Hamid v. John Jay College of Crim. Justice

United States District Court for the Southern District of New York

May 18, 2000, Decided ; May 19, 2000, Filed

99 Civ. 8669 (WK)

Reporter
2000 U.S. Dist. LEXIS 6915 *; 2000 WL 666344

ANSLEY HAMID, Plaintiff, - against - JOHN JAY COLLEGE OF CRIMINAL JUSTICE, CITY UNIVERSITY OF NEW YORK, GERALD LYNCH, BASIL WILSON, NATHAN GOULD, BRIAN MURPHY and RICHARD CURTIS, Defendants.

Disposition: [*1] Defendants' motion granted in part and denied in part. Plaintiff permission to request appointed counsel denied and leave to re-apply as qualified above granted.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

An appellate court may dismiss a given cause of action only if it appears beyond doubt that plaintiff can prove no set of facts in support of such claim that would entitle him to relief.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN2[] **Amendment of Pleadings, Leave of Court**

An appellate court should grant leave to amend the complaint when a liberal reading gives any indication that a valid claim might be stated if pled more adroitly. *Fed. R. Civ. P. 15(a)*.

Civil Rights Law > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN3[] **Civil Rights Law**

In order to state a Title VII of the Civil Rights Act of 1964 as amended, *42 U.S.C.S. § 2000e et seq.*, claim, a plaintiff must plead that; (1) he is a member of a protected class; (2) he was qualified for the job he held; (3) there was an adverse employment action; and (4) similarly situated non-minority individuals were treated differently.

Labor & Employment Law > Discrimination > National Origin Discrimination > Scope & Definitions

HN4[] **National Origin Discrimination, Scope & Definitions**

While the second circuit has instructed that, in discrimination suits, the level of proof required to establish a prima facie case is low, the required proof is greater in a mixed motive case alleging one legitimate and one discriminatory motive. In such cases, a plaintiff must initially proffer evidence that an impermissible criterion was in fact a motivating or substantial factor in the employment decision.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Education Law > Discrimination in Schools > Employment Discrimination > Educational Institutions

Labor & Employment Law > Discrimination > National Origin Discrimination > Scope & Definitions

HN5[] **Summary Judgment, Entitlement as Matter of Law**

Trial courts should be cautious about granting summary

judgment to an employer in an employment discrimination case where, as in this case, the employer's intent is at issue.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > ... > Retaliation > Elements > Causation

Labor & Employment Law > Discrimination > Retaliation > General Overview

Labor & Employment Law > ... > Retaliation > Elements > General Overview

Labor & Employment Law > ... > Retaliation > Elements > Protected Activities

HN6 **Employer Violations, Interference With Protected Activities**

To fashion a prima facie case of retaliation, an employee must show: (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

HN7 **Fundamental Rights, Procedural Due Process**

The supreme court has eschewed rigid or formalistic limitations on the *U.S. Const. amend. XIV*'s Due Process Clause, since liberty and property are broad and majestic terms that relate to the whole domain of social and economic fact.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN8 **Procedural Due Process, Scope of Protection**

The scope of academic interests evoking procedural due process requirements reaches well beyond the core protection of tenured positions.

Constitutional Law > Substantive Due Process > Scope

Education Law > Faculty & Staff > Tenure in Postsecondary Schools > Criteria & Procedures

Education Law > Faculty & Staff > Tenure in Postsecondary Schools > General Overview

HN9 **Constitutional Law, Substantive Due Process**

A person's interest in a benefit is a property interest for due process purposes if there are rules or mutually explicit understandings that support his claim of entitlement.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

HN10 **Fundamental Rights, Procedural Due Process**

A person's interest in his good reputation and consequent freedom to pursue future employment opportunities may remain totally unprotected by the *U.S. Const. amend. XIV* Due Process Clause if not accompanied by some additional grievance.

