

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

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

MEMORANDUM

Ludwig, J.

July 9, 2002

This 42 U.S.C. § 1983 action asserts free speech, due process, and equal protection violations.¹ Defendants² move for summary judgment. Fed. R. Civ. P. 56(c).³

On January 16, 2002, Temple University terminated the employment of plaintiff Martin Eisen, a tenured professor of mathematics, as recommended by a faculty hearing committee after an evidentiary hearing.⁴ The reasons given were "neglect of duty" and "incompetence." Def. exh. B(e). The amended complaint alleges that this was a pretext for firing plaintiff "because of the positions taken by [him] on matters of public concern." Amd. cmplt. ¶26. Jurisdiction is federal question. 28 U.S.C. § 1331.

¹ Under 42 U.S.C. § 1983, state action is implicated. Pi Lamda Phi Fraternity, Inc. v. University of Pittsburgh, 229 F.3d 435, 440 (3d Cir. 2000) citing Krynicky v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984); Molthan v. Temple University, 778 F.2d 955, 960 (3d Cir. 1985).

² Defendants are Temple University, David Adamany, Chris Platsoucas, Alu Srinivasan, Dan Reich, John Schiller, Karen Koziara, and John Does #1-25.

³ Fed. R. Civ. P. 56(c) mandates the entry of summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Crissman v. Dover Downs Entertainment, Inc., 2002 WL 849446, *1 (3d Cir. April 30, 2002). The facts are viewed in the light most favorable to the non-movant. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

⁴ The "Faculty Senate Personnel Committee" appointed the "Hearing Committee," consisting of five members of the Temple University faculty. See def. exh. D at 1, 14.

I. Count I: First Amendment Claims - motion denied. Plaintiff's speech as to alleged grade inflation and academic fraud is, arguably, protected.⁵ Brown v. Armenti, 247 F.3d 69, 78 (3d Cir. 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."); Green v. Phila. Hous. Auth., 105 F.3d 882, 885-86 (3d Cir. 1997); Johnson v. Lincoln Univ. of Com., 776 F.2d 443, 452 (3d Cir. 1985)(action by tenured African-American professor challenging termination: "It is difficult to imagine a theme [grade inflation and the importance of maintaining standards at black colleges] that touches more upon matters of public concern."). It probably is immaterial that plaintiff's speech did not occur in a public forum. See Azzaro v. County of Allegheny, 110 F.3d 968, 977-78 (3d Cir. 1997) (citing Connick v. Myers, 461 U.S. 138, 148 n.7, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983)). Was plaintiff's speech a substantial motivating factor in the decision to terminate him? Would defendants have taken the same action notwithstanding his protected speech? These questions are for trial. Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995) (process for analyzing First Amendment retaliation claim).

II. Count II : Due Process Claim - motion granted. Since plaintiff was paid his salary until termination, it cannot be said that any monetary deprivation of his property interest in his employment occurred. See Edwards. v. California Univ. of Pennsylvania, 156

⁵ However, it is not altogether clear whether First Amendment protection includes the criticism and challenging by a faculty member of a university's policies on these issues. This is a question of law that requires development of the facts as the basis for an eventual determination by the court. See Johnson v. Lincoln Univ. of Com., 776 F.2d 443, 450 (3d Cir. 1985)(citing Pickering v. Bd. of Educ., 391 U.S. 563, Appendix 578 n.2, 88 S. Ct. 1731, Appendix 1740 n.2, 20 L.Ed.2d 811 (1968)); Connick v. Myers, 461 U.S. at 147-48.

F.3d 488, 492 (3d Cir. 1998). Moreover, plaintiff also received pre-termination procedural due process: notice, an explanation of the evidence, and an opportunity to respond and be heard. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); McDaniels v. Flick, 59 F.3d 446, 454 (3d Cir. 1995)(citing Loudermill, 470 U.S. at 546). The university president gave plaintiff written notice of the charges. Report by Faculty Senate Personnel Committee, def. exh. J; letter from president Adamany, def. exh. L. Several months later, an evidentiary hearing was conducted in which plaintiff was represented, testified, called witnesses, and cross-examined adverse witnesses.⁶ Pl. dep. at 225-226; 242-255, def. exh. E. He was accorded procedural due process.

