RECORD NO. 22-1441

IN THE

United States Court of Appeals for the Fourth Circuit

ALYSSA REID,

Plaintiff-Appellant,

v.

JAMES MADISON UNIVERSITY, a Public University, and JONATHAN R. ALGER, sued in his official and individual capacities; HEATHER COLTMAN, sued in her official and individual capacities; ROBERT AGUIRRE, sued in his official and individual capacities; and AMY M. SIROCKY-MECK, sued in her official and individual capacities, and JANE or JOHN DOES 1-5, sued in their official and individual capacities, U.S. DEPARTMENT OF EDUCATION, and MIGUEL CARDONA, Secretary of Education, sued in his official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

APPELLANT'S REPLY BRIEF

GREGORY DOLIN
COUNSEL OF RECORD
HARRIET HAGEMAN
JOHN J. VECCHIONE
MARK CHENOWETH
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Greg.Dolin@NCLA.legal
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

When dealing with the public, "[t]he government must turn square corners," *United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 33 (1st Cir. 2011), meaning that, at a minimum, the government cannot mislead the public about the meaning of the rules and regulations it promulgates. *See, e.g.*, *Robbins v. Reagan*, 616 F. Supp. 1259, 1275 (D.D.C.), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985) (noting that "the concept of fair play" requires that "the government should be held to its word"). Thus, when in its own rules, a state university makes clear that a particular decision is not "final," it must not be permitted to later argue in the course of litigation that the same decision is, in fact, "final."

James Madison University's efforts to convince this Court to affirm the dismissal of Alyssa Reid's complaint as untimely fly in the face of the clear rules that the University itself promulgated. These rules specifically and explicitly state that, in a Title IX process, "*[i]n the absence of a timely written appeal*, the decision of the respondent's associate or assistant vice president or dean is final," J.A. 175, § 6.6.8.18 (emphasis added), *but if such an appeal is filed*, then "[t]he vice president shall make a *final* decision," *id.*, § 6.6.8.20 (emphasis added). Now that the University is defending a lawsuit, it has found it convenient to argue that "final" means something very different than what any ordinary reader would understand the rules to mean. Using this tortured reading, the University now seeks to dismiss a

complaint that was filed well within the deadline provided for by its own rules for resolving these matters.

In its submission to the Court, JMU muddles the factual background of the cases on which it relies, ignoring key differences between the internal university rules in play in those cases and JMU's own rules. As a result, the University ignores the fundamental principle that "statute[s] of limitations exist[] to promote the quick filing of worthy claims. [They] do[] not exist as a trap for the unwary or unsophisticated" litigants.[1] *Arch of Ky., Inc. v. Dir., Off. of Workers' Comp. Programs*, 556 F.3d 472, 482 (6th Cir. 2009) (internal quotations omitted).

This Court should not permit JMU to treat its rules as "a nose of wax, to be changed from that which the plain language imports" whenever the University finds it beneficial to do so. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926).

II. ARGUMENT

The parties agree that a Virginia plaintiff seeking redress for due process violations under 42 U.S.C. § 1983 must bring his claim within two years of the date of the injury. *See* Reid Op. Br. at 23; JMU Br. at 13 (both citing Va. Code § 8.01-243(A)). The only question before the Court then is when Reid's cause of action accrued. JMU's own rules, precedent, and the timing of Ms. Reid's knowledge of

[1] It is worth noting that, as required by Virginia law, Ms. Reid timely notified the University of her intent to sue. Thus, the University cannot claim to be surprised by having to defend an allegedly stale claim.

her injury all point to the same answer—the complained-of injury occurred no earlier than May 5th, 2019 (the effective date of Dean Robert Aguirre's decision), though in actuality, the injury did not fully materialize until Provost Heather Coltman denied Ms. Reid's appeal on June 19, 2019.

