

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

VALERIE A. SAVAGE,)
) Civil Action
 Plaintiff) No. 04-CV-2516
)
 vs.)
)
 BANGOR AREA SCHOOL DISTRICT)
)
 Defendant)

* * *

APPEARANCES:

DONALD P. RUSSO, ESQUIRE
On behalf of Plaintiff

JOHN E. FREUND, III, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendant's Motion Pursuant to [Federal Rule of Civil Procedure] 12(b)(6) and accompanying brief filed August 16, 2004.¹ On June 9, 2004 plaintiff school teacher filed a Complaint against defendant

¹ On September 15, 2004 plaintiff filed Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6). On October 19, 2004 defendant filed the Reply Brief of Defendant to Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss.

school district seeking money damages² and attorney's fees³ for wrongfully terminating her employment in violation of her federal due process rights.

In its motion, defendant asks this court to dismiss plaintiff's Complaint for failing to state a cause of action. For the reasons expressed below, we deny defendant's motion.

SUMMARY OF DECISION

There are a number of details necessary to the final disposition of this matter which are not contained, or are unclear, in plaintiff's Complaint. However, all that is required in federal notice-pleading practice is a short and plain statement of the claim that will give defendant fair notice of plaintiff's claim and the grounds upon which it rests.

Plaintiff's Complaint, and particularly paragraphs 36 through 39, satisfy these requirements. The Complaint puts defendant school district on notice that plaintiff teacher is seeking civil damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988, respectively, against her employer for wrongfully terminating her employment in violation of her civil rights.

Specifically, plaintiff alleges that defendant fired

² 42 U.S.C. § 1983. Section 1983 is a codification of Section 1 of the Civil Rights Act of 1871. See Kalina v. Fletcher, 522 U.S. 118, 123, 118 S.Ct. 502, 506, 522 L.Ed.2d 471, 477 (1997).

³ The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

her knowing that it did not have adequate grounds to do so under the Pennsylvania Public School Code of 1949 ("Code").⁴ Plaintiff also sufficiently avers that she was terminated without proper notice and without a hearing, thus depriving her of her property interest in her employment without due process of law.

Accordingly, we deny defendant's motion to dismiss the Complaint. The details which are missing from the Complaint, and which are enumerated below, can be determined and revealed in pre-trial discovery.

JURISDICTION

This case is before the court under federal question jurisdiction. 28 U.S.C. § 1331. Plaintiff's specific federal claims are brought under 42 U.S.C. §§ 1983 and 1988.

VENUE

Venue is proper in the United State District Court for the Eastern District of Pennsylvania because the events and omissions giving rise to this claim occurred within this district. See 28 U.S.C. §§ 118, 1391(b).

⁴ Act of March 10, 1949, P.L. 30, art. I-XXVII, §§ 101-2702, as amended, 24 P.S. §§ 1-101 through 27-2702.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure examines the sufficiency of the Complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). In reviewing a motion to dismiss filed under Rule 12(b)(6), the court may refer only to the facts alleged in the Complaint and its attachments. In determining the sufficiency of the Complaint, the court must accept all plaintiff's well-pled factual allegations as true and draw all reasonable inferences therefrom in favor of plaintiff. Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997).

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Conley, 355 U.S. at 47, 78 S.Ct. at 103, 2 L.Ed.2d at 85.

(Internal footnote omitted.)

"Thus, a court should not grant a motion to dismiss 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Graves, 117 F.3d at 726 (citing Conley, 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at 84).

FACTS

Under the foregoing standard of review, based upon plaintiff's Complaint, accepting all well-pled facts as true, and drawing all reasonable inferences therefrom in favor of plaintiff, as we are required to do, the pertinent facts are as follows.

Plaintiff Valerie A. Savage received emergency certification from the Pennsylvania Secretary of Education to allow her to teach as a substitute teacher with defendant Bangor Area School District ("BASD") for the period April 2000 through August 2000.⁵ On November 28, 2000 Miss Savage began working for the district as a part-time elementary school art teacher. At the time, she was not formally certified to teach in Pennsylvania.

Defendant appointed plaintiff pursuant to Section 1109.1 of the Code.⁶ This section authorizes school districts to issue emergency teaching certificates to otherwise qualified teachers who agree to enroll in "a teacher certification program and meet Pennsylvania certification requirements within a period not to exceed three (3) years." The certification process required plaintiff to complete and pass several examinations. She took one of these examinations, Principles of Learning and

⁵ Complaint, paragraph 10 at page 3.