Constitutional Law > Privileges & Immunities

HN11 **Constitutional Law, Privileges & Immunities**

Qualified immunity shields government employees from liability for conduct that does not violate clearly established statutory or constitutional rights of which an objectively reasonable person would have known.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN12 **Bill of Rights, Fundamental Freedoms**

A right is clearly established if the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates the right.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Education Law > Students > Right to Education

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Authority to Adjudicate

Governments > Courts > Courts of Claims

HN13[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

N.Y. Educ. Law § 6224(4) provides that exclusive jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claims of any person against the City University of New York (b) in connection with causes of action sounding in tort alleged to have been committed by a senior college of such university or any officer, agent, servant or employee of a senior college of such university in the course of his employment on behalf of such university.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Courts of Claims

HN14[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

The New York Court of Claims has exclusive jurisdiction over such tort claims brought against employees of City University of New York's senior colleges.

Counsel: For Plaintiff: Ansley Hamid, New York, NY.

For Defendants: June Steinberg, Asst. Attorney General, Office of the New York State Attorney General, New York, NY.

Judges: WHITMAN KNAPP, SENIOR U.S.D.J.

Opinion by: WHITMAN KNAPP

Opinion

MEMORANDUM & ORDER

WHITMAN KNAPP, SENIOR DISTRICT JUDGE

Defendants John Jay College of Criminal Justice (hereinafter the "College"), Gerald Lynch (President of the College), Basil Wilson (Provost of the College), Nathan Gould (chairperson of the College's Department of Anthropology), Brian Murphy (the College's Director of Security), and Richard Curtis (a professor of Anthropology at the College) move to dismiss in part the complaint of *pro se* plaintiff Ansley Hamid (hereinafter "plaintiff") for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. *Fed. R. Civ. P. 12(b)(1)*, *(6)*. For the following reasons, we grant the motion in part and deny it in part. We also deny plaintiff permission to request appointed counsel.

BACKGROUND

[*2] On this motion, we accept plaintiff's allegations as true and draw all reasonable inferences in his favor. We cull most of the following background from plaintiff's complaint and opposition papers.

This litigation stems from the removal by the College of plaintiff as principal investigator of two politically and racially sensitive research projects. The College appointed plaintiff as a professor in its Anthropology Department in 1984 and in 1992 granted him tenure. He quickly gained attention as a major anthropologist studying urban drug use. Then, in 1996-97, plaintiff helped the College obtain two federally-funded grants, totaling $ 7 million, to study "Heroin in the Twenty-First Century" and "International Drug Markets Convergence." These uncommonly large awards enhanced his growing reputation.

Plaintiff, a Trinidadian of Indian descent, has espoused fairly radical ideas about the role that illegal drugs and drug policies play in society. His study proposed to establish a "monitoring network to track the development cycle of heroin use in New York City from 1995 to 2000." With generous funding and the endorsement of his peers, he intended to focus his research on the behavior **[*3]** of white heroin addicts.

The National Institute of Drug Abuse ("NIDA") conferred the grants upon the College and appointed plaintiff as the Principal Investigator ("PI"). The College named defendant Curtis as Project Director. The College itself, as "Grantee Institution," assumed managerial responsibility for the grants. Several senior administrators, including President Lynch and Provost Wilson, were delegated this responsibility by the College.

As detailed below, plaintiff claims that defendants Lynch and Wilson (respectively plaintiff's highest and more immediate supervisors at the College), using their power over the grants' administration, soon embarked upon a campaign to undermine his ability to carry out his agenda. Indeed, within a year, they had maliciously orchestrated his dismissal as lead researcher. Plaintiff declares that they acted on both ideological and discriminatory impulses. That is, they disagreed with his theoretical and methodological approaches, in part due to racial and national origin prejudice.

Indeed, a feud between himself and President Lynch had been brewing for several years. Some components of this feud apparently involved race. For instance, the **[*4]** President disapproved of plaintiff's sympathizing with (mainly minority) students who had occupied a college building in protest against Lynch's exclusionary employment practices. Along these lines, Lynch preferred to sponsor other, predominantly white scholars as the College's "drug experts." After the grant awards in 1996-97, Lynch expressed particular displeasure that plaintiff intended to concentrate on white narcotics users. Simultaneously, Provost Wilson, a Jamaican of African descent, felt a nationalist bias against plaintiff, a Carribean immigrant of Indian descent.

