

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**JOHN EARNHARDT,** )  
 )  
 **PLAINTIFF** )  
 )  
 **v.** )  
 )  
 **UNIVERSITY OF NEW** )  
 **ENGLAND, ET AL.,** )  
 )  
 **DEFENDANTS** )

**Civil No. 95-229-P-H**

**ORDER ON ALL PENDING MOTIONS**

This diversity case arises out of a bitter dispute over the University of New England's ("UNE") decision that John Earnhardt's conduct as a professor violated university policy sufficiently to warrant his termination. For the reasons that follow, I **GRANT** UNE's and its Director of Human Resources Michael Miles's motion for summary judgment as to negligence and breach of contract, and **DENY** Earnhardt's motion for summary judgment on his breach of contract claim that the University failed to afford him a proper appeal. Earnhardt's motion for summary judgment on the defendants' counterclaims is **GRANTED**. My rulings on other pending motions are set forth at the end of this Order.

## FACTS AND PROCEDURAL HISTORY

The University of New England terminated the plaintiff John Earnhardt as an untenured associate professor in 1994, following an investigation of sexual harassment complaints made by several UNE students, a grievance and an appeal process. Earnhardt then brought this lawsuit against UNE, various UNE faculty and administrators, and two of UNE's lawyers charging negligence, negligent infliction of emotional distress, intentional interference with contract, invasion of privacy, and breach of contract. I dismissed all counts against the lawyers in August 1995. Earnhardt voluntarily dismissed the counts against all defendants other than UNE and Miles in November 1995, stipulating that his payment of reasonable attorney fees and costs accrued on behalf of the defendant(s) in this lawsuit would be a necessary precondition to renewal of any of those claims in this or any other court. See Order, Earnhardt v. UNE, Civ. No. 95-229-P-H (D. Me. Jan. 8, 1996); Pl.'s Stip. (Jan. 16, 1996). The remaining issues are Earnhardt's claims against UNE for negligence and breach of contract and against Miles for negligence, and UNE's and Miles's counterclaims against Earnhardt for abuse of process and malicious prosecution.

UNE and Miles have moved for summary judgment on Earnhardt's negligence and breach of contract claims. Earnhardt has moved for summary judgment on one of his breach of contract claims, as well as on UNE's and Miles's counterclaims.

## NEGLIGENCE

Earnhardt claims that he is entitled to damages on account of Miles's alleged negligence in handling and investigating the students' sexual harassment complaints, and UNE's alleged negligence in handling and investigating the complaints, in conducting the grievance process and in training and supervising the university personnel involved in the proceedings. See Compl., Cts. X & XV. Whether Miles and UNE had such duties to Earnhardt is a question of law for the court. Williams v. Inverness Corp., 664 A.2d 1244, 1246 (Me. 1995). There is no such duty. Under Maine law an employee's rights to recover damages arising out of a termination are exclusively contractual. See Bard v. Bath Iron Works Corp., 590 A.2d 152, 155-56 (Me. 1991); Staples v. Bangor Hydro-Electric Co., 561 A.2d 500, 501 (Me. 1989); Libby v. Calais Regional Hosp., 554 A.2d 1181, 1182-83 (Me. 1989). Earnhardt's terms of employment were governed by a written, one-year contract that incorporated the "applicable rules of the University and the respective Faculty and Personnel Handbooks." Plaintiff's Statement of Material Facts (in support of opposition to defendants' motion for summary judgment) ("Pl.'s Stmt. Mat. Facts I") ¶ 73; Pl.'s Mem. in Opp'n to Defs.' Motion for Summ. J. at 2-3.

Even if Earnhardt's claims could be characterized independently of a "wrongful discharge" theory—e.g., as claims for negligent training and supervision—they would be claims for injuries arising out of his employment and thereby barred by the exclusivity and immunity provisions of the Maine Workers Compensation Act. See 39-A M.R.S.A. § 104; Li v. C.N. Brown Co., 645 A.2d 606, 608 (Me. 1994). The negligence counts in Earnhardt's complaint also include allegations of "injury to reputation." See Compl. ¶¶ 98, 122. To the extent that those assertions may be construed as

defamation claims, they too are barred by Maine's workers compensation law. See Sylvester v. Wal-Mart Stores, Inc., 1995 WL 788206, at \*3 (D. Me. 1995); Caldwell v. Federal Express Co., 908 F. Supp. 29, 34 (D. Me. 1995).<sup>1</sup>

Therefore, the defendants' motion for summary judgment on the negligence counts against UNE and Miles is **GRANTED**.

