the University of Minnesota College of Pharmacy, to better identify ways to improve his performance.

6. Dr. Rodriguez started seeing Plaintiff on a regular basis starting in November of 2012. On November 26, 2012, at Dr. Rodriguez's invitation, a counselor from Disability Services (Ms. Blacklock) attended one of their sessions.

7. On February 21, 2013, Plaintiff alleges Dr. Rodriguez indicated that if he completed his rotation at Walgreens he would be removed from academic probation.

8. On March 29, 2013, Plaintiff successfully completed his rotation at Walgreens.

9. In April of 2013, Plaintiff was removed from the Acute Care APPE which he attended at Lake Region Healthcare in Fergus Falls, MN. Dr. Johnson was one of Plaintiff's preceptors at the Fergus Falls location. Ultimately, Plaintiff received a D grade for the work he performed at that location.

10. On April 25, 2013, Dr. Johnson met with Plaintiff and another student. Allegedly, Dr. Johnson called Plaintiff one of the worst

students he has had in 35 or 36 years of teaching, disclosed Plaintiff's private academic information, showed Plaintiff's marked exam, and accused Plaintiff of unprofessionalism, all in the presence of the other student.

11. On June 3, 2013, Dr. Rodriguez sat in on the ASC meeting which was asked to determine whether to dismiss Plaintiff. While she was not a member of the ASC, and did not take part in the actual deliberations, she did inform that body of her opinion Plaintiff should be dismissed.

12. On June 6, 2013, the ASC dismissed Plaintiff from the pharmacy program.

13. On June 27, 2013, Ms. Blacklock received documentation that established Plaintiff had a documented disability. This was the first documented proof of Plaintiff's condition.

14. On July 22, 2013, Plaintiff filed his first complaint with the University of Minnesota alleging the violation of University rules, policies, and established practices in regard to his removal from two courses, the issuance of non-passing grades, the improper continuation of probation beyond March 29, 2013, and his dismissal from the pharmacy program.

15. On April 30, 2014, Plaintiff filed a second complaint with the University of Minnesota asserting that because the University

violated its own rules, policies, and, established practices, particularly in regard to its anti-racial discrimination measures, he was entitled to a tuition refund and monetary reimbursements to account for Defendants actions. Plaintiff also asked for an apology from Defendants.

16. On September 12, 2014, the University of Minnesota held an evidentiary hearing to determine the status of Plaintiff's complaints.

17. On October 8, 2014, the University of Minnesota issued a final decision establishing no rules, policies, or established practices, where violated. On October 26, 2014, Plaintiff administratively appealed the decision to the Vice President of the University of Minnesota.

18. After considering the Plaintiff's position, the Vice President of the University of Minnesota issued a denial of Plaintiff's appeal on February 23, 2014.

19. Plaintiff later entered into a contractual agreement with the University of Minnesota to obtain a degree within a reasonable amount of time. A term within that agreement required Plaintiff to repeat the two courses he failed. Ultimately he completed the Doctor of Pharmacy program and was awarded the degree.

CONCLUSIONS OF LAW

The Court recognizes Plaintiff's need to be made whole. For him there has been an emotional cost for what he must feel was a long series of substantive wrongs. Though fairness, and to some extent empathy, are all relevant factors in the Courts rendering of a decision, such things are not particular only to Plaintiff. The challenge any court faces, therefore, is to be fair and empathetic to both sides in its assessment of whether any of Plaintiff's injuries are recognizable after an equal balancing of both law and fact. In the immediate case the analysis must begin with a painstaking consideration of whether qualified immunity is available to Defendants. In the Court's previous Order, this issue was left unresolved. Today, however, after all the facts have been clarified, this matter is of central importance to the Court's decision.

I. LEGAL STANDARD FOR SUMMARY JUDGMENT.

To prevail on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue as to any material fact and that [the moving] party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact for trial "must be established by substantial evidence." *Murphy v. County House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512, (1976). There is no genuine issue of a material fact if "the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). When a motion for summary judgment is made and supported, the nonmoving party

must "present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. "If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered." *Id.* Summary judgment on a claim is mandatory against a party who fails to establish an essential element of that claim, if that party has the burden of proof, because this failure renders all other facts immaterial. *Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. Ct. App. 1994).

II. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY PROTECTION.