III. Count III : Equal Protection Claim - motion denied. Questions of material fact remain for the fact-finder regarding plaintiff's claim of disparate treatment intentionally violating his First Amendment rights. See Homan v. City of Reading, 963 F. Supp. 485, 490 (E.D.Pa. 1997) (quoting Zahra v. Town of Southhold, 48 F.3d 674, 683 (2d Cir. 1995) and setting forth elements of equal protection claim); Government of Virgin Islands v. Harrigan, 791 F.2d 34, 36 (3d Cir. 1986) (elements of equal protection claim); Celotex, 477 U.S. at 322 (summary judgment standard); Lovrinic tr. at 9, 66, pl. exh. Q; Mehta aff., pl. exh. T.

⁶ Plaintiff concedes: "Certainly the defendants provided Dr. Eisen with at least three forums at which to be heard and a notice." Nevertheless, he contends that "under the unique circumstances of this case wherein the defendants accumulated without notice to the plaintiff numerous student complaints against him and then sprung them upon him years later, he was in fact denied fundamental fairness, in other words due process." Pl. mem. at 43. Plaintiff cites no authority for this proposition, nor does he cite to the record. He claims to have been denied due process by the Hearing Committee's refusal to permit him to call a union representative as a witness. However, he has not shown why or how that witness's testimony was competent or material. Our Court of Appeals has dispositively ruled that substantive due process protection does not extend to a tenured professorship. Nicholas v. Pennsylvania State University, 227 F.3d 133, 142 (3d Cir. 2000)(following weight of circuit authority that state-created employment rights are not "fundamental" or constitutionally implicated.).

IV. Immunity; Qualified Immunity Defense - granted in part; denied in part.

As Temple contends, it cannot be held accountable under Monell on an agency theory for the alleged torts of its employees. See Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978). Nevertheless, the conduct of an official clothed with authority - in this instance, the president of the university - may itself be sufficient to constitute the binding policy and therefore the action of the entity. See Pembaur v. City of Cincinnati, 475 U.S. 469, 480-83 (1986); Berg v. County of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000). Accordingly, Temple may not be dismissed at this stage.

Individuals acting in their official capacity as state representatives are not suable "persons" under § 1983. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). However, they may be sued in their individual capacities.⁷ For these claims, the defense of qualified immunity is invoked. "The threshold inquiry [of] a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." Hope v. Pelzer, 2002 WL 1378412, *4 (U.S. June 27, 2002)(citing Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). The determination of whether plaintiff engaged in constitutionally protected speech has been deferred until trial. See Section I, supra, at 2; Section II, supra, at 3. However, "[d]espite their participation in this constitutionally impermissible conduct, the respondents may nevertheless be shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would

⁷Whether or not Temple is an "arm of the state" or, as it suggests, of a municipality - the City of Philadelphia, see Bloch v. Temple University, 1995 WL 263541, *3 (E.D.Pa.) - need not be decided. Temple does not take the position that it is not suable under § 1983.

have known.'" Id. at 5 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Given the uncertain status of the law concerning a professor's First Amendment rights to protest against the policies and practices of a university in these circumstances, qualified immunity may well be applicable here - albeit under the case law in our circuit on grade inflation, for example, it appears to be a narrow or at least debatable and fact-driven question.⁸

An order accompanies this memorandum.

Edmund V. Ludwig, J.

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

⁸ In its recent opinion, the Court noted: "[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.' Saucier v. Katz, 533 U.S., at 206, 121 S.Ct. 2151. For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see Mitchell v. Forsyth, 472 U.S. 511,] 535, n. 12, 105 S.Ct. 2806, 86 L.Ed.2d 411; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" Hope v. Pelzer, 2002 WL 1378412, at *5 (citing Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). It continued: "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in Lanier [United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)], we expressly rejected a requirement that previous cases be 'fundamentally similar.' Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." Hope v. Pelzer, 2002 WL 1378412, at *6 .

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

ORDER

AND NOW, this 9th day of July, 2002, defendants' summary judgment motion is ruled on as follows:

1. Count I: First Amendment claims - motion denied.
2. Count II: Due Process claims - motion granted.
3. Count III: Equal Protection claim - motion denied.
4. All counts: Immunity; Qualified Immunity - motion granted as to individual defendants and denied as to Temple University.

Edmund V. Ludwig, J.