The building animosity between plaintiff and defendants exploded in November 1997 when, allegedly at the urging of Lynch, Wilson, and Gould, defendant Curtis leveled charges of malfeasance against plaintiff. Wilson then directed defendant Murphy, the Director of Security, to investigate. Within a month, plaintiff received notice that he had been terminated as PI on the two grants "for unprofessional behavior and not successfully managing staff." He then filed a complaint with the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging that his removal had been motivated by unlawful discrimination. His complaint **[*5]** ultimately resulted in a "right to sue" letter.

In January 1999, the College suspended his employment and gave defendant Curtis his office and a heightened role in his projects. A white sociologist replaced plaintiff as PI and began to investigate primarily non-white drug users. Plaintiff asserts that the college took such action to retaliate against him for lodging an EEOC grievance. He filed the instant lawsuit in August 1999. [1]

DISCUSSION

This suit alleges five causes of action: (1) employment discrimination in contravention of Title VII of the Civil Rights Act of 1964 as amended, *42 U.S.C. § 2000e et seq.*, for defendants' removal of plaintiff as PI on account of his national origin; (2) retaliatory discharge under Title VII for their suspension of plaintiff's teaching duties and **[*6]** initiation of proceedings to strip him of tenure in retaliation for his filing an EEOC complaint; (3) due process violations under *42 U.S.C. § 1983* for eliminating his PI status without giving him notice and an opportunity to defend himself; (4) *First Amendment* violations; and (5) tortious interference with prospective economic advantage for ousting him as PI. Defendants seek to dismiss all counts except # 4.

HN1[⬆] We may dismiss a given cause of action only if it appears "beyond doubt that plaintiff can prove no set of facts in support of such claim that would entitle him to relief." *See, e.g., Branum v. Clark (2d Cir. 1991) 927 F.2d 698, 705* (citation omitted). Moreover, ***HN2***[⬆] we should grant leave to amend the complaint "when a liberal reading gives any indication that a valid claim might be stated" if pled more adroitly. *Id.*; *Fed. R. Civ. P. 15(a)*.

I. Title VII Counts Against Individual Defendants

We dismiss the first two counts as against each individual defendant, because an employee cannot hold liable under Title VII an employer's individual agents, including those with supervisory control. In addition to advancing other rationales for **[*7]** this rule, the Second Circuit in a directly controlling case reasoned that because Congress intended the statute to apply only to employers with fifteen or more workers, the legislature could not have meant to impose liability on individual defendants, including supervisors. The Court dismissed all Title VII claims against the individual employees named in the complaint. *Tomka v. Seiler Corp. (2d Cir. 1995) 66 F.3d 1295, 1313-17, abrogated on other grounds, Burlington Indus. v. Ellerth (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633*; *see also, e.g., Arena v. Agip USA Inc. (S.D.N.Y. Mar. 8, 2000) 2000 U.S. Dist. LEXIS 2578, No. 95 Civ. 1529, 2000 WL 264312*, *3 (*citing Tomka*); *Jungels v. State Univ. College of N.Y. (W.D.N.Y. 1996) 922 F. Supp. 779, 782, aff'd, 112 F.3d 504 (2d Cir. 1997).*

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[1] In October 1999, plaintiff was arrested upon a federal complaint accusing him of misusing his grant money back in 1996-97. These charges have recently been dismissed without prejudice.

II. Title VII -- National Origin Discrimination

[2]

[*8] The College, the institutional defendant, argues that plaintiff has failed sufficiently to allege that national origin discrimination motivated his dismissal as PI. We disagree and therefore deny the College's motion.

HN3[↑] In order to state a Title VII claim, a plaintiff must plead that:

> (1) he is a member of a protected class;
>
> (2) he was qualified for the job he held;
>
> (3) there was an adverse employment action; and
>
> (4) similarly situated non-minority individuals were treated differently.

McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668.

HN4[↑] While the Second Circuit has instructed that, in discrimination suits, the level of proof required to establish a *prima facie* case is "low," the required proof is "greater" in a "mixed motive" case alleging one legitimate and one discriminatory motive. *De la Cruz v. New York City Human Resources Admin. (2d Cir. 1996) 82 F.3d 16, 20, 23* (citations omitted). In such cases, "a plaintiff must initially proffer evidence that an impermissible criterion was in fact a 'motivating' or 'substantial' factor in the employment decision." *Id. at 23* **[*9]** (citations omitted); *42 U.S.C. § 2000e-2(m)*.

In the case at bar, plaintiff adequately pleads a *prima facie* case. He alleges that he was replaced as PI by a white professor (Barry Spunt) in large part because Spunt was white. Plaintiff admits that Lynch's and Wilson's "initial" motivation for disliking him and his research was their "ideological" opposition to his liberal views of drugs, drug abuse, and the "drug war." But, plaintiff avers that this ideological animosity "was exacerbated by their discriminatory hostility…" (*Compl.* P 17, 18.) Hence, in this "mixed motive" situation, plaintiff must advance proof that the discriminatory animus helped to drive Lynch's and Wilson's behavior. Plaintiff infers such discrimination because defendants (including Gould, his immediate supervisor) eventually replaced him with Spunt, who plaintiff claims is unqualified to conduct ethnographic research. Spunt then drastically reduced all fieldwork on white drug users, focusing instead on "traditional" (non-white) subjects. (*Id. P 23*.)

Reading the complaint expansively, we find that plaintiff accuses defendants of holding to a "traditional" academic **[*10]** alignment infected with racism. Defendants felt compelled to throw the unflattering spotlight off of white addicts. Under the circumstances, one cannot easily separate this invidious pro-white ideology from prejudice against plaintiff himself because of his race or national origin: He embodied a racially "unacceptable" program. Defendants then expected that a Caucasian PI would more likely acquiesce (perhaps unwittingly) in their objectives. Thus, they illegally substituted a less qualified, white PI.

Granted, defendants also allegedly acted from other, more benign motives. Moreover, we find it difficult to imagine how defendant Wilson fits into plaintiff's scenario. Plaintiff, in his opposition papers, asserts that Provost Wilson (a black Jamaican) harbored nationalist hostility against a Trinidadian of Indian descent. But, Wilson did not refocus the research upon Indian drug users but rather (one assumes) to a substantial extent upon members of his own race. It strains credulity to trust that, because of his hatred of Indians, Wilson would act in concert with alleged white bigots to install a white PI to study black subjects.

Nevertheless, at this juncture, plaintiff has met his **[*11]** burden. *HN5*[↑] Trial courts should be cautious about granting summary judgment to an employer where, as in this case, the employer's intent is at issue. *Gallo v. Prudential Residential Servs., L.P. (2d Cir. 1994) 22 F.3d 1219, 1224* (citations omitted). This caveat seems particularly appropriate at this very early stage of the lawsuit, before plaintiff has had the chance to probe the College's hidden procedures. A defendant should not enjoy a tactical advantage in Title VII litigation by constructing a system for making employment decisions that is not amenable to scrutiny and is perhaps infused, at least in part, by illegitimate considerations.

Plaintiff's theory of liability will need to be fleshed out during discovery, but as cautioned by the *Gallo Court, supra*, we permit the case to proceed on the facts as alleged. Since, according to plaintiff, defendants effectively stymied the racially-provocative component of his research, plaintiff raises a colorable suspicion that racial discrimination contributed to the decision to demote him. In his opposition papers, plaintiff further attempts to explain Lynch's bias by reference to plaintiff's own support of student "race **[*12]** riots" targeting Lynch (Pl. Mem. at 4-5.) We therefore should give him the opportunity more fully to develop the record.

III. Title VII -- Retaliation

[2] Plaintiff pleads "national origin" discrimination (Compl. P 28), but reading his complaint as a whole, we would characterize his primary claim as one of "race" discrimination.

The College also contends that plaintiff has not sufficiently alleged a *prima facie* case that the College moved to discharge him in retaliation for commencing proceedings with the EEOC. We agree and dismiss this claim without prejudice.

HN6[] To fashion a *prima facie* case of retaliation, an employee must show:

> (1) participation in a protected activity known to the defendant;
>
> (2) an employment action disadvantaging the plaintiff; and
>
> (3) a causal connection between the protected activity and the adverse employment action.

Van Zant v. KLM Royal Dutch Airlines (2d Cir. 1996) 80 F.3d 708, 714.

Plaintiff meets the first and second criteria. Regarding the third criterion, however, plaintiff's complaint is entirely conclusory and demonstrates no such "causal connection." It alleges only that defendants tried to fire him "in retaliation" for filing an EEOC grievance. (Compl. PP 25, 31.) Thus, we dismiss this cause of action and grant plaintiff leave to amend his complaint to include more specific **[*13]** allegations if he can legitimately do so. [3] (In that case, though, he must name only the College and/or the City University of New York ("CUNY") -- and not individuals -- as defendants.)

[*14] IV. Procedural Due Process

Plaintiff avers that the individual defendants deprived him without due process of a protected interest in remaining as PI of the research grants. Defendants suggest that no authority has yet ascribed a constitutional "property" or "liberty" interest in someone's position as a grant's principal investigator. In fact, though, Supreme Court and other precedents adequately establish plaintiff's right to plead this cause of action.

HN7[] The Supreme Court has "eschewed rigid or formalistic limitations" on the *Fourteenth Amendment's Due Process Clause*, since "liberty" and "property" are "broad and majestic" terms that relate to the "whole domain of social and economic fact." *Board of Regents State Colleges v. Roth (1972) 408 U.S. 564, 576, 92 S. Ct. 2701, 33 L. Ed. 2d 548*. In *Roth* and its companion case, *Perry v. Sindermann (1972) 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570*, the Court made clear that HN8[] the scope of academic interests evoking procedural due process requirements reaches well beyond the core protection of tenured positions.

First, plaintiff has alleged a sufficient "property" interest. To establish this **[*15]** interest in a particular benefit, one must have a "legitimate claim of entitlement to it." *Roth, 408 U.S. at 577*. But, such a claim need not be grounded on express statutory or contractual provisions: "HN9[] A person's interest in a benefit is a 'property' interest for due process purposes if there are… rules or mutually explicit understandings that support his claim of entitlement…." *Perry, 408 U.S. at 601*. For example, in *Perry*, the unwritten "policies and practices" of the particular university provided the "equivalent of tenure" where no formal tenure system existed. *Id. at 602*.

A decision in this District has relied upon *Perry* and *Roth* in recognizing a property interest created by City College of New York's "longstanding, indeed, historic 'understanding,' officially promulgated and fostered by the College… that all teachers…. shall be free of thought control outside of the classroom (and indeed, inside the classroom as well) by [City] University and College officials and administrators." *Levin v. Harleston (S.D.N.Y. 1991) 770 F. Supp. 895, 925*, *aff'd in part and vacated in part on other grounds*, **[*16]** *966 F.2d 85 (2d Cir. 1992)*.

In that case, the University had responded to perceived racist comments by Prof. Levin by various measures such as investigating his fitness and warning students in writing of his "objectionable" views. Levin was given no opportunity to answer the charges made against him. *Id. at 924*. In discussing Levin's unwritten "tenure rights" protected by the Due Process Clause, the Court declared that, "Academic tenure, if it is to have any meaning at all, must encompass the right to pursue scholarship wherever it may lead…." *Id. at 925* (*citing Sweezy v. State of N.H. (1957) 354 U.S. 234, 250, 77 S. Ct. 1203, 1211, 1 L. Ed. 2d 1311*).

Similarly, plaintiff should have the chance to show that the College fostered a custom or mutual understanding that its faculty and administration would not interfere with a tenured

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[3] We note, though, the vincibility of this cause of action. In his opposition papers, plaintiff does assert a "causal connection" by reference to the timing of the alleged events: His supervisors dismissed him as PI in November 1997 yet permitted him to teach a full course load until the Spring 1999 semester. He thus asserts, "If the defendants truly believed that the allegations made by Curtis and Gould were proper grounds for dismissal, surely they would not have permitted plaintiff to continue teaching students for the entire year of 1998." (Pl. Mem. at 13.) He then causally attributes the later disciplinary action against him to his intervening EEOC action (in November 1998).

Yet it seems likely that defendants delayed disciplinary action in order to give plaintiff the benefit of the doubt while further investigating the charges of wrongdoing brought against him. Employers very commonly remove accused employees from "active duty," so to speak, but do not to fire them, pending additional inquiry. Given this everyday reality, plaintiff will be hard pressed to infer reasonably that the College would have blithely ignored the serious charges "but for" his administrative complaint.

professor's research based merely upon their prejudices or their disagreement with its direction or results. Surely, the right to guide a research project and receive funding therefor constitutes an integral part of social science scholarship. *See id.* (noting due process problem with university deterring a faculty **[*17]** member from seeking outside grants).

One case has ruled that a professor accused of scientific misconduct held no property interest in his appointment as PI of an ongoing federal grant, because the university, not the professor, was the grantee of the award (and thus retained the legal and financial responsibility for the grant funds). That is, the plaintiff did not show that he would "incur any personal financial injury if current funding for his research were suspended or terminated." *Abbs v. Sullivan (W.D. Wisc. 1990) 756 F. Supp. 1172, 1182-83*, *vacated on jurisdictional grounds*, *963 F.2d 918 (7th Cir. 1992)*.

We distinguish *Abbs* on three grounds. First, apparently unlike Abbs, plaintiff does allege that "as a result of his appointment as PI… his total income was increased." (Compl. P 15; *cf. id. P 26*.) Second, Professor Abbs claimed only a direct interest in the grant. Plaintiff, by contrast, also asserts a "tenure right" to unimpeded research, and this right (if proven) constitutes a substantive rule of entitlement independent of his source of funding. Indeed, the *Abbs* trial court unnecessarily focused only upon financial consequences, **[*18]** ignoring the fact, acknowledged in cases cited above and in the decision on appeal, that an academic's access to research funds often bestows crucial non-pecuniary rights. *See Abbs*, 963 F.2d at 927-28. Finally, Prof. Abbs challenged only the "lesser sanctions" and "interim actions" aimed at him during a pending investigation. The *Abbs* trial and appellate courts noted in dicta that a due process right may arise when an awardee actually loses his current funding or is barred from competing for future government grants. *See id.*; *756 F. Supp. at 1182-83* (discussing plaintiff's several theories of entitlement). [4]

[*19] Plaintiff's claim of a "liberty" interest under the Due Process Clause, while weaker than his claim of a "property" interest, still seems viable. In the wake of the Supreme Court's post-*Roth* jurisprudence, ***HN10***[⬆] a person's interest in his good reputation and consequent freedom to pursue future employment opportunities may remain totally unprotected by the Due Process Clause if not accompanied by some additional grievance. *See Siegert v. Gilley (1991) 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277*; *Paul v. Davis (1976) 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405*; *see generally* Ronald D. Rotunda & John E. Nowak, 3 *Treatise on Constitutional Law* (3rd ed. 1999 & Supp. 2000) 65-67, 81-82. Still, *Paul v. Davis* did not overrule *Roth* but rather distinguished it because the government "*in declining to rehire*" the *Roth* plaintiff imposed a "stigma or other disability" upon him "that foreclosed his freedom to take advantage of other employment opportunities." *Paul, 424 U.S. at 709-10* (*quoting Roth, 408 U.S. at 573*; emphasis supplied by the *Paul* Court); *see also Siegert, 500 U.S. at 233* **[*20]** (similarly distinguishing *Roth*). That is, defamation remains actionable under *§ 1983* when it occurs "in the course of the termination of employment." *Paul, 424 U.S. at 710*.

Practically speaking, to the extent that government's stigmatizing conduct "effectively preclude[s] [plaintiff] from participation in professional activities critical for career advancement," his employment has been so "terminated." *Abbs, 756 F. Supp. at 1185*. In the case at bar, plaintiff avers that defendants took action that harmed his "prestige and position" as an academic researcher. (Compl. P 26.) A key *factual* question remains -- whether demoting plaintiff from PI status for "unprofessional" behavior effectively banned him from his vocation. *See Abbs, 756 F. Supp. at 1185*. [5] Thus, plaintiff has properly plead a liberty interest.

[*21] Since plaintiff has a due process cause of action, we must now decide whether the individual defendants are entitled to qualified immunity. We hold that they have not met their burden of proving such immunity.

HN11[⬆] Qualified immunity shields government employees from liability for conduct that "does not violate clearly established statutory or constitutional rights of which [an objectively] reasonable person would have known." *Harlow v. Fitzgerald (1982) 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396*. ***HN12***[⬆] A right is "clearly established" if the "contours

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[4] Incidentally, NIDA, the agency that conferred the grants, manifestly believes that procedural safeguards should be afforded its grantees' employees. Pursuant to its regulations, all grantee institutions must establish and comply with an administrative process for reviewing, investigating, and reporting allegations of misconduct in connection with a grant project. *42 C.F.R. § 50.103(a)*. Specifically, the regulations enumerate compulsory steps that defendant Murphy's investigation allegedly ignored, such as giving the investigation's target an opportunity to comment upon a comprehensive report. *Id. § 50.103(d)(1), (2)*.

[5] *See generally Abbs*, 963 F.2d at 928 (Posner, J.) ("Put this [world-renowned research] director back into the classroom, having stripped away his scientific standing and access to research funds by condemning him for scientific fraud, and you exclude him from his occupation."); Dan. L. Burk, *Research Misconduct: Deviance, Due Process, & the Disestablishment of Science (1995) 3 Geo. Mason Indep. L. Rev. 305, 327* ("The sanction for research misconduct is no longer simply the disapproval of one's peers…. Scientists accused of misconduct, especially the misuse of government money, find themselves fighting for their reputations, their careers, and, given the availability of criminal sanctions, even their freedom.").

of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Anderson v. Creighton (1987) 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523*. In making this determination, we must look to the case law of the Supreme Court and the Second Circuit. *Russell v. Scully (2d Cir. 1993) 15 F.3d 219, 223* (citation omitted).

Taking the allegations of the instant complaint as true, the law existing in 1996-97 (including *Roth* and *Perry*) sufficiently explained that unwritten "tenure rights" demand the strictures of due **[*22]** process. In fact, the *Levin* case, reviewed by the Second Circuit, embroiled CUNY in litigation along these very lines.

V. State Tort Claim

Finally, plaintiff levels a state law tort claim (interference with prospective economic advantage) against the individual defendants. We have no jurisdiction to hear this cause of action and consequently must dismiss it.

HN13[↑] *New York Education Law § 6224(4)* provides that:

> Exclusive jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claims of any person against the city university of New York ["CUNY"]… (b) in connection with causes of action sounding in tort alleged to have been committed by a senior college of such university or any officer, agent, servant or employee of a senior college of such university in the course of his employment on behalf of such university.

Relying on this language, courts have consistently held that ***HN14***[↑] the New York Court of Claims has exclusive jurisdiction over such tort claims brought against employees of CUNY's senior colleges. *See, e.g., Chinn v. City Univ. of N.Y. (E.D.N.Y. 1997) 963 F. Supp. 218, 227*; *Illickal v. Roman (1st Dep't 1997) 236 A.D.2d 247, 653 N.Y.S.2d 562, 563*; **[*23]** *Ibekweh v. Wiredu (1st Dep't 1993) 197 A.D.2d 478, 603 N.Y.S.2d 2.*

Here, plaintiff alleges that employees of the College improperly removed him as PI and thereby injured his reputation with NIDA, the funding agency. They removed him in the course of their regular duties at the College, a "senior college" of CUNY. *See N.Y. Educ. Law § 6202(5)*; Compl. P 6. Hence, this case falls within the purview of *§ 6224(4)*.