A. THE COURT MUST GIVE EFFECT TO THE UNIVERSITY'S OWN RULES ON FINALITY

1. The Policy Is Clear on Its Face

Under well-settled law, an individual's claims against an employer (such as a university) matures only when the employer makes a "final" determination. *See Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (*en banc*) (noting that Title VII actions have "consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating."); *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 637 (7th Cir. 2004) ("In discriminatory discharge cases, two elements are necessary to establish the date on which the 'unlawful employment practice' occurred. First, there must be a final, ultimate, non-tentative decision to terminate the employee.").

The federal courts are uniform in holding that when a potentially adverse employment action is—*or can be*—rescinded through internal procedures before becoming effective, such an action is insufficient grounds for an employment discrimination suit. *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 929-30

(9th Cir. 2000) (plaintiff's evaluation "was not an adverse employment action because it was subject to modification by the city" on appeal); *Mayers v. Campbell*, 87 Fed. App'x 467, 471 (6th Cir. 2003) (unpublished) (prison employee suffered no adverse employment action when suspension was rescinded after employee filed grievance); *Dobbs–Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 546 (6th Cir. 1999) ("Dobbs–Weinstein succeeded in the grievance process, and Vanderbilt's final decision was to grant her tenure. She has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII."), *overruled in part by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006);[2] *Benningfield v. City of Houston*, 157 F.3d 369, 377 (6th Cir. 1998) (reprimand rescinded though internal procedures "does not constitute an adverse employment action"); *Lumhoo v. Home Depot USA, Inc.*, 229 F. Supp. 2d 121, 139 (E.D.N.Y. 2002) (claim of adverse employment action arising from discharge "fails as a matter of law because at the conclusion of defendants' investigation into [plaintiff's discharge] … defendants offered and Anderson accepted, an unconditional offer of reinstatement with full back pay, the same salary

[2] The *Burlington* Court focused on the anti-retaliatory provisions of Title VII and concluded that "retaliation" is not limited to "actions and harms it forbids to those that are related to employment or occur at the workplace." 548 U.S. at 57. Because Ms. Reid does not allege retaliation, *Burlington* does not affect the resolution of the present case.

and benefits, and the same seniority status"); *Crittenden v. Int'l Paper Co. Wood Prods. Div.*, 214 F. Supp. 2d 1250, 1254 (M.D. Ala. 2002) ("The ultimate result of the grievance process, if full relief is awarded, may remove the employment decision from the protection of the civil rights statutes.").[3] This rule exists because a contrary rule would tend "to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed." *Dobbs-Weinstein*, 185 F.3d at 546. The law is clear—when an employer has, through internal avenues, resolved the employee's complaints of discrimination, no cause of action for employment discrimination will lie. Only when the employer reaches a "final, ultimate, non-tentative decision" with respect to an employee can an aggrieved employee bring suit. Hence, had Reid brought suit when her appeal to the Provost was still pending, the case would not have been ripe. And the statute of limitations could not start to run until the case ripened.

Of course, each employer may have its own procedures for reaching (and communicating) such "final, ultimate, non-tentative decision" to the employee. It is therefore necessary to undertake a careful analysis of these internal procedures to determine when, during the course of the proceedings, the employer has reached a "final, ultimate, non-tentative decision." Fortunately, JMU's rules as to when a Title

[3] While the above-cited cases all concerned Title VII claims, the parties agree that "the same analysis governs claims challenging Title IX procedures." JMU Br. at 20-21. *See* also Op. Br. at 18.

IX process is concluded and the University's decision becomes final are unambiguous and do not require a complicated interpretation process. First, under JMU's rules, if a hearing panel concludes that a staff member committed a violation, the written notice of this conclusion must be communicated to such staff member and this notice must include "the date the decision becomes final." J.A. 174, § 6.6.8.15. The requirement that the notice include a "date that the decision becomes final" *in and of itself* confirms that under JMU's rules, finality does not automatically attach to a decision by the relevant dean.