The doctrine of qualified immunity is available to Defendants. Section 1983 provides a civil cause of action against any person who, under color of state law, causes a deprivation of the rights, privileges, or immunities secured by the Constitution and laws of the United States. 42 U.S.C. § 1983; *McRaven v. Sanders*, 577 F.3d 974, 979 (8th Cir. 2009). In an individual capacity suit under § 1983, a plaintiff seeks to impose personal liability on a state actor for actions taken under color of state law. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

When a state actor is sued in her individual capacity, she can plead an affirmative defense of qualified immunity. *Serna v. Goodno*, 567 F.3d 944, 952 (8th Cir.2009). One of the goals of qualified immunity is to eliminate meritless actions against public officials at the earliest possible stage in the litigation. *See Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815; *Harlow*, 457 U.S. at 816–18, 102 S.Ct. at

2737–38. Qualified immunity is a purely legal question conceptually distinct from a defense to the merits of plaintiffs' claim. *Id.*

In the immediate case, Defendants have been sued under §1983 in their individual capacities as members of the University of Minnesota staff. Each are state actors. As a result, they are entitled to qualified immunity protection where appropriate.

III. QUALIFIED IMMUNITY IS A BAR TO RECOVERY IN THIS CASE.

The facts of this case are such that Defendants are appropriately insulated from liability. Public officials are entitled to qualified immunity from liability for civil damages arising out of discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). As long as a public official's conduct does not violate a clearly established statutory or constitutional right, they cannot be held liable. *Id.* To defeat a defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation. *Id.* If the answer is no, that the complained of act violated a clearly established constitutional or statutory right, the court should grant a defendant's motion for summary judgment. *See* Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. With these principles in mind, this Court turns to Plaintiff's remaining §1983 retaliation claim (First Amendment grounds) and the question of whether Defendant's are immune from liability.

A. Plaintiff is unable to Demonstrate that Defendants Deprived him of a Constitutional Right.

Plaintiff's remaining claim asserts that Defendants retaliated after Plaintiff exercised his First Amendment Rights. It is settled at a high level that the First Amendment prohibits government officials from retaliating against a citizen for exercising her right to free speech. *Hartman v. Moore*, 547 U.S. 250, 256, 126 S. Ct. 1695 (2006). However, to establish a First Amendment retaliation claim in a particular case, a plaintiff must show (1) that he engaged in a protected activity, (2) that the defendant's actions caused an injury to the plaintiff's that would chill a person of ordinary firmness from continuing to engage in the activity, and (3) that a causal connection exists between the retaliatory animus and the injury. *Bernini v. City of St. Paul*, 665 F.3d 997, 1007 (8th Cir. 2012).

The facts of this case do not support a favorable finding on any of the prevailing elements. Defendant engaged in protected activity when he filed complaint with the University of Minnesota on July 22, 2013 and then again on April 30, 2014. While there are allegations of questionable conduct by Defendants throughout the foundations of Plaintiff's case, it is also true their timing occurred either before the protected activity, rendering them irrelevant, or the conduct was not of the type and quality definitive of a retaliatory animus, rendering them peripheral to the relevant inquiry. The facts of this case simply do not establish that a constitutional deprivation has occurred.

B. <u>The Constitutional Right was not Clearly Established at the time of the Alleged Violation.</u>

The second prong of the qualified immunity analysis requires the Court to determine whether the constitutional right Defendants allegedly violated was "clearly established" at the time of the challenged conduct. To this, the Court concludes in the negative. Whether an official eligible for qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034 (1987). The relevant assessment must be made in light of the legal rules that were "clearly established" at the time the official action was taken. *Id.* To be clearly established, the contours of the right must be sufficiently clear such that every "reasonable official would have understood that what he was doing violates that right." *Ashcroft v. al-Kidd,* 563 U.S. 731, 741, 131 S. Ct. 2074 (2011). Existing precedent must have placed the statutory or constitutional question beyond debate. *Id.* "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Nord v. Walsh Cnty.,* 757 F. 3d 734, 739 (8th Cir. 2014).

Defendants correctly point out that Plaintiff has not established any adverse action by Defendants which were related to the deprivation of a clearly identifiable constitutional right. Having reviewed the facts of this

case, in a way that favors Plaintiff, the Court can only conclude that qualified immunity is available to Defendants in such a way as to shield them from liability.

