

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

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ANTHONY GRONOWICZ,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 97-656
	:	
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	
Defendant.	:	
_____	:	

MEMORANDUM

R.F. KELLY, J.

DECEMBER 29, 1997

Anthony Gronowicz ("Plaintiff") has brought this action against his former employer, The Pennsylvania State University ("Penn State"). Plaintiff alleges breach of employment contract, deprivation of procedural due process in violation of 42 U.S.C. § 1983, and violation of substantive due process. Penn State has moved for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons that follow, Penn State's Motion will be granted.

I. FACTS.

A. Introduction.

On April 30, 1990, Penn State offered Plaintiff a position as an Assistant Professor of History at the Hazelton Campus. In this position, Plaintiff was on a "tenure track," which means that after six years of probation, he would become eligible for a tenured position within the University. During these six years, candidates for tenure are required to excel in

teaching effectiveness, research competence, scholarship and mastery of subject matter. Candidates are reviewed at least every two years to determine whether or not they are meeting the criteria for tenure.

To accept the position as assistant professor, Plaintiff was required to sign a one page "Memorandum of Personal Service." The "Memorandum of Personal Service" states in relevant part:

In accepting this appointment, you are entitled to the benefits of, and agree to abide by, the regulations in force throughout your employment at the University with respect to: . . .

(b) academic tenure, (if applicable)

Plaintiff contends that this document, and other University policies regarding promotion and tenure, constitute an express employment contract. Plaintiff claims to have been contractually entitled to established University procedures with respect to tenure, and claims that the University's failure to follow those procedures constitutes a breach of contract. Further, Plaintiff contends that the University's failure to adhere to established procedures violated his right to procedural due process and was so arbitrary and capricious that substantive due process was also violated.

B. Relevant Penn State Policy regarding Tenure.

As referenced above, the Memorandum of Personal Service, the Penn State Human Resources Promotion and Tenure Procedures and Regulations Policy Manual ("HR-23") sets forth "the criteria, procedures, and conditions . . . for the awarding

of promotion and tenure." According to HR-23, promotion and tenure decisions are based on three criteria: (1) teaching ability and effectiveness; (2) research or creative accomplishment and scholarship; and (3) service to the University, the public, and the profession.

As previously stated, tenure eligible employees of Penn State serve a six year "provisional appointment period." To earn a year of credit towards tenure, an employee must be in "active full-time employment status for no less than six months between July 1 and June 30 of one year." Normally, the six years run continuously, however, the "tenure track" may be "stayed" for up to one year upon written request. Such a stay would be granted for the birth of a child, a serious family or personal illness, or a similar situation.

Faculty members eligible for tenure are reviewed in the second year of service and no less than every two years thereafter. Reviews are conducted in three sequential levels: (1) peer review by the department; (2) review by the College; and (3) review by the University. Results are made known to the faculty member subject to review. Should a faculty member receive a negative fourth year review, but not be terminated, a special fifth year review could be scheduled.

HR-23 specifies that its procedures are stated as generalizations. Each individual academic unit is responsible for the development of more detailed review procedures. For Plaintiff, the additional procedures established by the College

of Liberal Arts and the Department of History applied to his tenure status.

C. Penn State's tenure procedures as applied to Plaintiff.

Plaintiff began working at Penn State in August 1990. After completing two academic terms, in the fall of 1991, he received his first review. All three levels of review were generally favorable. Two years of credit toward tenure were attributed to Plaintiff, however, several areas of concern were brought to Plaintiff's attention.

Two problems regarding Plaintiff's teaching were noted. First, Plaintiff's five day per week course load was considered "atypical," "excessive," and counter-productive to research activities. Second, low student evaluation scores were noted and attributed to Plaintiff's schedule. Plaintiff was instructed not to continue with such a demanding schedule the following year. Plaintiff's lack of research was also noted. Plaintiff was encouraged to continue working on his book-length manuscript but was advised to begin publishing in "mainstream refereed journals."¹

In the spring of 1992 Plaintiff was awarded the "Kent Forster Memorial Junior Faculty Award," a \$1580.00 stipend. Plaintiff used this award, and additional funds supplied by the Department of History, to "buy out" of his teaching schedule for

A "refereed journal" is a scholarly publication which is selective in its decision to publish academic articles, and which subjects its articles to rigorous peer review.

the spring of 1993.² Plaintiff taught at Hazelton during the fall of 1992, however, from December 1992 until August 1993 he was in New York City working on his manuscript. Plaintiff did not request a formal leave of absence during this time.