The next paragraph states that "[w]ithin ten days of receipt of the panel's recommendations, the respondent's associate or assistant vice president or dean will send a written decision in the case" to all parties. *Id.*, § 6.6.8.16. That sentence conspicuously omits the word "final." This omission is no accident, as the rules go on to explain that "the decision of the respondent's associate or assistant vice president or dean is final" *only* "[i]n the absence of a timely written appeal," *id.*, § 6.6.8.18, "to the vice president over the associate or assistant vice president or dean," *id.*, § 6.6.8.17.[4] The rules also explicitly state that if an appeal is filed, "[t]he vice president shall make *a final decision*" as to any allegations of sexual misconduct and sanctions therefor. *Id.* (emphasis added). JMU's rules are thus clear and

[4] In this case, the relevant vice president was the Provost of the University, Dr. Heather Coltman. *See* J.A. 196.

unambiguous on their face that the university reaches a "final, ultimate, non-tentative decision" only after the vice president resolves any appeal, or in the absence of such an appeal, no earlier than five days after the associate or assistant vice president or dean reaches his decision.

2. Well-Settled Principles of Contract Law Require the Court to Reject JMU's Litigation Position on the Title IX Disciplinary Process

It is also important to recall that JMU's rules and policies, including Policy 1340, form a part of the contractual agreement between the University and any employee. *See* J.A. 210, ¶ 4.1. Under Virginia law,[5] "[a] contractual term, absent a definition in the contract, is construed according to its usual, ordinary, and popular meaning." *Palmer & Palmer Co. v. Waterfront Marine Const., Inc.*, 662 S.E.2d 77, 81 (Va. 2008). Furthermore, "[i]n the event of an ambiguity in the written contract, such ambiguity must be construed against the drafter of the agreement." *Martin & Martin, Inc. v. Bradley Enters., Inc.*, 504 S.E.2d 849, 851 (Va. 1998).

The plain meaning of the word "final" is "coming at the end: being the last in a series, process, or progress." Merriam-Webster's Collegiate Dictionary 469 (11th ed. 2004). JMU's policies contemplate a series of steps in a Title IX investigation process, including "Formal Complaint Statement Collection," J.A. 171, § 6.6.4;

[5] The contract between JMU and Ms. Reid is governed by Virginia law. J.A. 211, ¶ 7.1.

"Notice to Respondent of Formal Complaint," J.A. 172, § 6.6.6; "Discussion of Formal Complaint Procedures with Respondent," *id.*, § 6.6.7; a hearing before a hearing panel, J.A. 173-74, §§ 6.6.8.2-6.6.8.12; deliberations and vote by the hearing panel, J.A. 174, §§ 6.6.8.13-6.6.8.14; a written report containing the hearing panels "decision and recommendations," *id.*, § 6.6.8.15; a written decision by the "associate or assistant vice president or dean," *id.*, § 6.6.8.16; an appeal by *either* the complainant or respondent to a vice president, J.A. 175, §§ 6.6.8.17-6.6.8.19; and a decision by the vice president, *id.*, § 6.6.8.20. Only the last step in this series or process is "final."

According to JMU, a decision could become "final" at different points during the Title IX process *depending solely* on whether the complaining party chooses to seek vice presidential review, and if so, whether such review results in any changes to the decanal decision. *See* JMU Br. at 24-25, n.4. That argument should be rejected because "it is difficult to conceive how the order could become final at multiple points in time." *Abdisalan v. Holder*, 774 F.3d 517, 524 (9th Cir. 2014) (*en banc*), *as amended* (Jan. 6, 2015).

It is also of note that Policy 1340 describes both the hearing panel's *and* the dean's actions as "decisions," but terms the vice president's decision alone as "a

final decision." *Compare* J.A. 174, §§ 6.6.8.15-6.6.8.16 *with* J.A. 175, § 6.6.8.20.[6] Sensibly, JMU doesn't argue that the hearing panel's decision was a "final" decision. *See* JMU Br. at 6 (referring to the hearing panel's action as a "recommendation."). But it makes no sense to treat the unmodified word "decision" in § 6.6.8.15 (referring to the panel's action) as any different from the unmodified word "decision" in § 6.6.8.16 (referring to an action by a relevant dean). *See Carson v. Simmons*, 96 S.E.2d 800, 804 (Va. 1957) ("[W]hen one uses the same words in different places in an instrument relating to the same subject matter, he intended that they should have the same meaning, unless there is something in the context showing that the words were used in a different sense.").

