

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

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

**ORDER - MEMORANDUM**

AND NOW, this 27th day of June, 2002, plaintiff Martin Eisen’s motion to dismiss the counterclaims of defendants Temple University, David Adamany, Chris Platsoucas, Alu Srinivasan, Dan Reich, John Schiller and Karen Koziara under is denied. Fed. R. Civ. P. 12 (c)<sup>1</sup> However, the counterclaim will be severed and placed in suspense pending exhaustion by defendants of administrative remedies as required under the applicable collective bargaining agreement.

The counterclaim sets forth a state law contract claim based on plaintiff’s alleged incompetence and negligence in the performance of his duties as a tenured professor of mathematics. Amend. Ans. at ¶¶ 35-39. Defendants would excuse the non-exhaustion of the bargaining agreement’s remedies because 1) the counterclaim is compulsory and 2) the termination of plaintiff’s employment vitiated the agreement’s procedural provisions. This latter point was rejected authoritatively in Litton Financial Printing v. N.L.R.B., 501 U.S. 190, 208, 111 S Ct. 2215, 2226, 115 L.Ed. 2d 177 (1991) (“[A]s we found in [Nolde Brothers, Inc. v. Bakery Workers, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977)], structural provisions relating to remedies and dispute resolution - for example, an arbitration provision - may in some cases survive in order to enforce duties arising under the contract. . . . We presume as a

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<sup>1</sup> A Rule 12(c) motion for judgment on the pleadings is treated using the same standard as under Fed. R. Civ. P. 12(6). Turbe v. Government of Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991). Dismissal is warranted only if it appears beyond doubt that the party asserting the claim “can prove no set of facts in support of his claim which would entitled him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement.”)

Defendants may be correct that under Article 13F(3)(d) of the collective bargaining agreement “arbitration may only be utilized if the [University’s] President disagrees with the recommendations of the faculty hearing committee.”<sup>2</sup> Def. mem at 5. Nevertheless, it is uncertain whether defendants’ breach of contract claim is controlled by Article 13 (Termination of Service of Faculty and Discipline of Faculty for Just Cause) or Article 8 (Grievance Procedure) and Article 9 (Arbitration Procedure). Because the interpretation of the terms of the collective bargaining agreement is a subject for arbitration,<sup>3</sup> this issue may not be ruled on here. The counterclaim, which is compulsory, will be preserved by severing it from plaintiff’s claim and placing it in suspense. Fed. R. Civ. P. 42(b). Plaintiff’s claim will proceed to trial on July 8, 2002, as scheduled.<sup>4</sup>

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Edmund V. Ludwig, J.

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<sup>2</sup> Article 13F(3)(d): “The Committee shall submit a written recommendation and reasons therefore to the President and to the faculty member. If the committee recommends against dismissal/discipline, the President may (normally within one month) still dismiss/discipline the faculty member, but the faculty member may then seek to utilize the arbitration provisions of this Agreement.”

<sup>3</sup> Pennsylvania’s Public Employee Relations Act mandates arbitration of “the interpretation of provisions of a collective bargaining agreement.” Pa. Stat. Ann. tit. 43 §§ 1101.903 (West 1991).

<sup>4</sup> On August 15, 2001, plaintiff filed the complaint and on April 30, 2002, an amended complaint. On January 22, 2002, defendant filed its original answer with counterclaim and on May 10, 2002 an amended answer with counterclaim. Plaintiff’s ADEA claim, filed November 2, 1999, is pending before the Philadelphia Commission on Human Relations.