⁶ Act of March 10, 1949, P.L. 30, No. 14, art. XI, § 1109.1, added June 7, 1993, 24 P.S. § 11-1109.1.

Teaching, on three occasions, the last time in June 2003, failing the examination each time.

Defendant terminated plaintiff's employment on July 2, 2003, providing her with two bases for its action: first, because of the results of an observation of her teaching conducted on May 7, 2003; and second, because she "failed the test."⁷ From the allegations in the Complaint, it can be inferred that the observation results were unfavorable and that the test referenced is the Principles of Learning and Teaching examination.

Plaintiff attempted to renew her emergency certification by contacting the Department of Education ("DOE") but was told she could not do so. It is not clear when her emergency certification lapsed nor when she tried to renew her emergency certification. However, at the time of her termination on July 2, 2003, plaintiff did not have her teacher certification.

Subsequently, on July 10, 2003, plaintiff was told by a DOE employee, that beginning on September 1, 2003 the certification requirements were being changed by no longer requiring the successful completion of the Principles of Learning and Teaching examination. At that time plaintiff was told to

⁷ Complaint, paragraph 21 at page 5.

submit a new application for certification no sooner than September 1, 2003.⁸

The Complaint avers that the Department of Education issued plaintiff her formal certification on September 3, 2003 and approved it on October 15, 2003.⁹ It is not clear from these averments whether her certification became effective on the issuance date or the approval date.

In her one-count Complaint, plaintiff's allegations of defendant's wrongdoing include the following:

36. Plaintiff believes, and therefore avers, that BASD knew that it did not have adequate grounds to deny Plaintiff tenure status under the Pennsylvania Public School Code; therefore BASD manipulated the Department of Education certification issue in order to wrongfully terminate the Plaintiff.
37. As a result of the BASD's actions in the case at bar, the Plaintiff has been deprived of her property interest in her employment without due process of law.
38. In particular, prior to her termination, the BASD did not give the Plaintiff an opportunity to explain the facts surrounding her teacher certification status.

⁸ Complaint, paragraph 14 at page 4.

⁹ Complaint, paragraph 19 at page 5.

39. In addition, the BASD did not provide the Plaintiff with notice of the charges against her and [have] an opportunity to be heard on those allegations following the termination of her employment.¹⁰

CONTENTIONS OF THE PARTIES

The question whether a person possesses a property interest in continued employment is governed by state law.

Independent Enterprises Incorporated v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165 (3d Cir. 1997). Review of plaintiff's argument requires an understanding of the three classifications of professional employees in the Code.

Article XI of the Code is titled "Professional Employees". The definition section of this article defines three terms: "professional employe", "substitute", and "temporary professional employe".¹¹ It reads in relevant part:

- (1) The term "professional employe" shall include those who are certificated as teachers....
- (2) The term "substitute" shall mean any individual who has been employed to perform the duties of a regular professional employe during such period of time as the regular professional employe is absent on sabbatical leave or for other legal cause authorized and approved by

¹⁰ Complaint, page 8.

¹¹ Act of March 10, 1949, P.L. 30, art. XI, § 1101, as amended, 24 P.S. § 11-1101.

the board of school directors or to perform the duties of a temporary professional employe who is absent.

- (3) The term "temporary professional employe" shall mean any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular professional employe whose services have been terminated by death, resignation, suspension or removal.

24 P.S. § 11-1101.

Plaintiff argues that prior to her termination she was a temporary professional employee. She argues that certain provisions of the Code, specifically Subsections 1108(a) and (b)(2),¹² provided her with a legitimate expectation of continued employment. In particular, Subsection 1108(a) provides that no temporary professional employee may be terminated unless rated unsatisfactory. This Subsection also requires that any such rating must be provided to the temporary professional employee within ten days of the date the rating was made.

Additionally, Miss Savage argues that she became a professional employee by operation of law because Subsection 1108(b)(2) provides that a temporary professional employee whose work is certified by the district superintendent as satisfactory within the last four months of the third year after she began

¹² Act of March 10, 1949, P.L. 30, art. XI, § 1108(a) and (b)(2), as amended, 24 P.S. § 11-1108(a) and (b)(2).

working as a temporary professional employee, is to be considered a professional employee.

Plaintiff also argues that, in light of the change in certification requirements, she met all the requirements for certification. Plaintiff contends that, because she met all the certification requirements, she was a professional employee as that term is defined in Section 1101(1). Plaintiff draws an additional expectation of continued employment from her purported status as a professional employee by arguing that, under Section 1122(a),¹³ professional employees could only be terminated for cause.