Basic principles of contract interpretation require that "[n]o word or clause will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words aimlessly." *Winn v. Aleda Const. Co.*, 315 S.E.2d 193, 195 (Va. 1984). *See also Ames v. Am. Nat. Bank of Portsmouth*, 176 S.E. 204, 216–17 (Va. 1934) ("[N]o word or clause should be discarded unless the other words used are so specific and clear in contrary meaning as to convincingly show it to be a false demonstration."). However, adopting JMU's interpretation of Policy 1340 would treat as "meaningless" and "discard" a number

[6] Dean Aguirre's letter to Appellant tracked this same terminology, and at no point referred to his decision as a "final" decision. J.A. 204.

of the provisions contained in the policy. First, it would render meaningless the words in § 6.6.8.18 that condition finality of a dean's decision on a lack of an appeal to the vice president. *See* J.A. 175, § 6.6.8.18 ("*In the absence of a timely written appeal*, the decision of the respondent's associate or assistant vice president or dean is final.") (emphasis added). Second, such an interpretation would excise the word "final" out of § 6.6.8.20, while inserting the word "final" into § 6.6.8.16.

To the extent that there is some inconsistency or ambiguity in Policy 1340 as to which decision is truly the "final" one (though there isn't and the policy is crystal-clear that if an appeal is lodged, it is the vice president's/Provost's decision that is "final"), such an ambiguity must be resolved in favor of Ms. Reid. *Martin & Martin*, 504 S.E.2d at 851. Such a resolution comports with the ordinary principles of contract interpretation. It also ensures that JMU cannot treat its policies as a "nose of wax," relying on the availability of an appeal to the vice president to defeat prematurely brought civil actions or to argue that an accused failed to exhaust his administrative remedies, while also being allowed to deny that such appeals are an integral part of the Title IX complaint resolution process when an employee files a lawsuit within two years of the vice president's final decision (but more than two years after the dean issues his decision). Thus, even if it were *plausible* to interpret Policy 1340 so as to conclude that the decision of the dean is the final decision of the University (even though the policy conspicuously omits that adjective when

describing the decanal decision, J.A. 174, § 6.6.8.16), such conclusion would have to be eschewed for an interpretation that favors Ms. Reid as the non-drafting party.

3. JMU's Prior Understanding of Its Title IX Disciplinary Process Contradicts Its Present Litigation Position

Up until the present lawsuit, JMU also took the position that the decision by Dean Aguirre was not a final decision. The letter that JMU sent to Ms. Reid confirms this—the very letter that JMU presently claims placed Appellant "fully on notice of the alleged discrimination and denial of due process." JMU Br. at 20. The letter explicitly states that "the AVP, Dean, *or VP* over the Responding Party will determine the final outcome of the case." J.A. 194 (emphasis added).[7] The reason that the letter does not specify which of these three individuals "will determine the final outcome of the case," is precisely because whether or not an appeal is lodged determines who within the University's hierarchy possesses the authority for rendering the "final, ultimate, non-tentative decision." Had JMU viewed Dean Aguirre's decision as "final" regardless, there would have been no reason to suggest that the final decision would (or even could) be made not by the "Dean" but the "VP over the Responding Party." Dean Aguirre's letter, J.A. 204, also intentionally

[7] In its brief JMU omits the reference to the "VP" and claims that the letter advised Ms. Reid that "that the Dean's ruling 'will determine the final outcome[] of the case.'" JMU Br. at 15 (quoting J.A. 194). This incomplete citation is misleading and strongly suggests that JMU knows full well that the complete quote undercuts its present argument.

avoided referring to his decision as the "final decision," using "written decision" terminology and phrasing the conclusion as conditional ("A letter of reprimand *should* be placed in the respondent's file.") rather than imperative ("A letter of reprimand *shall* be placed in the respondent's file."). In contrast, the Provost's letter phrased the decision in unconditional terms. *See* J.A. 200.