## **BREACH OF CONTRACT**

### **Facts**

I recite the relevant facts in the light most favorable to Earnhardt. In January 1994, three UNE students and alumnae, Susan Keene, Victoria Boisen and Alison Gully filed sexual harassment complaints against Earnhardt with UNE administrators. Pl.'s Stmt. Mat. Facts I ¶ 7; Miles/Hazard Report, Thompson Aff., Ex. B at 1 & Exs. C, D & E. Earnhardt has admitted that he had sexual relationships with Keene, Boisen and Gully, but maintains that he perceived those relationships to be consensual and welcome in all respects. Pl.'s Stmt. Mat. Facts I ¶¶ 39, 42. (Gully eventually withdrew her complaint, but both she and Earnhardt never denied having had a sexual relationship while she was still a UNE student. Miles/Hazard Report at 10-12.) Other information about Earnhardt's behavior, not officially submitted as a sexual harassment complaint, was filed several

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<sup>1</sup> Earnhardt also argues that UNE has breached an implied covenant of good faith and fair dealing. Although the Law Court has not entirely foreclosed future recognition of that cause of action, it has declined to recognize it thus far with respect to employment and has indicated that the prerequisites would include a violation of a public policy clearly enunciated by statute and for which no civil remedy is available. See Bard, 590 A.2d at 156. The statute cited by the plaintiff here, 20 U.S.C. § 1681 et seq., relates to sex discrimination and therefore is irrelevant to the undisputed facts in this case, which concerns the treatment of Earnhardt, not his accusers. See Order, Earnhardt v. UNE, 95-229-P-H (D. Me. Jan. 26, 1996) (endorsement on Pl.'s Mot. to Amend Compl. of Oct. 2, 1995). Moreover, the plaintiff does have a civil remedy in this instance, one for breach of contract.

weeks later by UNE student Darden Duclos, who claimed to have withdrawn from a research project supervised by Earnhardt after he subjected her to unwelcome sexual advances. Miles/Hazard Report at 14-15. Pending an investigation of the complaints, Earnhardt was placed on suspension with pay on January 24, 1994. Suspension Letter, Thompson Aff., Ex. F. Copies of the students' charges were attached to the suspension letter. Id. In accordance with UNE's sexual harassment policy, the complaints were investigated jointly by UNE Dean of Students Barbara Hazard and UNE Human Resources Director Michael Miles. Their investigation, which included notice to Earnhardt, examination of his lawyer's written response to the complaints and an interview with Earnhardt himself, resulted in a 16-page, single-spaced report dated February 21, 1994. See Miles/Hazard Report. The report concluded that Earnhardt's pattern of admitted relationships and other behavior with the complaining students had violated UNE's sexual harassment and conflict of interest policies, as well as the AAUP Statement on Professional Ethics. Id. at 16. Upon reviewing the report and consulting with UNE President Thomas Reynolds and Earnhardt's supervisor, Dr. Carl Spirito, UNE Dean Michael Beaudoin concluded that Earnhardt should be terminated. Termination Letter, Thompson Aff., Ex. O.

Earnhardt requested review of his suspension and termination by a grievance committee. The committee appointed by the Faculty Senate included one member who had served as Darden Duclos's faculty advisor. Pl.'s Stmt. Mat. Facts I ¶ 45. Earnhardt appeared before the committee in April, two working days after he had first received a copy of the Miles/Hazard Report. Pl.'s Stmt. Mat. Facts I ¶ 42. The committee heard evidence proffered by Earnhardt and his lawyer, including the testimony of six witnesses who appeared in his behalf. See Committee Mem., Thompson Aff., Ex. P; Defs.' Mot. for Summ. J. at 2; see also Defs.' Stmt. Mat. Facts I ¶ 50. In its memorandum