CONCLUSION

Plaintiff claims he was retaliated against for exercising his First Amendment rights. The facts, however, do not favor his position. While some of Defendants' conduct was questionable, there are no pliable facts establishing a retaliatory animus. Because Plaintiff is unable to tie his First Amendment conduct to any act of constitutional deprivation, his claim fails. Defendants are, therefore, entitled to qualified immunity. Summary Judgment is appropriate.

ORDER

Therefore, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED.**

LET JUDGEMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/
Browne, Michael
Judge of District Court
02/22/18 12:09 PM

APPENDIX D

STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT

Judge Michael K. Browne
Case Type: Discrimination
Court File No. 27-CV-16-12740

[Filed February 17, 2017]

Jun Xiao, Plaintiff,	)
v.	)
Regents of the University of Minnesota,	)
and	)
Dr. Raquel Rodriguez, individually and in her official capacity,	)
and	)
Brooks Jackson, individually and in her official capacity,	)
and	)
Todd Johnson, individually	)

and in his official capacity,)
Defendants.)
_____)

The above-captioned matter came before the Honorable Michael K. Browne, Judge of District Court, on Defendants' motion for a judgment on the pleadings on November 21, 2016. The hearing was held at the Hennepin County Government Center, located at 300 South Sixth Street in Minneapolis, Minnesota, in courtroom 953. Mr. Thomas Priebe and Mr. Jeffrey Schiek represented Plaintiff Xiao. Mr. Brian Slovut represented Defendants.

ORDER

FACTUAL BASIS (AS PRESENTED IN PLAINTIFF'S COMPLAINT)

Plaintiff is a graduate of the College of Pharmacy at the University of Minnesota ("UMN"). During his time at UMN, Plaintiff experienced a number of academic difficulties. According to his complaint, Plaintiff is a disabled individual, with disabilities that impact his mood, energy, and ability to interact with others. He is also a Chinese immigrant. Though he has an accent, Plaintiff has passed the University's exam for English proficiency and was admitted to the program.

Plaintiff earned a 3.1 grade point average ("GPA") in the first three years of Pharmacy School. He then began his Advanced Pharmacy Practice Experiences ("APPE") courses in his fourth year. There are 8 courses. These courses require patient care and interaction through rotations at different pharmacies.

Each of these rotations is 5 weeks, or 200 hours, supervised by pharmacists or "preceptors."

I. ALLEGATIONS AGAINST THE UMN

A. Missing Syllabi

Plaintiff alleges that UMN only provided one syllabus for one of the APPE courses when he enrolled in his classes, which was for a course in which he was not enrolled. He alleges that this was a violation of UMN's policy and in breach of his contract with the University. He states that he asked Dr. Raquel Rodriguez, Director of Experimental Education Programs at the Pharmacy School, for the syllabi and that she did not provide them.

Plaintiff stated that his preceptors at different times were Mr. Todd Johnson, Ms. Christina Sorrentino, and Ms. Beatrice Schwake, and that these preceptors treated him in a disparate fashion because of his disabilities, national origin, and race.

B. Ejection from PHAR 7126

Plaintiff alleges that on August 17, 2012, Ms. Sorrentino gave him a "C" grade during a midterm evaluation without hearing from the pharmacists with whom he worked, stating that she would hear from them regarding his final grade. As a result, on August 20, Plaintiff asked the pharmacists to give him "good feedbacks [*sic*]." On August 24, Plaintiff met with co-preceptor Ms. Dana Simonson about a potential misunderstanding regarding an assignment. He told her that he would improve his performance. Ms. Simonson assured him that he was doing a "really good

job," and confirmed the next week's schedule. She also asked him to come back the next day for a meeting with Ms. Sorrentino.

The next day, Ms. Simonson and Ms. Sorrentino met without Plaintiff. Then, Ms. Simonson met with "the Manager" of Plaintiff's assignment. The Manager ejected Plaintiff from Course 7126, citing the following reasons: (i) that Plaintiff "refused to do the assigned topic" and (ii) he attempted to interfere with his supervising pharmacists' feedback.

Plaintiff alleges that he was removed from the course just over four days before the course's end date. He states that the course is meant to teach students how to interact as pharmacists, and he should not be punished for not previously having the skills to be gleaned from that class.