Technically, plaintiff has sued the wrong entity on this cause of action. "By statute, the entity responsible for torts… of the agents and employees of the four-year colleges of CUNY is CUNY and not the individual institutions by which they are employed…, the real party in interest being CUNY." *Ibekweh v. State of N.Y. (Ct. Cl. 1993) 157 Misc. 2d 710, 598 N.Y.S.2d 664, 665* (*citing 2641 Concourse Co. v. City Univ. of N.Y. (Ct. Cl. 1987) 137 Misc. 2d 802, 522 N.Y.S.2d 775, 778 n.1*, *aff'd mem.*, *147 A.D.2d 379, 538 N.Y.S.2d 446* (1st Dep't 1989)). Although the caption of the complaint reads "John Jay College of Criminal Justice, City University of New York, [*et al.*]," and although the defendants have **[*24]** assumed that CUNY is a named party, the complaint in fact lists the College, and not CUNY, as a defendant. (Compl. P 6.) However, we must not permit plaintiff to circumvent the statute. We consequently dismiss this cause of action without prejudice, and if plaintiff chooses to take action in the Court of Claims, he should name CUNY, and not the College, as the real party in interest.

VI. Permission to Request Appointment of Counsel

Before submitting his opposition papers to the present motion, plaintiff applied for permission to request counsel. In civil cases, unlike in criminal cases, we have no authority to appoint counsel. We can only put into operation a process whereby this Court's Pro Se Office makes the case available to a pool of attorneys who then choose to accept or refuse the particular case. We decline, however, to initiate this process, primarily because plaintiff is already receiving highly competent advice.

The factors to consider are well-settled in this Circuit: The district judge should first determine whether the applicant's position seems meritorious. If the applicant meets this threshold requirement, the court should then contemplate the applicant's **[*25]** "ability to obtain representation independently and his ability to handle the case without assistance in light of the required factual investigation, the complexity of the legal issues, and the need for expertly conducted cross-examination…." *Cooper v. A. Sargenti Co., Inc. (2d Cir. 1989) 877 F.2d 170, 172* (*citing Hodge v. Police Officers (2d Cir. 1986) 802 F.2d 58, 61-62*). The Court of Appeals has admonished the district courts to avoid "indiscriminate assignment." *Id.*

In considering the merits, we should not appoint a lawyer in every case which survives a motion to dismiss, especially when, as here, the EEOC has rejected the plaintiff's contentions. *Id.* Yet even if we assume the soundness of plaintiff's constitutional grievances, he fails to satisfy the secondary criteria for appointment of counsel. His memorandum of law rivals in quality the work of many major Manhattan law firms. Whether the product of advice and materials furnished to him by sympathetic attorneys (*see* Pl. Mem. at 3 n.1) or of plaintiff's own latent juristic aptitude, his memo demonstrates beyond peradventure that he can capably rely on his own resources. As Judge **[*26]** Sweet has noted, "If [plaintiff] is thus a victim of his own talent and effort, then that is an unfortunate result of the utilitarian calculus required by the fact that 'volunteer lawyer time is a precious commodity.'" *Nielsen v. Bellevue Hosp. Ctr. 1996*

U.S. Dist. LEXIS 8930, *14, No. 94 Civ. 774, 1996 WL 352882, *5(S.D.N.Y. June 26, 1996) (*quoting Cooper, 877 F.2d at 172*).

Although we deny his instant petition, we grant plaintiff leave to renew his application should this case enter a posture where expertly conducted cross-examination or expertly conducted factual investigation becomes necessary. Then, we would reconsider all appropriate criteria.

CONCLUSION

We GRANT defendants' motion in part insofar as we:

(1) DISMISS WITH PREJUDICE counts # 1 (employment discrimination) and # 2 (retaliatory discharge) as against the individual defendants Lynch, Wilson, Gould, Murphy, and Curtis;

(2) DISMISS WITHOUT PREJUDICE count # 2 (retaliatory discharge) as against the College, with leave to amend the complaint to specify facts upon which relief may be granted;

(3) DISMISS WITHOUT PREJUDICE count # 5 (tortious interference with prospective economic advantage), with leave **[*27]** to file suit in the Court of Claims of New York;

We DENY the motion to dismiss counts # 3 (due process, as against the individual defendants) and # 1 (employment discrimination, as against the College). Finally, we DENY plaintiff permission to request appointed counsel, but we grant him leave to re-apply as qualified above.

SO ORDERED.

May 18, 2000

New York, New York

WHITMAN KNAPP, SENIOR U.S.D.J.