of May 3, 1994 (with a cover letter of May 4, 1994), the grievance committee set forth its findings and concluded that Earnhardt's suspension and termination had been justified on the grounds of the actions he had admitted. Committee Mem. Earnhardt's lawyer received the memorandum on May 9, 1994, and the same day appealed the committee's findings and recommendation in a letter requesting tape recordings of the grievance committee proceedings. Pl.'s Stmt. Mat. Facts I ¶¶ 84-85; Plaintiff's Stmt. of Material Facts (in support of plaintiff's motion for summary judgment on breach of contract claim) ("Pl.'s Stmt. Facts II") ¶ 8. Earnhardt never received a specific response to his appeal request. Pl.'s Stmt. Mat. Facts II ¶ 9. However, UNE President Reynolds independently decided to review the grievance committee's decision as soon as it was issued, and upheld Earnhardt's termination in a letter to him dated May 5, 1994, and postmarked May 6, 1994. Pl.'s Mem. in Support of Mot. for Summ. J. at 4; see also Pl.'s Stmt. Mat. Facts I ¶ 84. It is unclear whether Earnhardt received the President's letter prior to receiving the committee's termination memorandum.

As noted above, Earnhardt's contract of employment explicitly incorporates "applicable rules of the University and the respective Faculty and Personnel Handbooks." Pl.'s Stmt. Mat. Facts I ¶ 73; Employment Contract, Thompson Aff., Ex. G. The UNE Faculty Handbook provides that "[t]ermination for proven or admitted violations of ethical, moral or professional standards may be immediate." Faculty Handbook, Miles Aff., Ex. 1, § V (B)(4) ("Termination for Cause"). The UNE Personnel Handbook states that "Employees are expected to conduct themselves in accordance with the ethical principles or standards that may be outlined by their licensing agency or certification authority or by their professional association (whether or not they choose to belong)." Personnel

Handbook, Miles Aff., Ex. 2 at 8 (“Conflict of Interest”). The Personnel Handbook also sets forth the process for bringing and investigating sexual harassment complaints:

**A. Informal Complaint**

At the complainant’s option, a complaint may be brought to any of the following members of the University community: . . . .

The person to whom the complaint is brought will counsel the complainant as to the options available, and, at the complainant’s request, may help the complainant resolve the complaint informally, and/or help the complainant draft a formal statement of grievance.

**B. Formal Complaint**

A formal complaint should be filed with one of the University’s complaint officers, who are the Affirmative Action Officer/Human Resources Director and the Dean of Students. Normally, the Affirmative Action Officer/Human Resources Director is expected to investigate complaints involving employees, and the Dean of Students is expected to investigate complaints involving students.

The complaint officer shall immediately begin an investigation. The purpose of the investigation is to determine whether a violation of this policy has occurred. The complaint officer has an obligation to conduct a thorough and objective investigation in a timely fashion, assuring appropriate confidentiality and assuring that the accused has a full opportunity to respond to allegations.

At the conclusion of the investigation, the active complaint officer will, in consultation with the other complaint officer, submit a written report of findings and recommendations to the cognizant Senior Administrator, with a copy to the complainant and the accused. That Senior Administrator shall take corrective action as appropriate. The Senior Administrator shall consult with the president before any decision on action is made. Upon completion of the proceedings, both parties will be promptly informed of the results of the investigation and the outcome of the proceedings.

### **C. Appeals Process**

The right to appeal the findings, the recommendations, or corrective action is available to the complainant . . . , as follows: . . . . 2. employees may appeal by use of the grievance procedure described in the Faculty or Personnel Handbooks, as appropriate.

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### **III. Confidentiality**

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### **B. Protection of the Accused**

At the time the investigation commences, the accused will be informed of the allegations, the identity of the complainant and the facts surrounding the allegations. In the event the allegations are not substantiated, all reasonable steps will be taken to preserve the reputation of the accused.

Personnel Handbook at 32-33.

The Faculty Handbook sets forth the procedures for faculty grievances:

#### 2. Formal Grievance Process

b. . . . The Grievance Committee shall be appointed from the membership of the Faculty Senate and shall contain at least five members, none of whom has a direct conflict of interest in the issue at hand. . . .

c. The Grievance Committee . . . shall hear the grievance and such witnesses as it deems germane to the grievance and shall forward, within five working days of the close of the hearing, its recommendations in writing to the President of the University with copies to the Chair of the Faculty Senate and parties involved in the grievance. The grievance hearing and other proceedings will be closed to the public in order to assure confidentiality. The aggrieved party has the right to have either legal counsel or other representation. The Grievance Committee shall make every reasonable effort to hold a hearing, reach its findings, and make its recommendation to resolve the grievance within ten working days.

d. The recommendations of the Grievance Committee may be appealed in writing to the President of the University by the aggrieved employee within three working days after receiving the decision. With respect to all grievance proceedings, the decision, in writing, of the President shall be final, except where the President is one of the parties in the grievance . . . .