C. Medication History Class

Plaintiff also alleges that on August 17, 2012, he asked Dr. Rodriguez and Assistant Professor Christene Jolowsky to move him from the Medication History class to the Leadership Administration class, as Leadership Administration does not require interaction with patients. Plaintiff was enrolled in Medication History anyway. Ms. Schwake was his preceptor for that class.

Plaintiff alleges that he was not given the proper training to succeed in the Medication History class. He also alleges that he should not have been enrolled to take Medication History at the Fairview University of Minnesota Medical Center ("UMMC") because he had taken other courses there and this violated the

Pharmacy School's policy to provide a "diverse mixture of sites" at which students would complete their rotations. Additionally, Plaintiff alleges that Medication History is an elective and is treated by UMN faculty as required, contrary to the School's policy.

On September 12, 2012, Ms. Schwake told Plaintiff to go meet with Dr. Rodriguez. Plaintiff met with Dr. Rodriguez, who informed him that a patient had complained about him. The complaint's basis was Plaintiff's "national dialect." Plaintiff alleges that he was immediately removed from the class and prohibited from completing it. Before being removed from the class, Plaintiff worked for a mere three and a half days, interviewing 16 to 17 patients. Ms. Schwake approved and signed the documents pertaining to these patients, including the one who complained.

On approximately September 14, 2012, Plaintiff requested the release of his academic record regarding why he was removed from this course. On September 17, Mr. Peter Haeg, Director of Student Services, told Plaintiff that he was removed because UMMC believed that he compromised patient safety and that UMMC had the right to do so under the Affiliation Agreement between the UMMC and the UMN. Plaintiff asked for a copy of the agreement but never received one.

On approximately September 25, Plaintiff met with Dr. Rodriguez, who gave Plaintiff only select sentences from the patient's complaint, reiterated concerns regarding patient safety, and gave no reasons for the removal other than patient safety. Plaintiff told Dr. Rodriguez that the patient got angry with Plaintiff

because he asked the same questions the nurse and doctor had asked, which he was required to do.

Plaintiff alleges that UMN only gave him information about his ouster from the two classes discussed above after more than a year from when he requested the information. He also states that he received daily logs about his work two years after his request. These logs showed that Plaintiff did satisfactory work but was nonetheless ousted from those classes. He alleges that this violates UMN policy and does not afford him due process.

D. Tuition Payments

Plaintiff states that he paid over $43,000 for two semesters containing six APPE courses, averaging $7,200 per course. He paid over $17,700 for three courses at UMMC and did not receive a refund for the first course from which he was removed, nor did he receive a refund for the two later courses that he alleges he was prohibited from taking. At the time of his dismissal, Plaintiff alleges that he paid UMN over $163,000.

E. Prohibition from Completing Courses

Plaintiff states that he was removed from Medication History (7126) and Infusion (7211) without notice and given two "F" grades instead of "Incomplete" or "Withdrawn" grades. This negatively affected his GPA and allowed UMN to keep his tuition fees instead of reimbursing him or reapplying the fees to other classes.

F. Disparate Treatment

Plaintiff states that other non-disabled, American-born, non-minority students were given one to two extra weeks to complete their rotations upon request, while he was not.

II. ACADEMIC PROBATION

UMN placed Plaintiff on academic probation for receiving the two failed grades discussed above. Plaintiff states that because it was a violation of UMN's policies to fail him in the first place, it was against its policy to have put him on probation.

On December 14, 2012, Dr. Rodriguez and Plaintiff came to a written agreement regarding the "time and manner" in which he would complete the failed courses and receive the grade of "I" (incomplete). On January 16, 2013, the Academic Standing Committee ("ASC") informed Plaintiff that once he passed those classes that he would be removed from academic probation.

On February 21, 2013, Plaintiff met with Dr. Rodriguez, who stated that he would be "automatically" removed from probation once he passes PHAR 7126, which began the following Monday and ended on March 29 of that year. On February 22, Plaintiff passed PHAR 7211 with the grade of "A." This course, however, was registered as PHAR 7213 in Plaintiff's enrollment, while it was registered as PHAR 7211 for his classmates. This is because all electives are the same, according to Plaintiff.

On March 29, 2013, Plaintiff successfully passed PHAR 7126.

On April 1, Plaintiff began PHAR 7122, Acute Care I rotation at Lake Region Hospital. Mr. Todd Johnson was the preceptor. On April 4, Dr. Rodriguez informed Plaintiff that she would schedule the Natural Standard as Plaintiff's next elective course.

On April 25, Dr. Johnson met with Plaintiff and another student. In that meeting, Dr. Johnson called Plaintiff one of the worst students he has had in 35 or 36 years of teaching, disclosed Plaintiff's private academic information in front of the other student, showed Plaintiff's marked exam to the other student by holding it up to show Plaintiff's mistakes and berate him about them, and accused Plaintiff of unprofessional behavior because Plaintiff accepted help from a hospital staff person regarding the direction to the hospital reference room.

That same month, Dr. Johnson accused Plaintiff of cheating in a humiliating manner. Plaintiff alleges that Dr. Johnson violated the UMN policy to "be respectful, fair, and civil" to the students. Plaintiff complained to UMN directly, bypassing Dr. Rodriguez, about Dr. Johnson's behavior. Soon after, Dr. Johnson gave Plaintiff a "D" grade in PHAR 7122. Plaintiff then asked to be moved from Dr. Johnson's rotation and Dr. Rodriguez allegedly threatened to refer him to ACS for dismissal from the program.

Bizarrely, Plaintiff also alleges that Dr. Johnson sent him two text messages telling Plaintiff to move out of his apartment. Later, he allegedly went to Plaintiff's

apartment in person to tell him to move out of his apartment.

Plaintiff alleges that Dr. Rodriguez informed UMN that Plaintiff had not repeated PHAR 7211, stating that the electives are treated differently.

On May 29, 2013, Dr. Rodriguez sat in on an ASC meeting in which Plaintiff addressed the board. She remained for their deliberation and argued for Plaintiff's dismissal. On June 6, 2013, the College dismissed Plaintiff due to the "D" grade he received from Dr. Johnson. Plaintiff also challenges the set-up for Dr. Johnson's course, as well as the grading scheme.

III. PLAINTIFF'S COMPLAINT TO THE PHARMACY SCHOOL AND HEARING

Plaintiff filed a complaint with UMN on July 22, 2013. The University upheld Dr. Rodriguez's findings. On November 4, 2013, Plaintiff requested extra time to complete the rotations needed, as a disability accommodation. UMN denied this request.

On April 30, 2014, Plaintiff filed a second complaint with the University. He requested a tuition refund, monetary reimbursements to make up for the preceptor's and Dr. Rodriguez's actions, and an apology from Dr. Johnson, among other things.

On September 12, 2014, UMN's Pharmacy School held a hearing on Plaintiff's two complaints. Plaintiff challenges the neutrality of the panel, as they are all professors at the Pharmacy School. Plaintiff alleges that Dr. Rodriguez and the preceptors made a number of false allegations and denied their statements before

the panel. The hearing was a nine-hour evidentiary hearing.

On October 8, 2014, the hearing panel issued a decision finding that UMN and its employees did not violate any rules, policies, or established practice in relation to Plaintiff's enrollment or education. On October 26, 2014, Plaintiff appealed the hearing panel's decision to the Vice President. The Vice President issued a denial of Plaintiff's appeal on February 23, 2015, denying Plaintiff's ability to have the matter heard on the University-wide level. Plaintiff alleges that UMN violated its own practice in doing denying that appeal.

Plaintiff states that the actions of the UMN and its employees were discriminatory and in retaliation for Plaintiff's good faith requests for accommodations and reports regarding discrimination against him.

The proceedings at UMN were quasi-judicial, evidentiary proceedings. Plaintiff was represented by counsel, called witnesses, and submitted exhibits. The decision of the Vice President was final and binding.

CONCLUSIONS OF LAW

I. LEGAL STANDARD FOR MOTION

A pleading may be dismissed under Minn. R. Civ. P 12.02(e) if it "fail[s] to state a claim upon which relief can be granted." *See Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980) (quoting *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 670 (Minn. 1955)). The Court must take the facts alleged in the complaint as true and draw all inferences in favor of the nonmoving

party. *Burt v. Rackner, Inc.*, 882 N.W.2d 627, 629 (Minn. Ct. App. 2016), *review granted* (Sept. 20, 2016). A pleading will be dismissed "if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (*quoting N. States Power Co. v. Franklin,* 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)).

II. PLAINTIFF'S NON-STATUTORY CLAIMS FAIL AS A MATTER OF LAW.

It is well-established that a writ of certiorari to the Court of Appeals is the appropriate method of reviewing an administrative body's quasi-judicial decisions. *Shaw v. Board of Regents of University of Minnesota*, 594 N.W.2d 187, 190 (Minn. 1999) (citing *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). When an agency acts in a quasi-judicial capacity, appellate courts review its decision using a deferential test. *In re Expulsion of N.Y.B.*, 750 N.W.2d 318, 324 (Minn. Ct. App. 2008) (citing *Indep. Sch. Dist. No. 192 v. Minn. Dep't of Educ.*, 742 N.W.2d 713, 719 (Minn. Ct. App. 2007)). This standard is only used when the agency's quasi-judicial process is analogous to a trial court's. *Id*. This is found when the proceedings include (1) receiving and weighing evidence, (2) making factual findings, and (3) applying a prescribed standard to reach a conclusion. *Id*.

This standard of review is to maintain the integrity of the decision-making bodies in administrative agencies. *See Dietz*, 487 N.W.2d at 239. Further, Minnesota law requires the exhaustion of

administrative remedies prior to judicial review for the same reason. *Id.* Plaintiff's characterization of the claim does not impact jurisdictional analysis; instead, courts look at whether an inquiry into the claim asserted by Plaintiff implicates the administrative body's decision. *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646, 652 (Minn. Ct. App. 2009) (citing *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 332 (Minn. Ct. App. 2007)). Calling these claims by their rightful legal names does not change the fact that they were adjudicated on a prior occasion. Or, as William Shakespeare would put it, "What's in a name? That which we call a rose/ by any other name would smell as sweet."

Plaintiff has brought the following common law claims against Defendants: (a) breach of contract; (b) unjust enrichment; and (c) promissory estoppel. Defendants use direct quotations from the hearing panel's decision to prove that these issues have already been adjudicated in a quasi-judicial proceeding at UMN. Plaintiff argues that Defendants may not use that documentation to prove prior adjudication of the claims. However, it is unnecessary to look at the hearing panel and the Vice President's findings because Plaintiff's Complaint ascribes the same exact causes of action to his University complaints as are asserted here.

Plaintiff's Complaint includes cursory information about what was adjudicated at the University, including that the July 22, 2013 complaint involved an objection that the UMN had violated its own policies and that it had wrongfully dismissed Plaintiff from the

program due to discrimination. *See* Pl. Compl. at ¶89. The Complaint also states that the April 30, 2014 complaint included a request for a tuition refund, damages for Defendants' "illegal actions," and an apology from Dr. Johnson. *See* Pl. Compl. at ¶94. In other words, Plaintiff alleged breach of contract and promissory estoppel in the first complaint, and unjust enrichment in the second. Further, the Complaint itself repeats the facts that led up to the hearing panel's findings when providing factual bases for the common law claims.

Therefore, it is clear to this Court that the common law claims have already been adjudicated and settled by the administrative proceedings of the UMN. Thus, only a writ of certiorari is appropriate to review the UMN's findings. This Court has no jurisdiction to pursue *de novo* review of these claims.

III. PLAINTIFF'S STATUTORY CLAIMS AGAINST DR. RODRIGUEZ AND DR. JOHNSON MAY BE MERITORIOUS, WHILE HIS CLAIM AGAINST VICE PRESIDENT JACKSON IS NOT.

Plaintiff asserts a claim for damages under 42 U.S.C. § 1983 against defendants Rodriguez, Jackson, and Johnson for deprivation of his constitution rights to "due process, equal educational opportunity, the right to be free from discrimination in education, and the right to be free from retaliation in education."

To prevail on a § 1983 claim, Plaintiff must pierce the doctrine of qualified immunity. *Elwood v. Rice City*, 423 N.W.2d 671, 676 (Minn. 1988). Because Defendants were University of Minnesota employees during the

time of the alleged discrimination, Minnesota and federal law provides them with qualified or "good faith" immunity from personal liability. *Id*. at 674. The qualified immunity doctrine provides that "a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Id*. at 677 (citing *Sulsa v. State*, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (Minn. 1976).