In response, defendant filed the within motion to dismiss, raising three arguments. First, defendant argues that plaintiff signed a waiver at the start of her employment in which she "waive[d] all claims to continued employment" and "all claims to preferential consideration for regular employment."¹⁴ Second, defendant argues that plaintiff's failure to maintain the required teaching certificate precludes any property interest in her employment. Third, defendant argues that plaintiff was a substitute who had no constitutionally protected due process right in her employment.

¹³ Act of March 10, 1949, P.L. 30, art. XI, § 1122, as amended, 24 P.S. § 11-1122(a).

¹⁴ See Exhibit 1 to defendant's motion to dismiss.

DISCUSSION

Sufficiency of Complaint

As noted above, we conclude from a review of plaintiff's Complaint that plaintiff has satisfied the federal notice-pleading requirements. That is, plaintiff has set out in detail the facts enumerated above, upon which she bases her claim. Plaintiff's statement of the claim gives defendant clear notice that she is bringing a Section 1983 private civil rights action for wrongful termination of her employment in violation of her federal constitutional due process rights, and a Section 1988 action for attorney's fees.

Plaintiff has also clearly averred that she had a property interest in her employment with the school district; that the school district knew that no reasons existed under the Public School Code of 1949 for firing her; and that, nevertheless, she was terminated without cause and without notice or a hearing, thus depriving her of her property interest in her employment without due process of law.

Therefore, it does not appear beyond a doubt that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. This is sufficient to defeat defendant's motion under Federal Rule of Civil Procedure 12(b)(6)

to dismiss plaintiff's Complaint for failure to state a cause of action.

Effect of Omissions in Complaint

As noted above, there are a number of details necessary to the final disposition of this matter which are not contained, or are unclear, in plaintiff's Complaint. These missing details include the following:

- 1) what were the results of plaintiff's May 7, 2003 teacher observation;¹⁵
- 2) what test plaintiff failed which was one of the bases for her being fired;¹⁶
- 3) when plaintiff was provided her unsatisfactory teacher rating;¹⁷
- 4) when plaintiff's emergency certification lapsed;¹⁸
- 5) when plaintiff tried to renew her emergency certification;

¹⁵ However, as noted above, it can be inferred from the Complaint that the results of plaintiff's observation were unfavorable to her.

¹⁶ As also noted above, it can be inferred from the Complaint that the test which plaintiff failed was the Principles of Learning and Teaching examination.

¹⁷ Notice in writing of an unsatisfactory rating must be furnished to a temporary professional employee within ten days following the date of such rating. 24 P.S. § 11-1108(a).

¹⁸ For the reasons discussed below, it is significant whether plaintiff's emergency certification had lapsed as of the time of her discharge.

- 6) whether plaintiff's teacher certification became effective on its issuance date (September 3, 2003) or on its approval date (October 15, 2003);
- 7) whether plaintiff was hired as a substitute teacher or as a temporary professional employee;
- 8) what was plaintiff's teaching status during her second period as a teacher beginning November 28, 2000 (professional employee, substitute, or temporary professional employee);¹⁹
- 9) when plaintiff's three-year period of employment began;
- 10) when plaintiff's three-year period of employment lapsed; and
- 11) whether defendant's unsatisfactory review of plaintiff came within the last four months of plaintiff's third year of service.²⁰

Resolving these uncertainties may assist in determining the ultimate outcome of this lawsuit. They are matters which can, and should, be developed in discovery. They may provide evidence pertinent to a motion for summary judgment at the conclusion of pre-trial discovery. Or they may provide relevant

¹⁹ For the reasons discussed below, the status of plaintiff's employment with defendant is significant in establishing what right of review, if any, is available to her.

²⁰ The significance of when plaintiff's three-year period of employment began and ended, and whether defendant's unsatisfactory evaluation came within the last four months of plaintiff's third year, is explained below.

evidence for trial. Accordingly, their omission at this stage of the proceedings is not fatal to plaintiff's Complaint.

The additional information developed through discovery about these matters ultimately may be helpful to plaintiff, to defendant, to both, or to neither. However, plaintiff's Complaint as it presently exists is sufficient to state a cause of action, and does not need to allege these evidentiary matters.

Therefore the arguments of counsel concerning the effect of the resolution of these uncertainties are arguments more properly made at a later time when these facts have been established. Nevertheless, as an aid to the parties and counsel it may be helpful to briefly summarize at this time the positions of counsel on these uncertainties and the ramifications of their resolution.