In short, throughout the Title IX proceedings brought against Appellant, JMU took the position that the "final decision" would be made by Provost Coltman and that finality would attach to Dean Aguirre's decision only if *both* the complainant and the respondent waive the Provost's review. It was only after Ms. Reid filed this lawsuit that JMU adopted a different position. It is, however, well-settled that whereas "[t]he parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent," *Ocean Transport Line, Inc. v. Am. Philippine Fiber Indus., Inc.*, 743 F.2d 85, 91 (2d Cir.1984), the "*post hoc* conclusions of contracting parties" as to the meaning of a contract is not given weight, *Faulkner v. Nat'l Geographic Soc'y*, 452 F. Supp. 2d 369, 381 (S.D.N.Y. 2006), *aff'd sub nom. Ward v. Nat'l Geographic Soc'y*, 284 F. App'x 822 (2d Cir. 2008) (unpublished).

B. PRECEDENT FIRMLY SUPPORTS APPELLANT'S POSITION

The parties agree that the key precedent governing this case is *Delaware State College v. Ricks*, 449 U.S. 250 (1980). However, JMU misstates the holding of *Ricks*

and fails to grapple with the factual context in which it arose. In *Ricks*, the Supreme Court laid down the rule that in determining when a Title VII cause of action accrues the "focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (1979)) (emphasis in original). As a result, the Court held that the discriminatory act in *Ricks* was the denial of tenure, which occurred when the Board of Trustees voted to deny Professor Ricks's application for tenure and characterized this vote as its "official position." *Id.* at 261. The Court rejected the argument that the availability of a collateral grievance process reset the date of the allegedly discriminatory action to the day on which such grievance was denied. *Id.* (noting that "entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative[, because] [t]he grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.") (emphasis in original).

From this language, JMU draws the conclusion that *any* appellate process is necessarily "a remedy for a prior decision, not an opportunity to influence that decision before it is made." *See* JMU Br. at 18-26. That interpretation is flat wrong. JMU makes the mistake of blindly applying *Ricks* without engaging in a "close study" that the case warrants. *See Endres v. Ne. Ohio Med. Univ.*, 938 F.3d 281,

293 (6th Cir. 2019). This "close study" requires one to consider the actual facts of *Ricks*, which are set out in great detail in Professor Ricks's original Complaint. *See* Complaint, *Ricks v. Del. State Coll.*, No. 77-342, 1978 WL 13838 (D. Del.1977). There, Professor Ricks explains that the Promotions and Tenure "Committee *denied* [him] tenure on February 21, 1974," and that "[o]n or about March 30, 1974 [he] *petitioned* [the President of the College Luna I.] Mishoe *to reconsider* the *denial* of tenure." *Id.*, ¶¶ 33-34 (emphasis added). When the College President refused to disturb the Promotions and Tenure Committee's decision, Professor Ricks "*petitioned* the … Board of Trustees for a hearing on [his] *denial* of tenure." *Id.*, ¶ 35 (emphasis added). In other words, Professor Ricks himself admitted that the initial *decision* (which he believed was discriminatory) was the *denial* of tenure (not mere *recommendation* to deny) by the Promotions and Tenure Committee. However, because the College had itself created an internal appeal mechanism in which such a decision could be challenged prior to its being finalized, the Supreme Court concluded that the discriminatory act giving rise to the cause of action occurred not when the Committee voted to deny tenure to Professor Ricks, but when, after at least two rounds of appellate review, the Board of Trustees affirmed that decision and characterized its affirmance as "the Board's 'official position.'" *Ricks*, 449 U.S. at 261. *See also Endres*, 938 F.3d at 294 ("[T]he Court did not select February 1973—when the college's tenure committee first recommended denying

Ricks tenure—as the accrual date for Ricks's claim. Not until the tenure committee reevaluated that decision one year later, the faculty senate approved that decision, the board of trustees voted to deny Ricks tenure, and the college extended Ricks a one-year terminal contract did Ricks's claim accrue.").

Of course, once the "official position" was reached, the availability of an *additional and collateral* grievance procedure did not toll the statute of limitations. *Id.* But equally certain, the statute of limitations did not begin to run until the employer's position became "official."[8] *Ricks*, therefore, teaches that JMU's argument that any procedure that is termed an "appeal" does not affect the effective date for the statute of limitations is incorrect. To the contrary, *Ricks* teaches that until the internal appellate process is completed, the employer has not reached an "official" decision, and therefore the employee has not yet acquired a cause of action.

Applying the lessons of *Ricks* to the present case, the outcome is obvious. Though both the hearing panel and Dean Aguirre reached a "decision," *see* J.A. 174, §§ 6.6.8.15-6.6.8.16, neither decision was "final" nor the "official position" of the

[8] Indeed, the Equal Employment Opportunity Commission, appearing as *amicus curiae* in support of Professor Ricks, argued that Ricks should win because, in light of the availability of a grievance process, the Board's decision "was only an expression of intent that did not become final until the grievance was denied." 449 U.S. at 260. The Court was constrained to address and explicitly reject that argument based on the specific facts of that case. *Id.* at 261. This indicates that everyone was in agreement that to the extent a given decision was not "official" or "final," such a decision did not begin the running of the statute of limitations clock.

University. To the contrary, the University explicitly stated that the "final" decision will be reached by "[t]he respondent's AVP, Dean, *or VP*," who can make any decision on the case that "he/she deems appropriate." J.A. 194 (emphasis added).

JMU also relies on *Mezu v. Morgan State University*, 367 F. App'x 385, 386 (4th Cir. 2010) (*per curiam*) (unpublished). In JMU's view, this case also stands for the proposition that "a discrimination claim accrue[s] before the resolution of an internal appeal." JMU Br. at 19. However, once again, JMU plucks the holding of the case out of context while ignoring the holding's factual underpinnings. In that case, Professor Mezu was denied promotion to full professor both during the initial promotion process and following a request for reconsideration. She filed suit arguing that the denial of promotion on reconsideration was the date on which her cause of action accrued. This Court disagreed. However, the appellate process contemplated by Morgan State University was different and differently designated than the process at JMU.

Morgan State University's Faculty Handbook sets out a detailed, multi-step process for promotion. *See* MSU Faculty Handbook, § 2.IV, https://bit.ly/3T1ei2E. At the conclusion of that process, the file is presented to the President of the University who then "make[s] the *final decision* on the Applicant's application for promotion and/or tenure." *Id.*, § 2.IV.A.5. To the extent that the applicant for promotion is dissatisfied with that "final decision," he can appeal on a very limited

number of grounds. *Id.*, § 2.V.A. If an appeal is successful, the President (*i.e.*, the very person who made the decision being appealed) can choose to reverse himself or adhere to the original decision. *Id.*, § 2.V.D. Nevertheless, the President's first decision remains "final unless reversed by the President." *Id.*, § 2.V.D.1. Furthermore, Morgan State's policy *explicitly* states that "the initiation of the appeals procedure shall not dislodge or delay any formal notifications dealing with contract non-renewal or tenure denial actions." *Id.*, § 2.V.D.2.

In light of these procedures, and Morgan State's own clear statement that the President's decision not to promote a candidate is a "final" decision that does not delay notifications of any impending consequences, this Court correctly concluded that Professor Mezu's cause of action accrued at the time she was notified of the President's decision. After all, it was at that point that Morgan State arrived at its "official position." The opposite is true here. In the *Reid* case, both the JMU rules and the communications Ms. Reid received stated that the final decision would *not* be made by Dean Aguirre, but would be made by the "VP over the Responding Party" if Dean Aguirre's decision were appealed. Much like the Court held the parties in *Mezu* to the clearly stated policies of Morgan State University, so too should the Court hold the parties here to the clearly stated policies of JMU.

As already explained in Appellant's Opening Brief, this case is almost an exact replica of *Endres v. Northeast Ohio Medical University*, 938 F.3d 281 (6th Cir.