To pierce this immunity, Plaintiff must prove that the officials' conduct (1) violated clearly established statutory or constitutional rights, and (2) the person reasonable knew that this conduct would violate the law. *Id*. at 674-74 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982)); *see also Monroe v. Ark. State Univ.*, 495 F. 3d 591, 594 (8th Cir. 2007). The official must have violated a right that was "clearly established;" this is defined as one whose "contours […] must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In other words, unless the official is particularly incompetent or particularly malicious, she is exempt from personal liability.

Here, the Court will parse out each of Plaintiff's claim to determine whether it withstands the doctrine of qualified immunity:

A. Plaintiff's Claim that his Due Process Rights were Violated

Due process regarding an academic dismissal is far less stringent than due process in criminal or even civil legal proceedings. *See Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 82 (1978). These dismissals do not need to be heavily procedural. In fact, the United States Supreme Court held in a case about the suspension of a high school student that "the student be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id*. at 86 (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975)). The Court opined that an "informal give-and-take" was sufficient to give the student "the opportunity to characterize his conduct and put it in what he deems the proper context." *Id*. at 86. The Constitution does not necessitate a formal hearing process for a student to defend his or her academic standing. *Id*. at 90.

Here, Plaintiff admits to have had his complaints subject to administrative review, the opportunity to present evidence and arguments at a lengthy evidentiary hearing at the University, and review by the Vice President of the University. He was even represented by counsel during this process. This procedure goes above and beyond the proscribed constitutional procedure. Therefore, the Court finds that the pleadings are insufficient to show a § 1983 due process claim.

B. Plaintiff's Claims that his Right to Equal Protection was Violated

In Minnesota, equal protection analyses consist of a *prima facie* case, an answer, and a rebuttal, with the burden shifting from the plaintiff to the defendant and back. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "First, the plaintiff must present a prima facie case of discrimination by a preponderance of the evidence." *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986) (citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). This means that plaintiff has to present proof of discriminatory motive for defendant's actions. *Id.* at 720 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977)). If direct motive cannot be found, motive can be inferred by providing evidence that: (1) Plaintiff is a member of a protected group; (2) Plaintiff sought and qualified for opportunities that the University was making available to others in a similar situation; (3) Plaintiff was denied those opportunities; and (4) after Plaintiff was denied, the opportunities remained available or were given to others with Plaintiff's qualifications. *Id.* at 720.

Here, Plaintiff has little to show direct motive of discrimination. In one of his allegations, he cites the fact that he was removed from the Infusion course because a patient complained about his "national dialect." It is unclear what was meant by this or what actually happened with the patient, and it is unclear whether Dr. Rodriguez and the other administrators had the same reasoning for their treatment of Plaintiff.

Therefore, the Court cannot find enough evidence of a direct motive.

So, the Court turns to whether discrimination with an indirect motive exists. Plaintiff is part of three protected classes: national origin, race, and disability. He, however, has failed to identify similarly situated persons who received the accommodations or passing grades that he did not receive. This is fatal to his equal protection claim.

Plaintiff argues in his memo replying to Defendants' motion that "Plaintiff has stated multiple facts explaining how non-disabled and non-minority students were treated more favorably." However, the Court cannot find precise descriptions as required by law. Plaintiff makes some vague references to some students receiving one- and two-week extensions to finish their rotations, but provides no examples or clarification about why those students are similarly situated. Therefore, the Court finds that there is not a sufficient basis for an equal protection claim.

C. First Amendment Retaliation

To state a claim of retaliation under the First Amendment, a plaintiff must demonstrate (1) statutorily protected speech by the plaintiff, (2) that the defendants took an adverse actions, and (3) that the two events are causally connected. *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. Ct. App. 2005).

First, in order to engage in a statutorily protected activity, Plaintiff must have made a good faith report that implicates a violation or suspected violation of

federal or state law. *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000). Here, Plaintiff made a good faith report that his rights were violated under MINN. STAT. §§ 363A.13 and 363A.15, as articulated in both his complaint and in the findings of the hearing panel of the University.

Second, Plaintiff must demonstrate that Defendants took adverse actions against him. Defendants clearly took adverse actions against Plaintiff. Defendant Rodriguez, according to Plaintiff, testified against him before the ACS and the hearing panel and removed him from classes. Defendant Johnson allegedly gave him a "D" grade, sent him harassing text messages, and harassed him at his apartment. Defendant Jackson denied his appeal to the University level and affirmed the hearing panel's findings. These are all clearly adverse actions.

