

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

WM. C. PLOUFFE, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	
F. JAVIER CEVALLOS, et al.	:	NO. 10-1502

ORDER

AND NOW, this 12th day of April, 2011, upon consideration of defendant Kutztown University of Pennsylvania's Motion to Dismiss Plaintiff's Amended Complaint (Docket No. 15) and the plaintiff's opposition thereto; and Defendants Cevallos, Picus, Zayaitz, Alexander Pisciotta, Seigler, Toggia, Renzema, Hondaker, Kremser, Logan, G. Cordner and A.M. Cordner's Motion to Dismiss Plaintiff's Amended Complaint (Docket No. 16), and the plaintiff's opposition thereto, and after oral argument held on November 30, 2010, IT IS HEREBY ORDERED that the University's motion is GRANTED in its entirety and the individual defendants' motion is granted in its entirety as to claims against the individual defendants in their official capacities and is granted on all claims except Counts 1, 2, 9, 10 and 13 against the individual defendants in their individual capacities. The claims against the University are DISMISSED without prejudice to the plaintiff's right to bring them in another forum.

Sovereign immunity bars claims against Kutztown University and the individual defendants in their official

capacities for damages.¹ The Eleventh Amendment does not preclude plaintiffs from bringing suit for injunctive relief against a state official. See Ex Parte Young, 209 U.S. 123 (1908). The relief requested, however, is only nominally sought against the individual defendants in their official capacity, and the state is the real party in interest. The Court, therefore, grants the motions against the University and against the individual defendants in their official capacities.

The Court concludes that the plaintiff has stated a claim against the individual defendants in their individual capacities for Counts 1, 2, 9, 10, and 13. Although the defendants made a strong argument that the plaintiff was not speaking as a citizen when he made his complaint to the Office of Social Equity and, therefore, Count 1 should be denied, the plaintiff has alleged enough in his complaint to allow the case to go forward. The Court concludes similarly with respect to the First Amendment right to petition (Count 2), but this is even a closer case. The Court concludes that Counts 9 and 10, alleging a violation of the whistle blower law, sufficiently state claims under that statute. Wrongdoing is defined by the Act as "[a] violation which is not of a merely technical or minimal nature of

¹ A.M. v. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 580 (3d Cir. 2004) ("A suit against a governmental official in his or her official capacity is treated as a suit against the governmental entity itself.").

a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer." 43 P.S. § 1422. The plaintiff has made allegations of such violations.

Because the Court has denied the motion to dismiss with respect to the two First Amendment claims, the Court will also deny the motion as to the § 1983 conspiracy claim. Again, the plaintiff barely states a claim but the Court will allow it to proceed.

All the other counts are dismissed. Count 3 (academic freedom) is dismissed. Any right that the plaintiff asserts as a violation of academic freedom is subsumed in his First Amendment claims. The Third Circuit has held that academic freedom vests with the institution, not the teacher. "[Third Circuit] precedent has consistently demonstrated that it is the educational institution that has a right to academic freedom, not the individual teacher." Borden v. Sch. Dist., 523 F.3d 153, 172 n.14 (3d Cir. 2008).

The procedural due process claim (Count 4) is dismissed because the plaintiff did not have a property interest in his job. He did not have tenure and was an at-will employee. Count 5 is dismissed because there is not a private right of action under the Pennsylvania Constitution, and there is no equivalent

to § 1983. Counts 6, 7 and 8 are dismissed for the same reason. The state law tort claims (Counts 11, 12, 15-20) are barred by sovereign immunity. The Pennsylvania Sovereign Immunity Act waives the Commonwealth's immunity for nine categories of negligence. 42 Pa. Con. Stat. § 8522(b); 1 Pa. Cons. Stat. § 2310. The Commonwealth has not waived its sovereign immunity with regard to itself or the individual defendants on these causes of action, and the exceptions are not implicated here. The plaintiff does not allege a conspiracy under § 1985 or violation of § 1986 (Counts 14 and 22) because he has failed to allege that the defendants' actions were motivated by racial or other class-based discriminatory animus. Count 21 is also dismissed. The Court fails to understand how the purported illegal practice of psychology constitutes abuse of process and/or malicious prosecution.

BY THE COURT:


MARY A. McLAUGHLIN, J.