Waiver

We reject defendant's first argument that plaintiff waived any interest in continued employment. Defendant's argument is premised on the contents of a document that we may not consider because it was attached to defendant's motion to dismiss and not to the Complaint. Defendant may attempt to use this document at a later stage of the proceeding but it is not appropriately before us now. Accordingly, we reject the waiver argument.

Status of Employment

It is unclear whether plaintiff was hired as a substitute or a temporary employee. Plaintiff avers that she received emergency certification from the Secretary of Education to allow her to teach as a substitute teacher with defendant for the period of April 2000 through August 2000.²¹ She avers that she began her employment as a part-time elementary school teacher on November 28, 2000.²²

While the first period of employment with defendant seems to fall within the status of substitute, plaintiff's professional status as to her second period of employment is not as clear. The distinction is significant because it affects the reasonableness of plaintiff's expectation of continued employment which in turn determines what procedural due process is available to the employee.

While the Code offers no expectation of continued employment to substitutes, plaintiff is correct that it does provide temporary employees with some expectation of continued employment. Under Subsection 1108(b)(2), a temporary professional employee whom the superintendent certifies as satisfactory during the last four months of the third year of

²¹ Complaint, paragraph 10 at page 3.

²² Complaint, paragraph 5 at page 2.

service is deemed to be a professional employee. The district is then required to give that employee a contract of employment as a professional employee.²³

Additionally, plaintiff correctly notes that the Code provides that "[n]o temporary professional employe shall be dismissed unless rated unsatisfactory, and notification, in writing, of such unsatisfactory rating shall have been furnished the employe within ten (10) days following the date of such rating."²⁴

The Code further requires that any temporary professional employee not offered a contract at the conclusion of three years of service "shall be given a written statement signed by the president and secretary of the board of school directors and setting forth explicitly the reason for such refusal."²⁵

Local agency employees have a right to a hearing under the Local Agency Law²⁶ where they can establish that their dismissal affected a personal or property right. The personal or property right can be derived from a statute or contract. Short v. Borough of Lawrenceville, 548 Pa. 265, 696 A.2d 1158 (1997). Section 1108 of the Code establishes such a right, enabling a

²³ 24 P.S. § 11-1108(b)(3).

²⁴ 24 P.S. § 11-1108(a).

²⁵ 24 P.S. § 11-1108(c)(2).

²⁶ 2 Pa.C.S.A. §§ 105, 551-555, 751-754.

temporary professional employee who receives an unsatisfactory rating within the last four months of service as described in Section 1108 to contest the dismissal in proceedings under the Local Agency Law. Young v. Littlestown Area School District, 358 A.2d 120 (Pa. Commw. 1976).²⁷

However, any unsatisfactory rating made prior to the last four months of service, is "incontestable." Young, 358 A.2d at 126. Thus the status of plaintiff's employment with defendant is significant in establishing what right of review, if any, is available to her.

At this stage of the proceeding it is unclear whether plaintiff was hired as a substitute or as a temporary professional employee. If she were hired as a temporary professional employee, it is unclear when her three-year period of employment began and thus also when it elapsed. As defendant's unsatisfactory review may have come within the last four months of plaintiff's third year of service, if she were a temporary professional employee she may have been eligible for review under the Local Agency Law. The analysis does not end there though.

²⁷ For a discussion of the procedural remedies available for the different classes of employees and for different types of grievances, see School District of Philadelphia v. Rochester, 405 A.2d 1142 (Pa. Commw. 1979).

Certification

We will also address defendant's argument that even if plaintiff were not a substitute, plaintiff's failure to obtain her certification precludes any property interest in her employment.

Defendant argues that plaintiff, in her Complaint, acknowledges that her emergency certificate lapsed in either June or early July, 2003, and that she tried to renew it with the Department of Education but was told that she could not do so. Defendant argues that plaintiff did not receive her certification until September or October, 2003.

Defendant argues that once plaintiff's emergency certificate lapsed and given that she did not have her certification, any property interest she may have had in her position was lost. In support of this argument, defendant cites two cases, Moiles v. Marple Newton School District, 01-4526, 2002 U.S. Dist. LEXIS 15769 (E.D. Pa. 2002)(DuBois, J.) and Occhipinti v. Board of School Directors of Old Forge School District, 464 A.2d 631 (Pa. Commw. 1983).

