UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4619

MATTHEW THOMAS CLARKE,

Plaintiff-Appellee,

versus

UNIVERSITY OF NORTH TEXAS, ET AL.,

Defendants,

ALFRED F.. HURLEY, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
CA 4 89 150

(May 28, 1993

Before POLITZ, Chief Judge, GOLDBERG and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Appellee Clarke is now imprisoned for two sexual assaults he committed against students while he was a doctoral candidate at the University of North Texas (UNT). He filed suit against UNT, its daily newspaper, and various university officials for alleged violations of federal and state law committed during the investigation of his crime. He was particularly upset because the university has so far denied him the opportunity to defend his

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

doctoral dissertation, the only task standing between him and a chemistry Ph.D.

A magistrate judge, on considering the appellants' motion for summary judgment on qualified immunity, recommended dismissal of all of Clarke's claims save that of a procedural due process violation. She recommended denying summary judgment on immunity as to this claim.[1] The district court adopted her recommendations. On appeal of the qualified immunity ruling, we reverse.

I. BACKGROUND

Matthew Clarke was a Ph.D. student at the UNT chemistry department in the spring semester of 1987.[2] At that time, Clarke had fulfilled all the prerequisites for a doctorate of chemistry and was awaiting his dissertation defense. On May 27, Clarke was arrested for burglary and was linked to several aggravated sexual assaults. This information was conveyed to the Dean of Students who immediately "blocked" Clarke from enrolling in the first summer semester and barred him from the campus. Clarke found out about these restrictions upon his attempt to re-enroll. The effect of the block was to prevent Clarke from defending his doctoral dissertation. A flurry of meetings and telephone calls between Clarke and university officials ensued, including a meeting on June 10, a telephone call on June 19 and another meeting on the 22nd of

---

[1] She also recommended dismissing UNT and the student daily newspaper, and these defendants are no longer in the lawsuit.

[2] On an appeal from an order denying a motion for summary judgment based on qualified immunity we review the evidence in the light that is most favorable to the non-movant. Pfannstiel v. City of Marion, 918 F.2d 1178, at 1183 (5th Cir. 1990).

June. On June 24, Clarke was informed in writing that he had been charged with conduct that threatened the health and safety of individuals and which adversely affected the academic community, specifically with burglary and other criminal charges brought against him. Clarke was told that he would be provided an opportunity to respond prior to any final disciplinary decision in his case.

Clarke's attorney sought and received a postponement of the disciplinary proceedings until the resolution of criminal charges. At such time, UNT agreed, Clarke would have ten days to request a hearing on charges. Clarke's disciplinary charges remained stayed pending resolution of all his criminal appeals.

During April, 1988 Clarke was convicted in two separate proceedings of aggravated sexual assault. The convictions were added to the charges against him at UNT. At this time he received another notice from UNT reminding him of his status and of the stay of proceedings at UNT. To this date, UNT has not conducted disciplinary proceedings under its agreement with Clarke.

All the appellants are public university officials who are entitled to assert their defense of qualified immunity. Procunier v. Navarette, 434 U.S. 555, 561, 98 S. Ct. 855, 859, 55 L.Ed.2d 24 (1978). The district court's order denying summary judgment on this issue is appealable even though it is interlocutory. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed. 396 (1982). When a defendant raises a qualified immunity defense, "whether the conduct of which the

plaintiff complains violated clearly establish law" is an "essential legal question," Mitchell v. Forsyth, 472 U.S. 511, 528, 105 S. Ct. 2806, 2815, 86 L.Ed.2d 411 (1985), which we review de novo. McDuffie v. Estelle, 935 F.2d 682, 684 (5th Cir. 1991).

Qualified immunity shields government officials performing discretionary functions "from civil damage liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). Whether the defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions in light of clearly established law. Anderson, 483 U.S. at 639, 107 S. Ct. at 3038. When the plaintiff invokes a constitutional right such as that of procedural due process, the appropriate inquiry is whether "the contours of the right [are] sufficiently clear that a reasonable official would understand what he is doing violates that right." Anderson, 483 U.S. at 640, 107 S. Ct. at 3039. If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity. Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990); Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L.Ed.2d 271 (1986). Thus, even if the defendant's conduct actually violates the plaintiff's constitutional rights, the defendant is entitled to qualified immunity as long as the defendant's action was objectively

reasonable. Pfannstiel, 918 F.2d at 1183; Melear v. Spears, 862 F.2d 1177, 1188 (5th Cir. 1989) (Higginbotham, J., concurring).

The Supreme Court recently added a new wrinkle to the qualified immunity analysis by instructing courts that they must first determine if there was a violation of an actual constitutional right. Siegert v. Gilley, ___ U.S. ___, 111 S. Ct. 1789,1793, 114 L.Ed.2d 277 (1991). Only if such a violation occurred does the court then have to decide whether the contours of the right were sufficiently clear that its violation was objectively unreasonable.

Clarke's lawsuit asserts that UNT did not give him appropriate pre-deprivation notice and hearing relating to his being "blocked" from UNT and from his dissertation defense. The magistrate judge, ignoring oral communications between Clarke and university administrators, determined that the period between imposition of the block and Clarke's acquiescence to a stay of proceedings (July 24) constituted a possible deprivation of his procedural due process rights upon which qualified immunity could not rest. Under the circumstances of this case, Clarke's charge of inadequate predeprivation notice is insupportable; his complaint that no predeprivation hearing occurred is so inconsistent with protecting his rights during the criminal proceedings that it can hardly be taken seriously.

After being informed that Clarke might have committed burglary and sexual assaults, UNT officials acted correctly in barring him from campus immediately without formal notice.

Gardenhire v. Chalmers, 326 F. Supp. 1200, 2303 (D. Kan. 1971); Esteban v. Central Missouri State College, 290 F. Supp. 622, (W.D. Miss. 1986); Picozzi v. Sandalow, 623 F. Supp. 1571, 1578 (E.D. Mich. 1986) aff'd, 827 F.2d 770 (6th Cir. 1987), cert. denied, 484 U.S. 1044, 108 S. Ct. 777, 98 L.Ed.2d 864 (1988); Goss v. Lopez, 419 U.S. 565, 582-83, 95 S. Ct. 729, 740, 42 L.Ed.2d 725 (1975). The facts of this case fall squarely within precedents that permit dispensing with pre-suspension hearings[3] where charges of this nature have been made.

Clarke nevertheless contests the timing and adequacy of the formal charges sent him on June 24. He contends that Goss holds that receiving notice after suspension from a secondary school violates due process. Goss, 419 U.S. at 582-83, 95 S. Ct. at 740 (1975). His reliance is misplaced. First, because Goss involved a secondary school suspension, every day the student was absent from school harmed his studies. The same time pressure does not obtain during the pursuit of a doctoral degree. Second, public colleges and universities where one voluntarily enrolls as a student should not be fully analogous to public schools to which attendance is mandatory.[4] It may well be that in the university environment, the nature of academic requirements and the special

---

[3] We assume arguendo, as does the university, that Clarke has a property interest in receiving his graduate diploma sufficient to trigger procedural due process protections. We do not decide the question.

[4] See, e.g., Tilton v. Richardson, 403 U.S. 672, 687, 91 S. Ct. 2091, 2100, 29 L.Ed. 2091 (1971) (plurality opinion of Burger, C.J.); Widmar v. Vincent, 454 U.S. 269, 274, n.14, 102 S. Ct. 269, 276-77, n.14, 70 L.Ed.2d 440 (1981). Yudof, Three Faces of Academic Freedom, 32 Loyola L.R. 831 (1987); Underwood, Public Funds for Private Schools: The Gap Between Higher and Lower Education Widens, 41 Educational L. Reporter 407 (1988).

sense of community support less formal procedures than in pre-college education. We need not explore the extent of the differences in rights that students may enjoy in these environments, however, for we are confident that Goss does not literally govern this case. In circumstances indistinguishable from those before us, a district court held that an even longer delay before the issuance of charges did not violate the college student's due process rights. Picozzi, 623 F. Supp. at 1579-80.

Finally, in light of Clarke's agreement to delay his student disciplinary hearing until the final disposition of his criminal case[5], we find it difficult to understand exactly what more prompt notice of formal charges would have accomplished. In this case, unlike Goss, the timing of the notice and subsequent hearing have become completely de-linked. The timing of the notice is only a precondition to a hearing, which has not occurred because of Clarke's unilateral and self-interested decision.

As for the adequacy of the charges against Clarke, the magistrate judge erroneously found that his first post-deprivation notice was contained in the June 24 letter. It is undisputed, however, that Clarke knew that he was blocked from re-enrollment and had a number of conferences with university officials from the 10th to the 19th concerning his situation. While the conferences may not have been documented in writing, at least one court system holds that there is no requirement for written notice from

[5] A time limit that he has the right to waive. Nash v. Auburn University, 621 F. Supp. 948, 954 (M.D. Ala. 1985), aff'd 812 F.2d 655 (11th Cir. 1987); Yench, 483 F.2d at 823.

suspension at universities. Anderson v. Regents of the University of California, 99 Cal. Rep. 531, 536, 22 Cal. App. 3d 763, 771 (Cal. App. 1972); Pearlman v. Shasta Joint Junior College District Board of Trustees, 88 Cal. Rptr. 563, 568, 9 Cal. App. 3d 873, 880-81 (Cal. App. 1970). In any event, this argument is specious, as Clarke must have had more knowledge of the criminal investigation surrounding him than did the university, and he had no reason to believe that the university was pursuing other charges.

Clarke orally argued that UNT could have followed another procedure and could have permitted him to defend his doctoral dissertation off campus. He confuses right with remedy. His right was to obtain notice and "some kind of hearing" in connection with the charges made against him. Procedural due process rights do not guarantee a particular outcome to a disciplinary proceeding but only assure that it is fairly conducted.

In any event, even if Clarke had a right to an alternative form of hearing, or to clearer and more prompt notice, the officials' actions were not objectively unreasonable. We agree with the court in Picozzi when it stated that:

> In this case, [the defendant's] action was objectively reasonable because it did not violate a clearly established right of which a reasonable person would have known. Neither Goss, Matthews, nor any other federal law clearly requires a hearing prior to the preliminary action [the defendant] took in this case. He faced a situation calling for prompt action in requiring reliance on information supplied by other people, precisely the situation in which Wood called for application of the qualified immunity doctrine. Even if [subsequent actions] violated [the plaintiff's] constitutional

> right, [the defendant] cannot be held liable for damages because the right was not clearly established at the time he took the action.

Picozzi, 623 F. Supp. at 1580.

Accordingly, we REVERSE the judgment of the district court and REMAND for entry of summary judgment based on the qualified immunity of the university official appellants.

REVERSED and REMANDED.