

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
Case No: 99-CV-75997**

BRIEF OF DEFENDANTS-APPELLEES

August 2, 2001

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STATEMENT REGARDING ORAL ARGUMENT

Defendants believe that the briefs submitted by the parties and the district court record adequately present the facts and legal arguments relevant to this appeal. However, in the event that Plaintiff's request for oral argument is granted, Defendants respectfully request a similar opportunity for oral argument to allow Defendants to respond to any facts alleged or legal arguments raised by Plaintiff in the hearing before the Court.

JURISDICTIONAL STATEMENT

Plaintiff's initial Complaint, dated December 15, 1999, asserts a violation of his alleged Fourteenth Amendment "constitutionally protected property right" to report and have recorded an "F" grade on a student's transcript. (R. 1 Complaint, pp. 7-9). Subsequent amended complaints filed by Plaintiff assert a "deprivation of Plaintiff's 'freedom of speech' right to report and have recorded a 'F' grade". (R. 32, Second Amended Complaint, pp. 5, 7-8; also, see R. 62, proposed third amended complaint, paragraph 48).

The District Court had jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. §§1331 and 1343. While Defendants argued before the District Court that it should not exercise supplemental jurisdiction over Plaintiff's state law claims in the event of dismissal of Plaintiff's federal claim, to the extent that the District Court may have determined to continue jurisdiction over the state law claims, its jurisdiction to do so is premised upon 28 U.S.C. §1367.

Defendants moved for dismissal and/or summary judgment of Plaintiff's claims on October 10, 2000.

On May 7, 2001, judgment in favor of Defendants, disposing of all of Plaintiff's claims, was entered by the Court. (R. 91, Judgment in Favor of

Defendants). This Court, therefore, has jurisdiction over Plaintiff's appeal pursuant to 28 U.S.C. §1291.

Plaintiff filed his Notice of Appeal with the District Court clerk on May 14, 2001. Plaintiff does not appeal the District Court's dismissal of his defamation claims against Defendants Kotowicz, Stoffers and Sharphorn. Rather, his appeal is limited to the dismissal of his federal First Amendment and emotional distress claims. (See Brief of Appellant).

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER PLAINTIFF FACULTY MEMBER HAS A CONSTITUTIONALLY PROTECTED FIRST AMENDMENT INTEREST IN THE GRADE RECEIVED BY A STUDENT.
- II. WHETHER DISMISSAL OF PLAINTIFF'S EMOTIONAL DISTRESS CLAIM WAS IN ERROR.

COUNTER-STATEMENT OF THE CASE

Plaintiff filed his Complaint in the U.S. District Court for the Eastern District of Michigan on December 15, 1999, naming the Regents of the University of Michigan and twelve individuals¹ as defendants. (R. 1 Complaint). On December 21, 1999, Plaintiff filed his First Amended Complaint, naming the Regents of the University of Michigan and same twelve individuals as defendants. (R. 2, First Amended Complaint, caption).

On April 10, 2000, pursuant to the court's order granting him leave, Plaintiff filed his Second Amended Complaint, in which he added University of Michigan Assistant General Counsel Daniel H. Sharphorn as a defendant. Plaintiff's Second Amended Complaint alleges claims of deprivation of "Plaintiff's `freedom of speech' right to report and have recorded a `F' grade" and emotional distress. He also asserts claims of defamation against defendants Kotowicz, Stoffers and Sharphorn. (R. 32, Second Amended Complaint, pp. 5, 7-8).

¹ University of Michigan regents David Brandon, Laurence Deitch, Daniel Horning, Olivia Maynard, Rebecca McGowan, Andrea Fischer Newman, S. Martin Taylor, and Katherine White were named as well as University of Michigan School of Dentistry Dean William Kotowicz, Associate Dean Robert Fiegal, and Professors Merlel Jaarda and Kenneth Stoffers. All were initially named in "their individual and official capacities, jointly and severally." (R. 1, Complaint, caption).

On September 26, 2000, Plaintiff moved for leave to file a third amended complaint, in which he sought to add as Defendants University President Lee Bollinger, Drs Brian Clarkson and Christian Stohler and to add as involuntary plaintiffs three other faculty members of the University of Michigan School of Dentistry. (R. 62, Motion for Leave to Amend Complaint).²

On October 10, 2000, Defendants moved for dismissal and/or summary judgment of Plaintiff's claims. (R. 67, Motion for Dismissal and/or Summary Judgment and Brief in Support).