In Moiles, an assistant principal allowed his professional certification to lapse. The school district suspended the assistant principal without pay until he obtained his professional certification. One of the steps in obtaining

the certification was that he needed a letter from the district superintendent that attested to the assistant principal's satisfactory performance in the preceding three years.

The superintendent declined to issue such a letter. Subsequently, the district's school board terminated the assistant principal's employment for allowing his certification to lapse. The assistant principal did not receive prior notice or an opportunity to be heard prior to his termination.

The assistant principal brought suit alleging due process violations and sought relief under 42 U.S.C. § 1983. The court barred plaintiff's claims because they were brought after the lapse of the applicable two-year statute of limitations. The court addressed the merits of the claims in the alternative, assuming arguendo that the claims were not barred by the statute of limitations.

The court relied on the Occhipinti decision to conclude that the assistant principal lost his property interest in his continued employment as a consequence of the lapsing of his professional certification. The court reasoned that "when plaintiff's employment was terminated, he was not deprived of a constitutionally protected property interest, and he may not state a claim for a violation of his procedural due process rights." Moiles, 2002 U.S. Dist. LEXIS 15769 at *24.

In Occhipinti, plaintiff had an interim teaching certificate which she allowed to lapse on May 31, 1977 by her failing to satisfy educational requirements. The school board suspended her on June 1, 1977 because of the lapse and then after conducting a hearing, terminated her employment. At a second hearing, it was revealed that plaintiff teacher took the requisite courses she needed for certification in the summer of 1977 and had, accordingly, been recertified. The school board concluded that her recertification following her termination did not change the fact that on June 1, 1977 she lacked the requisite certification she needed to continue to teach.

The Secretary of Education reversed the board's decision, concluding that because the teacher had been recertified, she was a professional employee entitled to the appropriate due process protection for the termination of professional employees. The school board appealed this decision to the Commonwealth Court of Pennsylvania.

The Commonwealth Court reversed the decision of the Secretary of Education. The Court reasoned that the teacher ceased being a professional employee upon the lapse of her certification, and that the school board was required to terminate her employment under the school Code.

Plaintiff argues in her brief that she satisfied all the certification requirements as of July 2003.²⁸ This argument contradicts the averments she makes in her Complaint. In her Complaint Miss Savage avers that she *learned* of the change of certification requirements in July 2003, but that the change was *not effective* until September 2003. Furthermore, she avers that she was told to submit a new application for certification no sooner than September 1, 2003.²⁹

Plaintiff did eventually receive her certification, in either September or October, 2003, but this was well after the July date she claims in her brief. It is clear that at the time of her termination she did not have certification. Under the Moiles and Occhipinti cases, this lack of certification would prevent her from having a property interest in ongoing employment. Under these same cases, the fact that she may have obtained this certification at some later date is of no consequence.

Defendant correctly notes that plaintiff acknowledges in her Complaint that her emergency teaching certification lapsed. However, as previously discussed, it is not clear when her emergency certification lapsed. If, at the time of her

²⁸ Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) at page 3.

²⁹ Complaint, paragraph 14 at page 4.

discharge, the emergency certification had not yet lapsed, then her situation is different from Moiles and Occhipinti in that she still would have had a necessary certification, albeit an emergency certification, to allow her continued employment. If, however, her emergency certification lapsed prior to her discharge, her argument is more tenuous.

Conclusion

With these factual questions remaining to be developed in discovery, dismissal of plaintiff's action at this stage of the proceeding would be premature. While defendant raises significant arguments which call into question the ultimate viability of plaintiff's claim, those arguments will be more appropriately addressed in a motion for summary judgment after further development of the record. At this juncture we cannot say that it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Graves, 117 F.3d at 726.

For all the foregoing reasons, we deny defendant's motion to dismiss plaintiff's Complaint.

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

VALERIE A. SAVAGE,)
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) Civil Action
Plaintiff) No. 04-CV-2516
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vs.)
)
BANGOR AREA SCHOOL DISTRICT)
)
Defendant)

ORDER

NOW, this 30th day of March 2005, upon consideration of Defendant's Motion Pursuant to 12(b)(6) filed August 16, 2004; upon consideration of plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6), which brief was filed September 15, 2004; upon consideration of the Reply Brief of Defendant to Plaintiff's

Brief in Opposition to Defendant's Motion to Dismiss, which reply
brief was filed October 19, 2004; upon consideration of
plaintiff's Complaint filed June 9, 2004; and for the reasons

expressed in the accompanying Memorandum,

IT IS ORDERED that defendant's motion to dismiss the

Complaint is denied.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge