

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

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

MEMORANDUM

Dalzell, J.

September 11, 2006

Before us is defendants' motion to dismiss seven of the eight counts of DeJohn's complaint under Fed. R. Civ. P. 12(b)(6). Finding merit in several of defendants' arguments, we will grant the motion in part.

**A. Factual and Procedural Background**<sup>1</sup>

\_\_\_\_\_ In January, 2002, plaintiff Christian DeJohn enrolled in Temple University's Graduate School to pursue a Master's degree in Military and American History. DeJohn expected that his military experience<sup>2</sup> would be a useful background for the pursuit of the degree. Indeed, before DeJohn enrolled, Prof. Gregory Urwin, of the Temple History Department, praised DeJohn's background and expressed his opinion that DeJohn "ha[d] all the ingredients to make a first-rate professional military

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<sup>1</sup> Although many of the facts in this case appear to be disputed, on defendants' motion we must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994). Thus, we present the relevant facts as DeJohn has put them.

<sup>2</sup> DeJohn is a veteran of the United States Army and is currently a Sergeant in the Pennsylvania Army National Guard.

historian." Compl. Ex. D. at 1. DeJohn based his decision to enroll in Temple's program on his exchange with Urwin and the information about Temple that DeJohn could glean from the University's Web site and publications.

After successfully completing the Fall 2002 semester, his first in the program, DeJohn was ordered to active duty. Before his deployment, DeJohn requested an emergency leave from the program without any penalty or loss of credits.

While he was serving overseas, DeJohn continued to receive e-mails sent to all members of the History Department through its listserv. Among those e-mails were messages critical of the war in Iraq and some announcing sit-ins and other demonstrations against the war. DeJohn responded to the e-mail list, expressing his opinion that such communications were inappropriate when there were several Temple graduate students on active duty. DeJohn asked what the University and the History Department were doing to express support for their students who were fighting overseas. DeJohn received no response, but stopped receiving e-mails from the History Department list, presumably because he had been removed from it.

During his service overseas, DeJohn petitioned the department to allow him to receive credit towards his degree for a correspondence course taken through American Military University, an accredited university that enables students to take courses while on active duty. After several proposals from

DeJohn, Urwin approved a course on the Vietnam War. DeJohn completed this course in December, 2002, with a grade of A-.

After his return from active duty in April, 2003, DeJohn was notified that, because he had not requested a leave of absence, he was no longer a student in good standing. This left him unable to register for fall classes. The Provost of the University eventually informed DeJohn that the notification was the result of a clerical error and DeJohn was reinstated. He was able to register for fall classes and resumed his studies in the fall semester of 2003, the first semester following his return. One of his classes was Urwin's Comparative History of Modern War. During that class, DeJohn politely but firmly disagreed with some of Urwin's characterizations, particularly those regarding President George W. Bush and the war in Iraq.

During the fall semester, DeJohn sought credit for the correspondence course on the Vietnam War he had taken while overseas. Although he had earlier approved of the course, before granting the transfer of credit Urwin required DeJohn to complete additional reading and writing assignments. According to DeJohn, this additional work was tantamount to requiring him to retake the course.

Also during that semester, DeJohn began work on his graduate thesis. Although Urwin was the most likely advisor, he told DeJohn that he was too busy to be his advisor. In January, 2004, DeJohn began writing his thesis under the guidance of Prof.

Jay B. Lockenour.<sup>3</sup> In February of 2005, DeJohn notified Lockenour that his thesis was ready for primary review and expressed his intention to apply to graduate in May, 2005. Lockenour confirmed that DeJohn should apply to graduate, which DeJohn immediately did. The History Department subsequently informed DeJohn that he would be unable to graduate because he had missed a deadline for registering.

DeJohn continued to revise his thesis, and on August 10, 2005 Lockenour informed DeJohn that he would approve the thesis provided that DeJohn made a few changes that Lockenour had suggested. Lockenour instructed DeJohn to submit a copy of the thesis to Urwin, who was his secondary reader.

Urwin was, to say the least, unsatisfied with the quality of DeJohn's work. He described it as "naïve," "juvenile," and "agonizing," decried the "exaggerated melodrama" and "juvenile argumentation," and dismissed DeJohn's work as "a hissy fit in print." Compl. ¶ 54. Before DeJohn saw these comments, he was again called to active duty by the military. He did not see Urwin's comments until his return to the University in October, 2005.

Also in October, 2005, DeJohn received a notification from American Educational Services ("AES"), his loan guarantor, that, because of his graduation in May, 2005, he had now entered

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<sup>3</sup> Although DeJohn refers to Lockenour as an "informal, unofficial advisor," Compl. ¶ 47, the complaint and the attached exhibits do not explain what that means or how it is different from a permanent advisor. Lockenour appears to have remained DeJohn's advisor throughout the events at issue here.

the repayment period on his loans. Since DeJohn had made no payments on the loans, AES informed him that he was in default. On November 12, 2005, AES sent another letter informing DeJohn that he was no longer eligible for a reduced interest rate on his loans.<sup>4</sup>

On or about October 26, 2005, DeJohn wrote a letter to David Adamany, President of Temple University, describing the difficulties he had encountered in his graduate program and with his loans, and accusing the University of violating state and federal law. Adamany referred DeJohn's complaints to Philip Alperson, Acting Dean of the College of Liberal Arts, and Ira Schwartz, Provost of the University. DeJohn sent letters to Alperson and to Adam Michaels, assistant to Adamany, expressing his concerns about how he had been treated. On or about November 18, DeJohn met with Alperson, Immerman, Urwin, and Lockenour to discuss his grievances. After that meeting, Lockenour sent DeJohn a "plan of attack" for completing his thesis and getting it approved. See Compl. Ex. T. This plan involved very significant revision of both the format and content of DeJohn's thesis.