In the fall of 1993 Plaintiff received his fourth year review. The results were again generally favorable, despite a research record that was considered "clearly inadequate" due to Plaintiff's failure to publish. Plaintiff was considered to have an adequate teaching record but was encouraged to begin to present papers at major meetings. To address these concerns, a special fifth year review was scheduled by the Dean.

Plaintiff was warned that a successful fifth year review was conditioned on completion and submission of his manuscript to a university or other high quality press. Plaintiff was required to produce a letter from the university or press acknowledging, at the least, review of his manuscript. Additionally, unless Plaintiff's colleagues found his manuscript likely to be accepted by a high quality press, a negative fifth year review was imminent.

In the fall of 1994, the special fifth year review took place. By this time, Plaintiff had completed his manuscript but it had been rejected by two publishers without submission to outside reviewers. Such a review was critical for Plaintiff to receive a favorable fifth year review and continue on the tenure

A faculty member can "buy out" of classes by reimbursing the University budget for the cost of a replacement teacher for the semester.

track. Further, Plaintiff's colleagues described the manuscript as "problematic."

The Committee on Promotion and Tenure in the Department of History recommended, by a four to one vote, that Plaintiff not be continued on the tenure track. The Head of the Department of History joined in this recommendation, as did the Dean. Plaintiff's lack of research and failure to publish were cited as the reasons for his termination.

Plaintiff was notified of the decision to terminate him in January 1994. Plaintiff appealed the termination decision internally through the "Faculty Rights and Responsibility Committee" of Penn State. The Committee found no procedural violations of HR-23 and refused to overturn Plaintiff's termination. Plaintiff sought further review through various Penn State officials, none of whom have found that the decision to terminate Plaintiff should be reversed.

Plaintiff continued to submit his manuscript to publishers relying on the possibility that his tenure status would be reconsidered if a publisher was found. In December 1995, a publisher was found, however, after reconsideration, Penn State decided not to reinstate Plaintiff on the tenure track. This action followed.

Plaintiff claims that the faculty of Penn State failed to follow established procedure in reviewing his qualifications for tenure. Plaintiff alleges that he was prejudiced because several favorable peer reviews were missing from his file.

Plaintiff claims that the faculty categorized his manuscript as "problematic" without reading it. Also, Plaintiff claims his receipt of the Kent Forster Award and highly favorable student evaluations were ignored by the faculty. Finally, Plaintiff claims that the time he spent away from the Hazelton Campus for research purposes should not have been considered for purposes of tenure. Plaintiff insists that if he had been reviewed one year later, he would have been offered tenure.

III. STANDARD.

Summary Judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986). Penn State, as the moving party, has the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Then, Plaintiff, as the nonmoving party, must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c). If the court, in viewing all reasonable inferences in favor of the nonmoving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

IV. DISCUSSION.

A. Breach of Employment Contract.

Plaintiff asserts the existence of an express employment contract between the parties. Penn State asserts that their employment relationship with Plaintiff was "at-will." To overcome Pennsylvania's presumption of at-will employment, Plaintiff must show: "(1)sufficient additional consideration; (2) an agreement for a definite duration; (3) an agreement specifying that the employee will be discharged only for just cause; or (4) an applicable recognized public policy exception." Robertson v. Atl. Richfield Petro., 537 A.2d 814, 819 (Pa. Super. 1987), alloc. denied, 551 A.2d 216 (Pa. 1988). Plaintiff has failed to assert any proof of the above and instead demands that I "assume" the existence of an express employment contract.

None of the documents published by Penn State promised Plaintiff a definite term of employment or state that he could only be terminated for just cause. Plaintiff does not allege that he provided any additional consideration to Penn State. Plaintiff's termination does not violate public policy. There is no basis from which to draw the assumption that an express employment contract existed between the parties.

To the contrary, Penn State offers much support for the proposition that Plaintiff's employment was "at-will." Indeed, Pennsylvania's adherence to the employment at will doctrine is zealous. See e.g., Morosetti v. Louisiana Land & Exploration Co., 564 A.2d 151, 152-53 (Pa. 1989); Rutherford v. Presbyterian

Hosp., 612 A.2d 500, 503 (Pa. Super. 1992); Scott v.

Extracorporeal, Inc., 545 A.2d 334, 336 (Pa. Super. 1988).

Further, one court has already held that HR-23 does not create a contract of employment. Fratkin v. The Pennsylvania State University, No. 4:CV-95-1220(M.D. Pa. July 25, 1996)(holding that PS-23, the predecessor to HR-23, did not create any contractual obligation).

At the summary judgment stage, once the movant points out the absence of a genuine issue of material fact, it is Plaintiff's burden to present specific facts showing a genuine need for trial. Plaintiff has failed to produce any evidence to overcome the presumption that his employment with Penn State was "at will," therefore, I will grant summary judgment as to Count I in favor of Defendants.