Faculty Handbook at 13-14.

### **Earnhardt's Argument**

In his complaint Earnhardt charges that the defendants breached his contract by suspending him without reason to believe his continued presence on campus would threaten harm to himself or others; denying him a competent, impartial and thorough investigation of the three sexual harassment complaints; denying him informal resolution of those complaints; failing to inform him fully of the charges during the investigation of the complaints; failing to notify him of all charges prior to the grievance hearing; failing to provide him sufficient time before his grievance hearing to prepare a defense; failing to inform him of the procedural rights he would have during the grievance hearing; failing to staff the grievance committee with faculty competent in UNE and American Association of University Professors (AAUP) sexual harassment investigation and grievance procedures; allowing him to attend only one of the eleven grievance committee meetings; allowing the grievance committee to interview witnesses without him or his counsel being present; not allowing him to confront his accusers or to question witnesses; failing to reveal the names of the witnesses interviewed by the committee; not requiring the complainants to appear in person at the hearing and allowing the committee to rely on the Miles/Hazard report; allowing the committee members to consult with Miles and Hazard and UNE lawyers during the hearing; and failing to provide him with

explicit findings by the committee with respect to each of the grounds of removal presented. Compl. ¶ 129. In addition, in his response to the motion for summary judgment, Earnhardt asserts that UNE and Miles breached his contract by failing to follow its own internal procedures; failing to provide an adequate explanation of the reasons for his suspension and then for his termination that would enable him effectively to grieve that termination; failing to provide him with a copy of the Miles/Hazard report at the close of their investigation; failure of the grievance committee to conduct an inquiry independent of that conducted by Miles and Hazard into whether his behavior toward Keene, Boisen, Gully and Duclos violated UNE policy; failing to provide a grievance committee all of whose members were faculty free of conflicts of interest; failure of the grievance committee to hold a single hearing at which he could confront all witnesses before the committee; failure of the grievance committee to determine whether his conduct warranted termination; and failure to afford him a proper appeal from the committee's determination. Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J. at 3-23.

### **Analysis**

Because UNE is a private institution of higher education these facts present no state action and Earnhardt's procedural rights are governed exclusively by his contract of employment rather than by federal or state constitutional due process standards. See Knowles v. Unity College, 429 A.2d 220, 221-22 (Me. 1981); Rendell-Baker v. Kohn, 457 U.S. 830, 839-43, 102 S. Ct. 2764, 2770-72, 73 L. Ed. 2d 418, 426-29 (1982); Johnson v. Pinkerton Academy, 861 F.2d 335, 337 (1st Cir. 1988); see also Logan v. Bennington College Corp., 72 F.3d 1017, 1027-29 (2d Cir. 1995).

The vast majority of Earnhardt's claims are insufficient to amount to breach of contract because Earnhardt's contract, including the faculty and personnel handbooks, provides no such guarantees. As a glance at the sections of those documents quoted above reveals, Earnhardt's contract contained no requirement that a faculty member's continued presence on campus threaten harm to himself or to others before he could be suspended; no option of informal resolution of a sexual harassment complaint at the request of the accused rather than the victim; no requirement that a grievant be allowed to attend all grievance committee hearings or confront all grievance committee witnesses; no requirement that the grievance committee conduct a single hearing at which all witnesses must appear; no requirement that the grievance committee engage in fact-finding independent of that conducted by the investigating administrators; no requirement that the grievance committee proceed without consulting university counsel; and so forth.

Earnhardt claims the references to AAUP policies and guidelines in the Miles/Hazard Report, in correspondence from UNE to Earnhardt and in the faculty and personnel handbooks require the University to follow AAUP procedures when dealing with faculty grievances.<sup>2</sup> But nowhere do the relevant UNE documents explicitly adopt or incorporate those procedural requirements. See Knowles, 429 A.2d at 222 (Me. 1981). The Personnel Handbook does state that *employees* are bound by the ethical principles or standards outlined by their professional associations—a *de facto* adoption of AAUP policies for application to faculty behavior—but that provision does not bind UNE or its administrators by AAUP's suggested grievance procedures. See id. Earnhardt also argues

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<sup>2</sup> Dean Beaudoin's termination letter of March 3, 1994, referred to "allegations of violations of the . . . AAUP guidelines," Termination Letter, Thompson Aff., Ex. O, and the Miles/Hazard Report referred in detail to the AAUP Statement on Professional Ethics, Miles/Hazard Report at 5, 10, 13, 15 & 16, and AAUP's Sexual Harassment, Suggested Policy and Procedures for Handling Complaints. Id. at 6, 9 & 13.

that UNE's failure to provide him with a copy of the Miles/Hazard Report until two working days prior to his grievance hearing—and six weeks after the report was issued—violates the University's own requirement that “[a]t the conclusion of the investigation . . . a written report of findings and recommendations . . . [will be sent] to the accused.” See Personnel Handbook at 32. However, Earnhardt has failed to identify any evidence he would have presented to the grievance committee had the report been provided to him earlier; that is, he has failed to show that this breach was material.

Others of Earnhardt's claims simply are not borne out by the record. First, Earnhardt argues that UNE failed to provide an “objective and thorough investigation” of the sexual harassment charges, see Personnel Handbook at 32, on several grounds, all of which are either immaterial or unsupported by the record. I address each of them. Earnhardt claims that Hazard was unable to investigate the charges objectively because of her prior involvement with the three complainants and due to her having labeled his conduct sexual harassment before beginning the investigation; in fact, Hazard met with the three complainants only once prior to the investigation (logically, in her capacity as the administrator specifically designated to handle sexual harassment complaints involving students, see Personnel handbook at 32), a meeting at which the students did not disclose Earnhardt's name and at which Hazard simply advised them that their complaints might best be brought under the rubric of “sexual harassment.” Pl.'s Stmt. Mat. Facts I, App. at 10-11 & 14-17. Earnhardt argues that Hazard's comments to the women at that meeting about sexual harassment being “the closest thing” to the behaviors they were describing indicated that the “university was willing to ‘fudge’ things in order to obtain a desired result,” Pl.'s Mem. in Opp'n at 7; Hazard's comments on their face belie Earnhardt's interpretation. Earnhardt asserts that Hazard covered up

UNE's Counseling & Career Center Director Jeri Keane's alleged conflict of interest and continuing involvement in the investigation. Because Keane never participated in the Miles/Hazard investigation nor sat on the grievance committee, whatever conflicts of interest she may have had are immaterial; even so, the documents submitted by Earnhardt include Keane's *own* letter to the complainants of January 3, 1994, removing herself from further involvement with their complaints because of her prior contacts with the plaintiff. Keane Letter, Thompson Aff., Ex. A. Earnhardt argues that a more thorough investigation would have undermined two particular conclusions in the Miles/Hazard Report: that Keane "remained in the relationship [with Earnhardt] against her will," Pl.'s Mem. in Opp'n at 7, and that Duclos dropped a student research internship and received an 'F' because she was fearful of Earnhardt's sexual advances. First, neither Keane's complaint nor the Report asserts that Keane stayed in the relationship against her will. See Miles/Hazard Report at 2-7; Keane Complaint, Thompson Aff., Ex. C. Second, while Earnhardt claims that Duclos failed her internship project because she never started it, he provides no basis for this assertion in the record and, instead, includes among his supporting documents one that shows her having registered for the internship. Duclos Transcript, Thompson Aff., Ex. I at 1. The course description Earnhardt submits to prove that such projects cannot be commenced without a faculty sponsor's signature says nothing about the timing of such approval. UNE Student Research Project Guideline, Thompson Aff., Ex. J. Earnhardt argues that the omission of certain pieces of information from the Miles/Hazard Report is proof of a lack of thoroughness. He claims that the most "important, and intentional, omission" was the failure to include Gully's admission to Hazard on February 17, 1994, that most of the allegations in her complaint were untrue and Hazard's supposed conclusion that this was so. In fact, the documents cited by Earnhardt—principally a memorandum from Miles and Hazard to Dean

Beaudoin about their communications with Gully—indicate that as of February 17 Gully had indicated to Hazard that only two statements in her complaint were untrue and that Hazard believed that most of the complaint was accurate. Miles/Hazard Memorandum, Thompson Aff., Ex. H at 4; Miles/Hazard Report at 14. Finally, Earnhardt argues that Miles and Hazard deliberately omitted from their report “their conclusion,” Pl.’s Mem. in Opp’n at 10, that Earnhardt’s relationships with the three complainants presented no conflict of interest; he claims that their alleged conclusion was based on their knowledge of Spirito’s alleged awareness of Earnhardt’s conduct with two students, and implies that Spirito’s failure to act on that information was proof that the plaintiff had not, after all, violated the policy. *Id.* But whether Spirito chose to act on this alleged awareness is immaterial to whether UNE later had a right to investigate Earnhardt’s conduct and find that he violated the conflict of interest policy. Even if it were material, the record substantiates Spirito’s lack of awareness that Boisen was still a UNE student when he learned of her relationship with Earnhardt, Spirito Aff. at 2-3, and his inability to act on the allegations he heard in 1992 as to sexual overtures the plaintiff may have made to another student, due to the source’s refusal to disclose the student’s name. *Id.* at 2.

Furthermore, Earnhardt was informed of all charges and complaints against him and given an opportunity to respond during the investigation of the sexual harassment complaints, compare Pl.’s Mem. in Opp’n to Defs.’ Mot. at 11 with Suspension Letter and with Keene Complaint (App. A to Miles/Hazard Report and Attachment to Suspension Letter) at 1-2; he did receive an extensive explanation of the reasons for his termination prior to the grievance committee hearing, see Miles/Hazard Report; Pl.’s Stmt. Mat. Facts I ¶ 42; the grievance committee did determine whether his conduct warranted suspension and then termination, see Committee Memorandum ¶¶ 3-6; and

there are no factual allegations to substantiate the accusation that one of the members of the grievance committee had a “direct conflict of interest in the issue at hand,” see Faculty Handbook at 13, simply because he had served as faculty advisor to Darden Duclos (the student who presented additional information to Miles and Hazard during their investigation of the other students’ sexual harassment complaints). See Duclos Transcript, Thompson Aff., Ex. I; Miles/Hazard Report at 14-15; Pl.’s Mem. in Opp’n at 15 & Stmt. Mat. Facts I ¶ 45; Defs.’ Reply Mem. 24-25 & App., Carter Aff. ¶¶ 3-5, 8-9.

Thus, I **GRANT** UNE’s and Miles’s motion for summary judgment on Earnhardt’s breach of contract claims.

Likewise, I **DENY** Earnhardt’s motion for summary judgment on the issue whether UNE breached his contract by failing to afford him an appeal consistent with the terms of his contract of employment. The relevant facts are undisputed. The Faculty Handbook, which is incorporated in Earnhardt’s contract of employment, provides him the right to appeal grievance committee decisions “in writing to the President of the University . . . within three working days after receiving the decision.” Faculty Handbook at 13. Earnhardt appealed the grievance committee’s decision the very day he received it, May 9, 1994, but four days earlier President Reynolds independently decided to review the grievance committee’s findings and recommendations as if Earnhardt already had requested an appeal. Pl.’s Mem. in Support of Mot. for Summ. J. at 4; see also Pl.’s Stmt. Mat. Facts I ¶ 84. But for the order of the letters, which may have crossed in the mail, President Reynolds afforded Earnhardt the very review to which his contract of employment entitled him. Nothing in his employment contract provides Earnhardt with the right to a *de novo* factual determination by the

president, nor does it guarantee him an opportunity beyond his initial submission of an appeal in writing to argue the merits of his case.<sup>3</sup>

**COUNTERCLAIMS  
(Malicious Prosecution and Abuse of Process)**

Under Maine law the elements of abuse of process are the use of legal process in a manner not proper in the regular conduct of the legal proceedings and the existence of an ulterior motive. Goucher v. Dineen, 471 A.2d 688, 689 (Me. 1984). The First Circuit Court of Appeals has explained that the filing of a baseless lawsuit itself may be sufficient to establish a claim. Simon v. Navon, 71 F.3d 9, 15 (1st Cir. 1995) (construing abuse of process under Maine law). However, proof of an ulterior motive requires showing a “specific link” between the process at issue—here a lawsuit—and an impermissible, collateral purpose. Simon, 71 F.3d at 16. As the First Circuit explained, “This could [be] satisfied . . . with evidence of a threat made explicitly to [the defendant] or a disclosure confided to a third party that [the plaintiff] planned to file suit solely to hurt [the defendant].” Id. at 16. That is, “circumstantial evidence,” see Defs. Objections to Pl.’s Mot. Dismiss and for Summ. J. upon Defs.’ Countercls. at 12, of an ulterior motive is insufficient. Here,

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<sup>3</sup> The only arguments raised by Earnhardt’s attorney in his appeal letter were as follows:

Insofar as I and my client were not notified as to any hearings in which witnesses on behalf of the University appeared and addressed your committee, and obviously did not involve the right to examine and cross examine these persons under oath, there are very serious flaws in the University’s procedures, and [sic] consequently violate due process standard [sic].

Pl.’s Stmt. Mat. Facts II ¶ 8; Att’y Certif., Ex. C. As explained above, Earnhardt had no such rights as a matter of constitutional and contract law.

because UNE and Miles have failed to provide any evidence of such a “specific link,” I **GRANT** Earnhardt’s motion for summary judgment on abuse of process.

Earnhardt also has moved for summary judgment on the malicious prosecution claim. Under Maine law, to sustain an action for “wrongful use of civil proceedings” a party must show that the proceedings were initiated or continued without probable cause and with malice, that the primary purpose was one other than that of securing the proper adjudication of the claim in which the proceedings are based and that the proceedings have terminated in favor of the person against whom they are brought. See Restatement (Second) of Torts, § 674; see also Nadeau v. State, 395 A.2d 107, 116 (Me. 1978); Larsen v. Hanscom, 539 A.2d 627, 627 (Me. 1988); Simon, 71 F.3d at 14-15. The proceedings in question cannot be deemed terminated until the final disposition of any appeals that may be taken, see Restatement § 674 cmt. j. I read First Circuit precedent as requiring this precondition even with respect to the voluntarily dismissed counts against the individual UNE faculty and staff, despite the fact that those counts cannot be subject to appeal. See Simon, 71 F.3d at 15 (“The difference between [abuse of process and malicious prosecution] often is explained as a matter of timing and scope: malicious prosecution is the appropriate cause of action for challenging the *whole* of a lawsuit—*i.e.*, asserting that the suit has no basis and should not have been brought—while abuse of process covers the allegedly improper use of individual legal procedures after a suit has been filed properly.” (emphasis added)). Accordingly, the malicious prosecution claim is premature and I **GRANT** Earnhardt’s motion for summary judgment.

UNE and Miles have moved to strike the certificate of Earnhardt’s lawyer on a variety of grounds, including failure to comply with the requirements for the form and substance of an affidavit

for summary judgment purposes. See Fed. R. Civ. P. 56(e). Given my rulings above with respect to final termination, the motion is **MOOT**.

#### **OTHER PENDING MOTIONS**

The above rulings render **MOOT** the defendants' motion for judgment on the pleadings and their motion in limine to exclude the testimony of Nancy Deane, as well as the plaintiff's motion to strike the defendants' affirmative defenses and his motion to strike portions of the Beaudoin, Moore, Spirito and Miles affidavits. Nothing presented in the affidavits would affect or alter my rulings above. The plaintiff's motion to strike the defendants' Supplemental Statement of Material Facts seems to have been based on a misunderstanding of its purpose<sup>4</sup>; given that and the appropriateness of the supplement that motion is **DENIED**. The defendants' remaining motion for extension of a page limit is **GRANTED**; the plaintiff's objection to the length of the defendant's reply to his summary judgment response is **DENIED**.

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<sup>4</sup>The plaintiff objects to the defendants' Supplemental Statement as if it had been submitted in support of their motion for summary judgment; in fact, it was submitted in conjunction with the defendants' opposition to the plaintiff's motion for summary judgment on the defendants' counterclaims and, as such, was entirely appropriate.

## CONCLUSION

In sum, the defendants' motion for summary judgment as to all remaining counts of the complaint is **GRANTED**, the plaintiff's motion for summary judgment on his breach of contract claim is **DENIED** and the plaintiff's motion for summary judgment on the defendants' counterclaims are **GRANTED**.

**SO ORDERED.**

**DATED THIS 3RD DAY OF JULY, 1996.**

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**D. BROCK HORNBY**  
**UNITED STATES DISTRICT JUDGE**