

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

MARTIN EISEN : CIVIL ACTION
 :
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 v. :
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 : No. 01-4165
TEMPLE UNIVERSITY, et al.

ORDER - MEMORANDUM

AND NOW this day of January, 2002, the motion of defendants' Temple University, et al.,¹ to dismiss Counts I and II is denied; and the motion to dismiss Count III is granted. Fed. R. Civ. P. 12(b)(6).²

This is a 42 U.S.C. § 1983 action asserting free speech, due process and equal protection violations, together with a supplemental state constitutional claim.³ In or about August 1999, plaintiff, Martin Eisen, a tenured professor of mathematics was suspended by his employer, Temple University, for refusing to "abandon his policy against academic fraud." Cmplt. ¶128. Jurisdiction is federal question and supplemental. 28 U.S.C. §§ 1331, 1367.

I. Count I : First Amendment claim - denied.

According to the complaint, plaintiff was suspended because he protested permitting unqualified students to enroll in college level classes and professors not to complete the course material. Cmplt. ¶19-20. His concern was that students would do poorly on actuarial and

¹ The other defendants are David Adamany, Chris Platsoucas, Alu Srinivasan, Dan Reich, John Schiller, Karen Koziara, and John Does #1-25.

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 could prove no set of facts that would entitle relief. Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

³ Under 42 U.S.C. § 1983, state action is implicated here because of state funding. Pi Lamda Phi Fraternity v. University of Pittsburgh, 229 F.3d 435, 440 (3d Cir. 2000) citing Krynicki v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984).

other standardized exams and he characterized these practices as a "fraud" upon the public. Cmpl. ¶20. Defendants argue factual inadequacy: "The Complaint merely alleges that he 'maintained a policy'. . . That he 'protested' (how? when? to whom?) about 'other instructors not completing the syllabi in 'Math 55'." Defendants' reply at 2. However, under the liberal pleading standard of Fed. R. Civ. P. 8, a plaintiff need not answer such questions at this stage or plead more specifically.⁴ Here, sufficient facts are averred to set forth an issue of public concern.⁵ See Brown v. Armenti, 247 F.3d 69, 78 (2001) ("Had the plaintiff been reprimanded for speaking regarding, for example, grade inflation, a specific subject about which there is demonstrated interest, he might have satisfied this [public concern] test."); Richardson-Freeman v. Norristown Area School Dist., 2000 WL 1751062 at *3 (E.D.Pa. 2000).

II. Count II: Fifth and Fourteenth Amendment claims - denied.

1. Due process

At the time that defendants moved to dismiss, plaintiff had not been terminated and was due to have a pre-termination hearing. Defendants' brief at 8 and reply at 3. His current status is not of record. However, the suspension itself is enough to raise due process issues.⁶ Therefore, dismissal on the ground stated is not justified.

⁴ See Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

⁵ The two elements of a First Amendment claim are: (1) that the speech is protected and (2) that it was a substantial or motivating factor for the retaliation. Feldman v. Philadelphia Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994). For the speech to be protected here, it must involve a matter of "public concern." Sanguini v. Pittsburgh Bd. of Educ., 968 F. 2d 393, 397 (3d Cir. 1992).

⁶ To state a viable procedural due process claim, the complaint must aver the existence of a Constitutionally protected life, liberty or property interest of which plaintiff was deprived without due process of law. Unger v. National Residents Matching Program, 928 F.2d 1392, 1395 (3d Cir. 1991). Plaintiff is alleged to have been suspended from his teaching duties without an investigation. Cmpl. ¶ 24. Gilbert v. Homar, 520 U.S. 924, 935, 117 S. Ct. 1807, 1814 (1997) (remanding proceeding to consider whether plaintiff received sufficiently prompt post-suspension hearing).

2. Equal protection

Even though plaintiff is not alleged to be a member of a protected class, the complaint makes out an actionable equal protection claim.⁷ Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074 (2000) (recognizing equal protection claims brought by a "class of one."). It alleges that plaintiff was treated differently from others similarly situated, that the treatment was intentional, and that defendants' purpose was to limit his speech. Cmplt. ¶¶27, 31.

III. Count III: State constitutional claim - granted.

Plaintiff concedes that this claim should be dismissed because there is no private cause of action. Defendants' brief at 2-3; see also Sabatini v. Reinstein, 1999 WL 636667 (E.D.Pa. 1999) (Ludwig, J.) citing Lees v. West Greene School Dist., 632 F.Supp. 1327, 1335 (W.D.Pa. 1986) (Article 1, §7 "contains no provision, express or implied, which creates a private right of action for violations of an individual's right to free speech.").

Edmund V. Ludwig, J.

⁷ The elements of an equal protection claim are: (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of a constitutional right, or by a malicious intent to injure. Homan v. City of Reading, 963 F.Supp. 485, 490 (E.D.Pa. 1997) (quoting Zahra v. Town of Southold, 48 F.3d 674, 683 (2d. Cir. 1995)); Government of Virgin Islands v. Harrigan, 791 F.2d 34, 36 (3d Cir. 1986).