On November 8, 2000, the Court³ heard argument on Plaintiff's motion to amend complaint and Defendants' motion for dismissal and/or summary judgment. The court granted Plaintiff's motion in part, permitting him to amend his complaint to add Drs. Brian Clarkson and Christian Stohler as defendants in accordance with the draft third amended complaint attached to his motion. (R. 62, draft third amended complaint attached to Motion for Leave to Amend Complaint). Plaintiff's motion was denied as to University President Lee

² Plaintiff's Third Amended Complaint also omitted the Board of Regents of the University of Michigan as a defendant and dismissed all named defendants in their official capacities. (R. 62, draft Third Amended Complaint; R. 82, Third Amended Complaint).

³ Magistrate Judge Virginia Morgan

Bollinger and the three individuals Plaintiff sought to add as involuntary plaintiffs. (R. 79, Order Granting in Part Plaintiffs Motion to Amend).

Defendants' Motion for Dismissal and/or Summary Judgment was taken under advisement by the court following the November 8, 2000 hearing, with supplemental briefs permitted of the parties. (R. 78 Order).

On December 6, 2000, Plaintiff filed his purported Third Amended Complaint. (R. 80, Stricken Third Amended Complaint). This document was "materially different from the proposed third amended complaint attached to his motion to amend" and, thus, was stricken from the record by court order dated December 15, 2000. (R. 81, Order). Plaintiff filed another Third Amended Complaint on December 21, 2000. (R. 82, Third Amended Complaint).

On December 28, 2000, the magistrate judge issued a Report and Recommendation, recommending that Defendants' Motion For Dismissal and/or Summary Judgment be granted, the complaint dismissed, and judgment entered in Defendants' favor. (R. 84, Report and Recommendation). Plaintiff filed objections to the Magistrate's Report and Recommendation on January 8, 2001, (R. 87, Objections to Magistrate Judge's Proposed Findings of Fact and Recommendation in Dispositive Pretrial Matter), and subsequently filed a

Request for a De Novo Redetermination of Magistrate Judge's Proposed Findings of Fact and Recommendation in Dispositive Pretrial Matter. (R. 89).

On May 7, 2001, the District Judge entered an Order dismissing Plaintiff's federal claim, state law defamation claim against Defendants Kotowicz and Sharphorn, and emotional distress claim with prejudice, and dismissing the state law defamation claim against Defendant Stoffers without prejudice. (R. 90, Order Accepting in Part and Rejecting in Part the Magistrate's Report and Recommendation). On the same date, judgment in favor of Defendants was entered by the court. (R. 91, Judgment).

STATEMENT OF FACTS

Defendants do not concede that the factual allegations Plaintiff makes in support of his claim of violation of his First Amendment academic freedom, as represented in his pleadings and briefs in the District Court or his brief on appeal, are accurate. Nor do Defendants concede that Plaintiff has accurately or thoroughly portrayed the sequence of events that occurred regarding the issuance of the grades in question. For purposes of this Court's review of the District Court's order of dismissal, however, it is unnecessary to address the veracity of the many factual allegations Plaintiff makes.

The following alleged facts relevant to his appeal are asserted by Plaintiff: Plaintiff was among a group of four faculty members asked to grade the practical examinations of certain students. (R. 32, Second Amended Complaint, p. 4; R. 62 Third Amended Complaint, p. 7). Plaintiff and the other faculty members collectively submitted their assigned grade to Associate Dean Robert Feigal. (R. 32, Second Amended Complaint, p. 5; R. 62, Third Amended Complaint, p. 9). Subsequently, an administrative decision was made not to record the grades submitted by Plaintiff and the other faculty members. (R. 32, Second Amended Complaint, p. 5; R. 62, Third Amended Complaint, p. 9). Finally, at no time

was Plaintiff asked to change the grade he submitted with the other faculty members. (R. 54, Deposition of L. Keith Yohn, p. 41).

SUMMARY OF ARGUMENT

The District Court after careful review properly dismissed this case in its entirety. As the District Court held, the law in the 6th Circuit makes clear that an educator's First Amendment right to academic freedom is violated only *when the educator himself or herself is compelled to change a student's grade.* (*R. 90*, Order, p. 8, emphasis in the original). This is so because a professor has no constitutional interest in the grade ultimately received by a student. *Id.* Therefore, Plaintiff has not stated a claim of violation of his First Amendment academic freedom. Plaintiff's First Amendment claim against the defendants in this matter was properly dismissed.

Further, there is no error in the District Court's determination that Plaintiff has presented no evidence to support his emotional distress claim. The District Court did not rely on a “document stricken from the record” as Plaintiff alleges. Plaintiff provides no competent evidence in support of this claim. Further, Defendants are entitled to qualified immunity from Plaintiff's emotional distress claim.

ARGUMENT

I. Statement of Standard of Review.

This Court's review of the District Court's grant of summary judgment is *de novo*, applying the same standards as those employed by the District Court. *Betkerur v. Aultman Hosp. Assn.*, 78 F.3d 1079, 1087-88 (6th Cir. 1996). The pertinent Federal Rule holds that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *Betkerur* at 1087. Plaintiff must "do more than simply show that there is some metaphysical doubt as to the material facts" to avoid summary judgment. *Betkerur*, at 1087-88. Further,

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Landefeld v. Marion General Hosp., 994 F.2d 1178, 1181 (6th Cir. 1993).

II. Plaintiff Does Not Have A Constitutionally Protected Interest In The Grade Received By A Student.

This Court has acknowledged that a university professor's communicative act in assigning a grade is entitled to some measure of First Amendment

academic freedom protection. Parate v: Isibor, 868 F.2d 821, 827 (6th Cir 1989). However, it has also concluded that, as a matter of law, a professor has no constitutional interest in the grade ultimately received by a student. *Id* at 829. Therefore, although efforts by university administrators to compel a professor to change a grade would be violative of the professor's constitutional academic freedom interests, an administrative change to a student's grade after submission by the faculty member does not violate or abridge any constitutional interest of the professor. *Id* at 828-30. Accord, Hillis v. Stephen F. Austin State University, 665 F.2d 547 (5th Cir. 1982), cert. denied, 457 U.S. 1106 (1982) (professor's claim of violation of his first amendment academic freedom rights without merit where student's grade changed by administration and professor not compelled to do so. at 549). See also, Keen v. Penson, 970 F.2d 252, 257 (7th Cir. 1992) (noting with approval lower court holding that the giving of a grade is not protected by the principle of academic freedom).

There is no factual dispute between the parties that Plaintiff, along with three other faculty members, graded a practical examination for certain students at the University of Michigan School of Dentistry. There is also no dispute that the grades determined by this group of faculty were submitted to the School's administration and a subsequent decision was made not to record those grades.

Most importantly, there is no factual dispute that Plaintiff was never asked by School of Dentistry administrators to change the grade he submitted for the students in question. (R. 54, Deposition of L. Keith Yohn, p. 41). In fact, Plaintiff has never suggested or alleged - in his pleadings, briefs, or otherwise - that anyone among the current Defendants or anyone else acting on behalf of the University of Michigan ever requested, insisted or compelled him to change his evaluation of the students' work or the grades he submitted. Therefore, Plaintiff has failed to state a claim of violation of his First Amendment academic freedom rights. See, Jones v. Indian River School District, 1994 WL 45428 (Del. Superior Ct) (distinguishes Parate, where professor was compelled to change grade, from case at bar where it was undisputed that defendant never told the plaintiff to change any student's grade from what she had already given and concludes that teacher's constitutional right to academic freedom is not implicated in latter circumstance).

Plaintiff attempts to avoid the effect of Parate as authoritative in this case by arguing on appeal that the facts in Parate are "not analogous to the facts in Plaintiff's case". (Brief of Appellant, page 23). Rather than supporting Plaintiff's conclusion of "gross dissimilarities" between the facts in Parate and this case (Brief of Appellant, p. 25), Plaintiff's comparison of the facts of the two

cases underscores that the facts in this matter, present exactly the situation which Parate concludes would not violate a professor's constitutional interests.

Similarly, the legal authority cited by Plaintiff in his Brief on Appeal is presented entirely out of context and/or is wholly irrelevant⁴. Most importantly, it does not in the least undermine the legal conclusion that Plaintiff has no constitutional interest in the grade ultimately received by a student. For example, Board of Curators v. Horowitz, 435 U.S. 78, 98 S.Ct. 948 (1978) does not even address the issue of an educational institution's ability to change the grade submitted by a professor. Rather, the Horowitz Court was faced with a legal challenge by a student dismissed from a university for academic reasons. In that context, the Court noted the need for the *judiciary* to practice restraint and respect the academic evaluation of a professor and/or institution. Id at 90 (Court

⁴ Without burdening the Court with corrected quotations, Defendants also note that various passages from the cases Plaintiff cites to are inaccurate quotes.