B. Procedural Due Process.

In Count II Plaintiff claims that Penn State violated 42 U.S.C. § 1983 by denying his right to procedural due process as guaranteed by the 5th and 14th Amendments to the United States Constitution. For Plaintiff to establish a procedural due process claim, he must first demonstrate that he has been deprived of a protected liberty or property interest. Board of Regents of State Colleges v. Roth, 408 U.S. 578, 569-70 (1972). Plaintiff claims that he had a property interest in Penn State conforming to established procedures regarding tenure, and that he was deprived of that interest, without due process, when the University deviated from those procedures.

Property interests are created and defined, not by the Constitution, but by an independent source such as state law. Roth, 408 U.S. 578, 577 (1972). Once created and defined, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." Angelini, Inc. v. City of Philadelphia, ___ F. Supp. ___, No. 96-3200, 1997 WL 735809, at *13 (E.D. Pa. Nov. 24, 1997). To establish a constitutionally protectable property interest in tenure procedures, Plaintiff must show that the procedures at issue so limit the University's discretion that he was objectively entitled to tenure and did not merely subjectively expect a promotion. Varma v. Bloustein, 721 F. Supp. 66, 69 (D.N.J. 1988), aff'd 860 F.2d 1075 (3d Cir. 1988), cert. denied 489 U.S. 1014 (1989)(citing Perry v. Sinderman, 408 U.S. 593, 601-02 (1972)).

Plaintiff has failed to show that the documents published by Penn State limited the faculty's exercise of discretion in determining eligibility for tenure. Ziegler v. The Pennsylvania State University, 4:CV-94-311 (M.D. Pa. Nov. 21, 1994)(holding that PS-23 did not create a protectable liberty or property interest). HR-23 states that "Tenure and promotion imply selectivity and choice; they are awarded for academic and professional merit, not for seniority." The Guidelines for Promotion and Tenure established by the Department of History note:

Since the decisions of the Department Head and the Committees are essentially qualitative judgments, the

guidelines are not to be interpreted as minimal quantitative requirements that if met will automatically result in positive recommendations. Similarly when, in the opinion of the Head and the Promotion and Tenure Review Committee, special circumstances warrant, exceptions may be made to these guidelines.

(emphasis in original). Plaintiff's subjective expectation that he would receive tenure is insufficient to establish a property interest protected by the due process clause, therefore, I will grant Summary Judgment as to Count II of the complaint.

B. Substantive Due Process.

In Count III Plaintiff claims that Penn State, through the "arbitrary and capricious" actions of its faculty, violated his right to substantive due process. "[W]hile property rights for procedural due process purposes are created by state law, substantive due process rights are created by the Constitution." Reich v. Beharry, 883 F.2d 239, 244 (3d Cir. 1989)(approving Justice Powell's concurrence in Regents of the Univ. of Michigan v. Ewing, 474 U.S. 14 (1985)). For Plaintiff to establish a substantive due process claim he must demonstrate that he was "deliberately and arbitrarily or capriciously deprived of a 'fundamental' right for which substantive due process protection is ordinarily afforded." Smith v. Borough of Pottstown, No. 96-1941, 1997 WL 381778, at *15 (E.D. Pa. June 30, 1997)(citing Austin v. Neal, 933 F. Supp. 444, 451 (E.D. Pa. 1996)(citations omitted)).

Plaintiff asserts his right to contractually established University procedures regarding tenure and promotion. The Third Circuit has not defined the precise contours of the

"particular quality of property interest entitled to substantive due process protection," Independent Enters. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1180 (3d Cir. 1997); Vartan v. Nix, ___ F. Supp. ___, No. 96-6365, 1997 WL 36994, at *5 (E.D. Pa. Jan. 29, 1997), aff'd, ___ F.3d ___ (3d Cir. (Pa.) Nov. 6, 1997)(Table, No. 97- 1194). The right asserted by Plaintiff, however, "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." Independent Enters., 103 F.3d at 1180 (citing Mauriello v. Univ. of Med & Denistry of N.J., 781 F.2d 46, 50 (3d Cir. 1986)(quoting, Ewing, 474 U.S. at 229-30(Powell, J., concurring))). Accordingly, I will grant Summary Judgment as to Count III of the complaint.

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY GRONOWICZ,
Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant.

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CIVIL ACTION

NO. 97-656

ORDER

AND NOW, this 29th day of December, 1997, upon consideration of the Defendant's Motion for Summary Judgment, and Plaintiff's Response thereto, it is hereby ORDERED that said motion is GRANTED.

BY THE COURT:

Robert F. Kelly J.