

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAWN PERLMUTTER

v.

W. CLINTON PETTUS, Ph.D., and
HANK HAMILTON, JR.

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CIVIL ACTION

No. 01-1663

MEMORANDUM

Ludwig, J.

October 1, 2001

This is a 42 U.S.C. §§ 1983 and 1985 action for religious and racial discrimination and free speech violations, together with a supplemental state law claim for civil conspiracy. Defendant W. Clinton Pettus, Ph.D., president of Cheyney University of Pennsylvania, moves to dismiss Counts II and III of the complaint for failure to state a claim upon which relief can be granted and also by reason of the Eleventh Amendment, the bar of the statute of limitations, and sovereign immunity.¹ Fed. R. Civ. P. 12 (b) (6). Jurisdiction is federal question and supplemental. 28 U.S.C. §§ 1331, 1367. The motion to dismiss is ruled on as follows.²

¹Count I, under 42 U.S.C. § 1983, concerns defendant Hank Hamilton, Jr. only and is not the subject of this motion.

² In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all allegations in the complaint are accepted as true and viewed in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff would prove no set of facts that would entitle her to relief. Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

I. Count II - 42 U.S.C. § 1985 (3) - Pettus in his individual capacity: Denied.

The § 1985 (3) claim is pleaded with sufficient specificity. Federal Rule of Civil Procedure 8 (a) requires only a "short and plain statement of the claim that will give defendant a fair notice of what the plaintiff's claim is and the grounds upon which it rests." Fed. R. Civ. P. 8 (a).³ To state a claim under § 1985(3),⁴ it is necessary to aver: (1) a conspiracy by defendants; (2) designed to deprive plaintiff of equal protection of the laws; (3) motivated by racial or other class-based invidiously discriminatory animus; (4) resulting in injury to person or property, or the deprivation of a right or privilege as a United States citizen; and (5) an act in furtherance of the conspiracy. Griffen v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1791, 29 L.Ed.2d 338 (1971); Lake v. Arnold, 112 F.3d 682 (3d Cir. 1997) .

Here, the complaint alleges: "All defendants knowingly and intentionally engaged in a deliberate policy of retaliation against Plaintiff on account of her race and religion and because of her speech." Cmpl. ¶66. It continues: "The conduct of defendants was aimed at discouraging Plaintiff and all white employees from enforcing her rights or

³ Though Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit, 507 U.S. 163, 167, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993) dealt specifically with a § 1983 case against a municipality, its reasoning laid to rest the decisional jurisprudence that heightened pleading requirements applied in civil rights cases. The Court: "We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules." Id.

⁴ Section 1985 (3) appears to be applicable, albeit the complaint does not specify a subsection.

complaining about unlawful acts through a coordinated plan and an intentional practice of consistent discrimination and harassment against Plaintiff to oppress and intimidate her for reporting and opposing Defendants' actions." Cmpl. ¶68. While few details are offered regarding Pettus's role in the alleged conspiracy, the complaint constitutes sufficient notice of the nature of the claim to withstand a dismissal motion.⁵

Pettus's novel analogy to "whistleblowers" - that they are not a protected class - is inapt. The claims at issue are for racial and religious discrimination, both of which implicate protected classes under § 1985. Cmpl. ¶¶66, 68.

II. Count II - 42 U.S.C. § 1985 (3) - Pettus in his official capacity: Granted in part; denied in part.

a. Dismissed with prejudice as to claims for monetary relief.

The Eleventh Amendment bars "suits against departments or agencies of the state having no existence apart from the state," Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981). A state university system, as a government instrumentality, is "entitled to the protection of the eleventh amendment." Skehan v. State System of Higher Educ., 815 F.2d 244, 249 (3d Cir. 1987). Cheyney is a state university. 24 P.S. § 20-2002-A(3).

Moreover, Cheyney, as an arm of the state, and Dr. Pettus, acting in his official capacity, are not suable "persons" under § 1985. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L. Ed.2d 45 (1989).

⁵ Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

b. Denied as to claims for prospective injunctive and declaratory relief.

The Eleventh Amendment does not inhibit official capacity claims for prospective injunctive and declaratory relief, the theory being that they are not against a state. Will, 491 U.S. at 71, 109 S.Ct. at 2312. Therefore, plaintiff's § 1985 claims for such relief may proceed.

III. Statute of limitations - Denied.

Section 1985 claims are governed by the relevant state statute of limitations, which under Pennsylvania law is two years. 42 Pa. Cons. Stat. Ann. §§ 5524; Bougher v. University of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989). Asserting a continuing violation,⁶ the complaint set forth that: "All Defendants knowingly and intentionally engaged in a deliberate policy of retaliation against Plaintiff on account of her race and religion and because of her speech. The above-described conduct began in 1995 and continues to the present." Cmpl. ¶¶66-67. Viewing the allegations according to the most favorable light standard, the defense motion must be denied at this stage.

IV. Count III - state law claim for civil conspiracy: Dismissed.

Under 42 Pa.C.S.A. § 8522 (b), Pettus, as a Commonwealth employee acting within the scope of his duties, is entitled to sovereign immunity vis-a-vis plaintiff's claim. Shoop v. Dauphin County, 766 F. Supp. 1327, 1333-34 (M.D.Pa.), aff'd, 945 F. 2d 396 (3d

⁶ Our Court of Appeals upheld the continuing violation theory in the Title VII employment discrimination context in Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997).

Cir. 1991), cert. denied, 112 S. Ct. 1178 (1992). There is no exception for intentional torts. Id. at 1334; Miller v. Hogeland, No. 00-516, 2000 WL 987864, *3 (E.D.Pa. July 18, 2000); Dill v. Oslick, No. 97-6753, 1999 WL 508675, *4 (E.D.Pa. 1999); Yakowicz v. McDermott, 120 Pa.Comm. 479, 488, 548 A.2d 1330, 1334 (1988), appeal denied, 523 Pa. 644, 565 A.2d 1168 (1989). Sovereign immunity also bars monetary relief claims against defendants, such as Pettus, acting in their individual capacity. Dill v. Oslick, 1999 WL 508675, at *4; Maute v. Frank, 441 Pa. Super. Ct. 401, 403, 657 A.2d 985, 986 (1995).

Edmund V. Ludwig, J.