Third, Plaintiff must demonstrate that the speech and the adverse action were causally connected. Minnesota has recognized that "retaliatory motive is difficult to prove by direct evidence and ... [a Plaintiff] may demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive." *Cokley v. City of Otsego*, 623 N.W.2d 625, 632 (Minn. Ct. App. 2001). Such circumstantial evidence may have close temporal proximity, but that is typically not sufficient on its own. *Freeman v. Ace Telephone Ass'n*, 404 F.Supp.2d 1127, 1141 (D. Minn. 2005).

Here, firstly, Plaintiff has not shown enough evidence to implicate Defendant Jackson in a retaliation claim. There is no evidence of adverse action

except for Jackson's decision. If the Vice President of the University, who regularly receives academic appeals from the various colleges, were to be found to have retaliated against every individual whose appeal he denies, then he would be constantly retaliating against students for appealing the college's decisions. There is no evidence that he does that or, conversely, that he has a particular reason to deny this appeal except on its merits.

Second, Dr. Rodriguez may be found to have retaliated against Plaintiff. According to Plaintiff's complaint, Dr. Rodriguez refused to accommodate him when he asked to take a course that did not require patient interaction. His request to be accommodated was a protected action. She enrolled him for Medication History instead. When he had an altercation with a patient, she removed him from the course and he was given an "F" grade instead of an "I" grade. When he attempted to get off academic probation, she enrolled him in the wrong class, thus foiling his chances of getting off academic probation.

Dr. Rodriguez also threatened to dismiss Plaintiff from the program by referring him back to ACS when he complained about discriminatory treatment by Dr. Johnson. Further, when the ACS reviewed Plaintiff's case, Dr. Rodriguez attended the hearing and stayed for the deliberation of the board. Finally, she allegedly "lied" in the Pharmacy School hearing regarding how she directed Plaintiff and what information she gave to him. If Dr. Rodriguez did, in fact, conduct herself in the way outlined here, then it is quite possible that she was retaliating against Plaintiff. If this is the case, then she

was acting maliciously, which pierces her qualified immunity.

Third and finally, Dr. Johnson may be found to have retaliated against Plaintiff as well. When Plaintiff took his Acute Care I course, Dr. Johnson allegedly humiliated Plaintiff regarding his grades before another student and accused him of cheating in a humiliating and derogatory way. Plaintiff then complained to UMN, going over Dr. Rodriguez's head. Soon after, Dr. Johnson gave Plaintiff a "D" grade in his course (which precipitated his dismissal). He also allegedly harassed Plaintiff via text message and by showing up at Plaintiff's home, telling him that he should move out of his apartment.

Based on these allegations, there may be some evidence that Dr. Johnson retaliated against Plaintiff because Plaintiff complained about him and asked to be removed from his class after Dr. Johnson humiliated him. Afterward, he gave him a grade that would result in his dismissal from the program and also harassed him. It is clear that harassing a student and retaliating against his complaint about discrimination are malicious actions and would allow not qualify Dr. Johnson to immunity under § 1983.

Therefore, Dr. Johnson and Dr. Rodriguez may not be immune from liability based on the standard for a motion to dismiss, which takes facts in the light most favorable to the Complaint.

CONCLUSION

Plaintiff has already adjudicated his breach of contract, unjust enrichment, and promissory estoppel

claims. He exhausted the administrative remedies available to him for those claims and should have appealed it to the Court of Appeals in a timely way. He may not come to District Court now to have the same claims adjudicated *de novo*. His non-statutory claims shall be dismissed.

Plaintiff's § 1983 claim may only continue against Dr. Rodriguez and Dr. Johnson for their alleged retaliation against Plaintiff. Vice President Jackson's qualified immunity bars any § 1983 claim against him because there is no evidence to show that his action was malicious or out of the purview of his work as Vice President.

ORDER

Based on the applicable facts, law, and analysis, the Court **hereby ORDERS** that:

1. Defendant's motion to dismiss is **GRANTED** in part and **DENIED** in part.

    a. The only remaining claims in this matter are the § 1983 claims against Defendants Rodriguez, Johnson, and Regents of the University of Minnesota.

IT IS SO ORDERED.

BY THE COURT

/s/
Browne, Michael
Judge of District Court
Feb 17 2017 8:51 PM