declines to "further enlarge the judicial presence in the academic community").⁵

Plaintiff's reliance on Simmons v. Budd, 165 Conn. 507, 338 A.2d 479 (1973) is similarly misplaced. In Simmons, the plaintiff sought through a mandamus action to have the grades he submitted recorded on his students' transcripts. Without any discussion of or findings as to whether a professor could *ever* be found to have a constitutional interest in the grade ultimately received by a student, the Simmons court concluded that there was no merit to the argument that the university's administrative change of grades submitted by the plaintiff professor where he did not follow the new grading regulation adopted by the university abridged his equal protection or due process interests. 338 A.2d at 483. In fact, Simmons notes that corrective action regarding the administrative change of a student's grade, if warranted, is within the province of

⁵ Horowitz, as well as Greenhill v. Bailey, 519 F. 2d 5 (8th Cir. 1975), and Hines v. Rinker, 667 F.2d 699 (8th Cir. 1981) are Fourteenth Amendment due process cases arising from the dismissal of a student from an academic program for performance reasons. Wieman v. Updegraff, 344 U.S. 183 (1952) and Speiser v. Randall, 357 U.S. 513 (1958) involve the constitutionality of loyalty oaths required of teachers (for continued employment) and taxpayers (to qualify for tax exemption benefits), respectively. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) addresses whether a content-based speech restriction contained in the federal Telecommunications Act is sufficiently narrowly tailored, and Spence v. Washington, 418 U.S. 405 (1974) involved a statute which prohibited the display of a flag with any further adornments on it. Neither case mentions grades or teachers, although Plaintiff cites them in a manner which suggests that they do. (Brief of Appellant, pp. 11-12).

the university's board, state governor or legislature, and that judicial intervention in such policy decisions is not appropriate. Id. at 483. Simmons is, therefore, consistent with the conclusion that a professor has no cognizable constitutional interest in the administrative change of a student's grade. Moreover, even if it were factually analogous to this case; Simmons is a Connecticut state court decision and, therefore, does not have the same precedential effect as Parate.

Plaintiff asserts several alleged facts in his appellate brief as well as his pleadings submitted in the District Court which go to the circumstances leading up to the examination that Plaintiff graded, communications among School of Dentistry faculty after the date on which Plaintiff and the other three faculty members submitted their assigned grade to School of Dentistry administrators, and Plaintiff's interpretation of why the grade he submitted was not recorded by the School of Dentistry. These alleged facts do not, however, establish a constitutionally protected First Amendment interest which has been violated in any way by the administrative decision of certain Defendants not to record the grades submitted by Plaintiff. Plaintiff offers no authority to support a different conclusion.

The District Court's dismissal of Plaintiff's First Amendment claim was correct as a matter of law because Plaintiff has failed to state a cognizable

constitutional interest which was violated by Defendants. The District Court's ruling should be affirmed.

III. Plaintiff's Emotional Distress Claim Was Properly Dismissed.

The District Court held that there was no evidence to support a claim that Defendants intentionally inflicted emotional distress upon the Plaintiff, noting that Plaintiff did not attach any exhibits to his response to Defendants' Motion. (R. 90, Order, p. 14).

Plaintiff argues that the District Court ruling was in error because the Court "used a document stricken from the record" to find insufficient evidence to support Plaintiff's claim. (Brief of Appellant, p. 28).

At the November 8, 2000 hearing in this matter, the magistrate judge granted in part Plaintiff's motion to file a third amended complaint. (R. 79, Order Granting In Part Plaintiff's Motion to Amend). The court permitted Plaintiff to file "the Third Amended Complaint attached to his motion to amend, with the exception that the allegations against Mr. Bollinger shall be stricken therefrom." (R. 79, Order, p. 4). On December 6, 2000, Plaintiff filed his purported third amended complaint (R. 80, stricken third amended complaint), which the court subsequently ordered stricken from the record because it was "materially different from the proposed third amended complaint attached to his

motion to amend." (R. 81, Order)., Thereafter, on December 21, 2000, Plaintiff filed a Third Amended Complaint which, although not identical to that attached to his motion, was entered into the docket. (R. 82). A review of the references to the Third Amended Complaint in the Magistrate's Report and Recommendation reveals that the Magistrate was actually citing to the version of the third amended complaint attached to Plaintiff's motion, which was approved for filing by Plaintiff, not the stricken version of the third amended complaint. Thus, the Court did not, in fact, rely on a stricken document in ordering the dismissal of Plaintiff's intentional infliction of emotional distress claim.