2019).[9] JMU implausibly contends that *Endres* is inapposite. JMU Br. at 22-24. According to JMU, in *Endres* the cause of action clock reset, but *only because* the dismissed student prevailed in an administrative appeal and received a second hearing (which also resulted in an unfavorable outcome). *Id.* at 23. In JMU's view, had the appeal not resulted in a *vacatur* of the initial dismissal order and a new hearing, the cause of action would have accrued at the time of that initial order and not at the time of the denial of the appeal. But that is not what the Sixth Circuit held. To the contrary, the Sixth Circuit wrote that the medical school "did not reach a final decision—and communicate that decision to Endres—until … Endres had exhausted the appeals process." *Endres*, 938 F.3d at 294. As the Sixth Circuit explained, the student's fate is sealed only when there is a "final decision" to dismiss the student, which occurs when his appeal is denied or is not brought within the time allotted. *Id.* at 294-95. Of course, if a student is successful in the appeal and receives a second hearing before the Committee on Academic and Professional Progress (as happened in *Endres*), the statute of limitations clock remains paused until the conclusion of *that* hearing. But appellate success was not relevant to the Sixth Circuit's conclusion. The question is not whether "the student [got] *another opportunity* to influence [the] decision before it is made," JMU Br. at 23 (quoting *Endres*, 938 F.3d at 295), but at what point "there [was] no doubt that Endres would have to leave"

[9] The relevant facts of *Endres* are set out in Appellant's Opening Brief at 29-30.

the medical school. 938 F.3d at 296. That point only occurred when the appellate process was exhausted and a final decision was reached. *Id.*

So too here. JMU admits that had Provost Coltman modified Dean Aguirre's decision (*e.g.*, by increasing the sanction), Ms. Reid's cause of action would have accrued at the time of the modification. *See* JMU Br. at 24, n.4. This admission proves that until Provost Coltman reached her decision, there remained "doubt" as to whether Reid would be found liable for violating JMU policies, and if so, what sanctions would be imposed. So long as Ms. Reid's "fate remained uncertain," and opportunities to change both the finding of responsibility (or non-responsibility) as well as any sanction existed, the University decision remained not "final," and the cause of action did not accrue. *Endres*, 938 F.3d at 296. In short *Endres* is not "inapposite" but fully on point.[10]

Whether one looks at each prior decision individually or at the whole body of case-law, the message is clear—in an employment discrimination context, a cause

[10] Until the present case, the District Judge also viewed *Endres* as being directly on point. The judge adjudicating this case relied on Northern District of Ohio's decision in *Endres* when deciding *Doe v. Va. Polytechnic Institute & State University*, 400 F. Supp. 3d 479, 491 (W.D. Va. 2019) (approvingly citing *Endres v. Ne. Ohio Med. Univ.*, No. 5:17cv2408, 2018 WL 4002613 (N.D. Ohio Aug. 22, 2018)) (Dillon, J.). *Virginia Polytechnic* was in turn cited with approval in the District Court's decision granting JMU's Motion to Dismiss. *See* J.A. 224-25. Only when the Sixth Circuit reversed the trial court's decision in *Endres* did that case somehow become "inapposite."

of action accrues when the employer communicates to the employee its "official position," *Ricks*, 449 U.S. at 261, and leaves "no doubt," *Endres*, 938 F.3d at 296, as to the employee's fate. Until those points are reached, the employee retains the ability to "influence" the ultimate decision, which is all that the precedent requires. *Ricks*, 449 U.S. at 261.

C. DEAN AGUIRRE'S LETTER DID NOT PUT APPELLANT "FULLY ON NOTICE" OF HER CLAIMS

Ultimately, JMU's argument reduces to the claim that Ms. Reid's cause of action accrued when she was "on notice of the facts underlying her claim," JMU Br. at 26 n.5, and that she "knew all the facts establishing her causes of action, at the latest, when she received Dean Aguirre's decision holding her responsible for violating JMU's sexual misconduct policy," *id.* at 11.

