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

CHRISTIAN M. DEJOHN	:	CIVIL ACTION
v.	:	
TEMPLE UNIVERSITY, et al.	:	NO. 06-778

ORDER

AND NOW, this 21st day of March, 2007, upon consideration of plaintiff's motion for partial summary judgment (docket entry # 37), defendants' response (docket entry # 50), defendants' motion for summary judgment (docket entry # 44), and plaintiffs' response (docket entry # 47) and the Court finding that:

(a) Plaintiff's motion seeks summary judgment only on counts 7 & 8 and defendants' seeks summary judgment on all four remaining counts;

(b) We first address the cross-motions for summary judgment on counts 7 & 8;

(c) On November 15, 2006, we denied plaintiff's motion for judgment on the pleadings on these counts, finding that, if Temple could show a "particularized reason as to why it anticipate[d] substantial disruption from the broad swath of student speech prohibited under the Policy," the otherwise unconstitutional language of the policy might be justified, Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001);

(d) On January 15, 2007, Temple amended the policy at issue, adding a requirement that, in order to constitute sexual harassment, the harassing behavior must be "sufficiently severe,

pervasive, and objectively offensive as to substantially disrupt or undermine a person's ability to participate in or to receive the benefits, services, or opportunities of the University," Pl. Mot., ex. B, at 8;

(e) Although this likely resolves the problem with the policy going forward,[1] as we found in our Order of February 1, 2007, DeJohn is still entitled to seek redress for any violation of his rights that the former policy caused while it was in place;

(f) It is hornbook First Amendment law that regulations that limit the time, place, or manner of speech must be narrowly tailored to advance a significant state interest, see, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989);

(g) It is obvious that the new Temple sexual harassment policy, which is identical to the previous policy save for the restriction quoted above, is narrower than the earlier policy;

(h) Thus, in order for the previous policy to be constitutional, there must be some substantial interest of the state that the previous policy advances that the new policy does not equally advance;

(i) In the school context, our Supreme Court has found that the state has a substantial interest in preventing actions that "'materially and substantially disrupt the work and discipline of the school'" or "substantially interfere with the

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[1] Plaintiff does not appear to challenge the new policy. See Pl. Mot. at 16 ("Temple's former speech codes were not justified by a concrete threat of substantial disruption....") (emphasis added).

opportunity of other students to obtain an education," Healy v. James, 408 U.S. 169, 189 (1972) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969));

(j) By its terms, the new policy still prohibits any harassing conduct that "substantially disrupt or undermine a person's ability to participate in or to receive the benefits, services, or opportunities of the University," Pl. Mot., ex. B, at 8, addressing the second of Healy's concerns;

(k) Thus, for the previous policy to be permissible, Temple must demonstrate "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," Tinker, 393 U.S. at 514;

(l) If Temple can show such a reasonable forecast, it may enact restrictions on speech in the Temple community so long as those restrictions are no broader than necessary to address the likely disruption;

(m) In an attempt to meet its burden, Temple discusses a number of incidents of sexual harassment that occurred before the adoption of the policy DeJohn challenges, Def. Mot. at 31-32;

(n) All of these incidents, however, are sufficiently severe or pervasive that they would have been prohibited not only by the challenged policy but also by the new, narrower policy;

(o) Indeed, some of the incidents would potentially subject the harassers to criminal sanctions;

(p) Even if the new policy would not cover some small number of previous complaints, those that remain are insufficient to allow school officials reasonably to forecast the kind of significant disruption Tinker requires;[2]

(q) Temple has identified no incident, real or imagined, that would cross the threshold Tinker set, but would only be prohibited by the broader policy that existed before January 15 of this year;

(r) This failure is fatal to Temple's claim that the challenged policy was allowable under Tinker and Saxe;

(s) We find that the sexual harassment policy that was in effect at Temple from September 14, 1999[3] until January 15, 2007 was facially unconstitutional;[4]

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[2] Plaintiffs also cite to Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243 (3d Cir. 2003), where our Court of Appeals found that a speech regulation was warranted. The situation in Sypniewski, however, was so much more severe, protracted, and volatile than the incidents Temple cites that the comparison is inapt.

[3] Although the policy went into effect on September 10, 1992, Pl. Mot., ex. B, at 7, it was modified on February 22, 1994 and September 19, 1999, id. at 6. Since we do not know the substance of those modifications, we cannot address the constitutionality of the policy that existed before September 19, 1999.

[4] Because we find that the policy is facially unconstitutional even without the challenged language on the Tuttleman Counseling Service Web site, we need not reach the question of whether that Web site language represented official school policy. The likelihood that students like DeJohn would interpret it as official policy and that this interpretation would chill their expression is, of course, relevant to the jury's consideration of DeJohn's damages.

(t) We will, therefore, grant plaintiff's motion as to counts 7 & 8;[5]

(u) Defendants also seek summary judgment on count 1, DeJohn's claim that the University and three named individuals discriminated against him in retaliation for his exercise of his free speech rights;

(v) It is indisputable that, between November, 2001 and August, 2003, something happened that significantly altered Prof. Gregory Urwin's appraisal of Christian DeJohn, compare Def. Mot, app. B, ex. 3 with Pl. Mot., ex. C, at 36-37;

(w) A similar shift seems to have occurred with Prof. Richard Immerman, see Pl. Mot., ex. C, at 40;

(x) Whether these shifts were caused by DeJohn's protected speech in the classroom[6] or some other occurrence is not something we can determine conclusively from this record;

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[5] Because the question of what, if any, harm DeJohn suffered as a result of the unconstitutional policy is a question of fact about which there are serious disputes, it must be held over for trial.

[6] Defendants assert, without any significant jurisprudential support, that "ordinary discussions and discourse between a college student and a professor" are not constitutionally protected speech. Def. Mot. at 14. Defendants are apparently attempting to import the matters of public concern analysis from Connick v. Myers, 461 U.S. 138 (1983), into this situation. Christian DeJohn is, of course, not a state employee and the cited cases have no relevance at all to his speech. Like any other student, DeJohn's statements made during class or to his professors after class -- like all speech by private citizens that does not fall into one of the limited exceptions to the First Amendment's protections -- is protected.

(y) A jury could plausibly determine that Urwin's refusal to sign off on DeJohn's thesis and Immerman's refusal to intervene on DeJohn's behalf were retaliatory acts;

(z) With regard to Urwin and Immerman, therefore, summary judgment is inappropriate;

(aa) There is nothing on this record that in any way implies that David Adamany was involved with DeJohn or was even aware of any of the protected speech that DeJohn claims spurred Urwin and Immerman to retaliate against him;

(bb) For this reason, we will grant the motion of defendant Adamany as to count 1;

(cc) Defendants also seek summary judgment on count 2, plaintiff's "class of one" equal protection claim;

(dd) In order to make out such a claim, DeJohn must show that defendants "intentionally treated [him] differently from others similarly situated and that there is no rational basis for the difference in treatment," Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000);

(ee) In Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006), our Court of Appeals affirmed dismissal on the grounds that plaintiff "does not allege the existence of similarly situated individuals";

(ff) Here, although DeJohn alleges that Immerman and Urwin interfered with his graduation out of spite and without rational basis, he does not point to any other students who were treated differently;

(gg) Indeed, his only specific allegations of differential (as opposed to merely objectionable) treatment are Prof. Jay Lockenour's testimony that he had never seem Prof. Urwin refer to another student as having Alzheimer's, Lockenour Dep. at 68:21-23, and Immerman's statement that he could not recall referring to other students as "gnats" or expressing the hope that they would "self-destruct," Immerman Dep. at 52:14-20;

(hh) These statements are simply not sufficient to establish differential treatment at the hands of defendants, especially when we consider that both statements were made in communications among the professors, not to DeJohn himself or in any public setting;

(ii) Because DeJohn has not put forth any evidence of differential treatment of the sort that would support such a claim, we will grant defendants' motion as to count 2;

It is hereby ORDERED that:

1. Plaintiff's motion for partial summary judgment is GRANTED;

2. Temple University is ENJOINED from reimplementing or enforcing the sexual harassment policy that existed before the changes it implemented on January 15, 2007;

3. Defendants' motion for summary judgment is GRANTED IN PART as follows in the next two paragraphs;

4. Count 1 of plaintiff's complaint is DISMISSED as to defendant David Adamany;

5. Count 2 of plaintiff's complaint is DISMISSED;

6. By April 16, 2007, the parties shall FILE their joint submission, including any motions in limine, conformably with the Court's standing order, attached[7]; and

7. Trial on the remaining counts will BEGIN April 25, 2007 at 9:30 a.m. in Courtroom 10-B.

BY THE COURT:

Stewart Dalzell, J.

[7] We stress to the remaining parties that we expect the Agreed Facts to be as comprehensive as they can, in good faith, make. If the parties file motions in limine, responses are due in chambers forty-eight hours later.