The only "evidence" that Plaintiff submits in support of this claim is his prepared statement made at his deposition, which he scheduled and noticed. (R. 54, Deposition of Keith Yohn). At his deposition, Plaintiff provided the court reporter with prepared questions which he required her to read to him as though she were conducting the examination. (R. 54, Deposition of Keith Yohn, pp. 5-8). Plaintiff had in his possession prepared answers to the questions, although he alleges that he gave his deposition "almost completely 98 percent without even reading the document". (R. 54, Deposition of L. Keith Yohn, p. 5-6, 39-40). Clearly, Plaintiff's prepared and self-serving statement is not competent factual evidence to support a claim for emotional distress. The District Court was

correct in its conclusion that there is no evidence to support Plaintiff's emotional distress claim. Moreover, Plaintiff did not reference his deposition testimony in response to Defendants' Motion for Dismissal and/or Summary Judgment.

Although assigning a separate heading for emotional distress in his pleadings, Plaintiff pleads emotional distress merely as an element of damages, not a separate tort.⁶ Indeed, the cases he cites on appeal are cases which consider emotional distress as a damages element only. See, Holmes v. Donovan, 984 F.2d 732, 739 (6th Cir. 1993) (Court determines "no need" to consider plaintiff's damages for emotional distress where his claims are barred); Chatman v. Slagle, 107 F.3d 380 (6th Cir. 1997) (jury award for emotional distress damages not disturbed by appellate court where plaintiff received judgment against defendant on §1983 illegal search and seizure case). As determined by the District Court and discussed above, no constitutional violation has occurred against Plaintiff. As Plaintiff's constitutional claim has been dismissed, there is no basis on which he may recover emotional distress damages.

Finally, even if Plaintiff did establish facts sufficient to avoid dismissal of

⁶ While the District Court treated Plaintiff's request for emotional distress damages as a claim for a separate tort of intentional infliction of emotional distress, Plaintiff has never pled the elements of the tort, nor provided argument in support of such a claim.

his emotional distress claim, Defendants are entitled to qualified immunity from that claim, as briefed in Defendants' Brief in Support of Motion for Dismissal and/or Summary Judgment. (R. 67, Brief in Support of Motion for Dismissal and/or Summary Judgment, pp 11- 13). Qualified immunity protects governmental officials from a civil suit for money damages unless their alleged conduct violates a clearly established constitutional right of which a reasonable person should have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Christophel v. Kukulinsky, 61 F.3d 479, 484 (6th Cir. 1995). Qualified immunity is available to claims against state officials in their individual as well as official capacities. Vance v. Board of Supervisors of Southern University, 1996 WL 580905 (E.D. La.). The threshold inquiry in a qualified immunity analysis is whether a constitutional violation occurred at all. Purisch v. Tennessee Tech. Univ., 76 F.3d 1414, 1423 (6th Cir. 1996); Centanni v. Eight Unknown Officers, 15 F.3d 587, 589 (6th Cir.), cert. denied, 512 U.S. 1236 (1994). Only if the court can find a constitutional violation does it examine whether it involved a "clearly established constitutional right of which a reasonable person would have known." Christophel, 61 F. 3d at 484-85.

No constitutional violation has occurred in this case which would permit Plaintiff to avoid the immunity to which Defendants are entitled. Indeed, as

already discussed, no cognizable constitutional right is implicated at all by Plaintiff's allegations.

Defendants are immune from Plaintiff's

emotional

distress

claim. 21

CONCLUSION

Defendants ask this Court to AFFIRM the District Court's May 7, 2001
Order and Judgment granting Defendants' Motion for Dismissal and award
Defendants their costs.

Respectfully submitted,

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APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

Defendants -Appellees, pursuant to Sixth Circuit Rules 28(d) and 30(b) hereby designate the following filings in the district court's record as items to be included in the joint appendix:

Description of Entry:	Date Filed District Court:	Record Entry Number:
Second Amended Complaint	4/10/00	32
Deposition of Keith Yohn <u>Pages 5-8, 39-41</u>	8/28/00	54
Plaintiff's Motion for Leave To Amend Complaint with memorandum, exhibits, attachment	9/26/00	62
Defendants' Motion for Dismissal and/or Summary Judgment with Brief in Support and exhibits to Brief	10/10/00	67
Order by Magistrate Judge V. Morgan Granting in part Plaintiffs Motion to Amend Complaint	11/27/00	79
Order Striking amended Complaint	12/15/00	81
Third Amended Complaint	12/21/00	82
Report and Recommendation	12/28/00	84

Plaintiffs Objections to Magistrate Judge's Proposed Findings of Fact and Recommendation	1/08/01	87
Order Accepting in Part and Rejecting in Part the Magistrate's Report & Recommendation	5/07/01	90
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