It is certainly true that "[u]nder federal law a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995) (*en banc*). However, the timing of such knowledge heavily depends on the nature of the University's policies. *See Endres*, 938 F.3d at 296. "That is not to say that the policies themselves have independent legal significance or that [the Court should] substitut[e] the policies in place of [federal] law. Rather, the policies help [the Court] determine when" Ms. Reid *knew* that she had been found liable for violating JMU policies and what sanction was imposed on her. *Id.*

Certainly, Ms. Reid believes (and will prove at trial) that the very process that she was subjected to was illegal, in violation of her due process and contractual rights, and injurious to her reputation. Nevertheless, it is well established (and JMU does not appear to contest the proposition, *see* JMU Br. at 24 n.4), that had she, *at any point*, been cleared of wrongdoing, she would have had no cause of action no matter how outrageous, improper, or illegal the process leading to her ultimate vindication had been, or how much stress or other injury it had caused her, *see ante* pp. 3-5 (and cases cited therein). Therefore, in order to truly be "on notice" of her causes of action, Ms. Reid had to await the final outcome of the process launched against her. True, as it turned out, the decanal and vice presidential review process produced no changes to the hearing panel's "decision and recommendations;" however, Ms. Reid had no way of *knowing* that *until* the process had run its course. JMU is simply trying to "retcon" Ms. Reid's after-acquired knowledge to an earlier point in time simply because she was unsuccessful in the appellate process. That, however, is not the test. A putative plaintiff is not required to *guess* as to what claims might eventually remain live once the putative defendant completes its internal review process. There is no doubt that, had Ms. Reid brought her claim before the vice president ruled on her appeal, JMU would have moved for dismissal of the claim as unripe. And rightly so. For this reason, the cause of action only accrues when the putative plaintiff *knows*, *i.e.*, is *certain of* all relevant facts—including the

fact of the University's final decision. Here, no such certainty was present so long as the University's decision remained not final, and it remained not final up until the point that Provost Coltman rejected Ms. Reid's appeal.

Contrary to JMU's current assertions then, it was not Dean Aguirre's email that put Ms. Reid "fully on notice of the alleged discrimination and denial of due process," JMU Br. at 20; rather, it was Provost Coltman's formal letter, on University letterhead, that did so. Because the cause of action accrued at the time that Provost Coltman communicated the University's final decision to Ms. Reid, the present action was timely filed.

D. APPELLANT AGREES THAT THE COURT SHOULD NOT AFFIRM ON ANY ALTERNATIVE GROUNDS

In her opening brief, Appellant explained why the Court, though it has the power to do so, *see Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308, 311 (4th Cir. 2009), should not affirm the judgment below on alternative grounds. Although JMU's Motion to Dismiss included multiple grounds in addition to the timeliness of the complaint, the District Court did not reach those issues, *see* J.A. 223-27 (addressing only the timeliness issue), and the University does not seek affirmance on any of those grounds, *see* JMU Br. 26-27. When an appellee has made several alternative arguments to the trial court, some of which the trial court did not address, and the appellee does not press these alternative arguments in support of affirmance, it is this Court's practice, to remand the matter to the trial court for consideration of such

arguments in the first instance. *See Hillman v. I.R.S.*, 263 F.3d 338, 343 & n.6 (4th Cir. 2001). Without receding from the arguments made in her Opening Brief, *see* Op. Br. 36-49, Appellant agrees that the Court should follow this practice here.

III. CONCLUSION

For the foregoing reasons, as well as those in Appellant's Opening Brief, this Court should reverse the judgment of the District Court for the Western District of Virginia that dismissed this case for want of jurisdiction. It should likewise deny JMU's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and remand the matter for further proceedings.

October 25, 2022

Respectfully submitted,

/s/Gregory Dolin
Gregory Dolin
Harriet Hageman
John J. Vecchione
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Greg.Dolin@NCLA.legal

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   this document contains 5,843 words.

2. This document complies with the typeface requirements because:

   This document has been prepared in a proportional spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: October 25, 2022

/s/ Gregory Dolin
Gregory Dolin

Counsel for Plaintiff-Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 25, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

/s/ Gregory Dolin
Gregory Dolin

Counsel for Plaintiff-Appellant