As DeJohn's thesis remains unapproved, he remains a student in the Department.

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<sup>4</sup> The letters from AES both suggested that DeJohn contact it to explore options for repaying his loans. DeJohn's submissions make no mention that he did this or made any attempt to resolve this problem by informing AES that he had not, in fact, graduated.

**B. Legal Analysis**

\_\_\_\_\_ Defendants have filed a motion seeking dismissal of seven of DeJohn's eight claims. We will address each of the challenged causes of action in turn.

\_\_\_\_\_ **1. Count 2: § 1983 Equal Protection**

\_\_\_\_\_ DeJohn's second count alleges that the difficulties he has experienced in completing his graduate program constitute a violation of his Fourteenth Amendment right to equal protection of the law. DeJohn brings suit under 42 U.S.C. § 1983 to vindicate his rights.

Although DeJohn claims that he was deprived of equal protection "because of his veteran status," Pl. Resp. Brief in Opp. to D.'s Mot. to Dismiss ("Pl. Opp.") at 22, he does not claim, nor have we found any case that holds, that veterans are a protected class for purposes of his equal protection argument. Instead, DeJohn seeks relief under the so-called "class of one" theory. In order to state a claim under the "class of one" theory, DeJohn must allege that he "has been intentionally treated 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). Thus, in order to survive a motion to dismiss this claim, DeJohn must allege that (1) the University and the individual defendants treated him differently than other graduate students, (2) they did so intentionally, and (3) there was no rational basis for this

difference. See Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006).

In support of his allegation of differential treatment, DeJohn lists seven specific actions that one or more of the defendants took: (1) dismissal from the University; (2) "denigrating his personal and professional abilities in reviewing his thesis"; (3) requiring him to retake the Vietnam War correspondence course; (4) "refusing to advise him on his thesis"; (5) the lack of a permanent thesis advisor; (6) "delaying his graduation three times, preventing him from obtaining employment as a professional historian;" and (7) "incorrectly notifying [AES] that he had graduated." Compl. ¶ 94.

We note that our Court of Appeals is "particularly vigilant" in its review of dismissals of civil rights claims. Lake v. Arnold, 112 F.3d 682, 684-85 (3d Cir. 1997). Thus, while the equal protection violations are alleged with precious little specificity regarding Hill's requirements,<sup>5</sup> we are unable to say that "it is readily discerned that the facts cannot support entitlement to relief." Id. at 685 (quoting Carter v. City of Philadelphia, 989 F.2d 117, 118 (3d Cir.1993)). It is conceivable that DeJohn could prove that these actions meet the

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<sup>5</sup> Indeed, as regards the delays in his graduation date and the lack of advising on his thesis, DeJohn himself said, in his letter to Acting Dean Alperson, that those actions represented "a dereliction of professional responsibilities to all Temple Graduate students, not just veterans." Compl., Ex. S, at 6.

Hill requirements. Further, since the question of differential treatment necessarily requires a detailed examination of both DeJohn's situation and that of his fellow students, it is poorly suited to resolution on a motion to dismiss.

Thus, Count 2 is at this juncture viable, and defendants' motion will be denied.

## **2. Count 3: Conspiracy to Violate Civil Rights**

DeJohn's third count claims that the University and the three individual defendants conspired to violate DeJohn's civil rights in violation of 42 U.S.C. §§ 1985(3) and 1986. 42 U.S.C. § 1985(3) provides a remedy against those who conspire to deprive another of his or her civil rights.<sup>6</sup> In order to survive this motion to dismiss, DeJohn must allege four elements:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is injured in his person or property or deprived of any right or privilege of a citizen of the United States.

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<sup>6</sup> The statute reads, in relevant part:

If two or more persons ... conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Farber v. City of Paterson, 440 F.3d 131, 134 (3d Cir. 2006) (quoting United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 828-29 (1983)). Because we find that DeJohn has failed to allege a conspiracy as the first element requires, we must dismiss this claim.<sup>7</sup>

DeJohn's complaint provides no specific averments of a conspiracy, alleging only that defendants "have conspired to treat Plaintiff differently than similarly situated graduate students...." Compl. ¶ 99. This is clearly insufficient to support DeJohn's claim. When pleading a civil rights conspiracy, the "'short and plain statement' provision of [Fed. R. Civ. P.] 8 is satisfied only if the defendant is provided with the degree of particularity that animates the fair notice requirement of the Rule." Loftus v. Se. Pa. Transp. Auth., 843 F.Supp. 981, 988 (E.D. Pa. 1994).

DeJohn's task in pleading his conspiracy claim is made considerably more difficult by the intracorporate-conspiracy doctrine. This doctrine holds that the employees of an entity cannot conspire with the entity unless they are acting in a personal capacity in the conspiracy. Robison v. Canterbury Vill., Inc., 848 F.2d 424, 431 (3d Cir. 1988). Employees of the same entity can, however, conspire with each other. Novotny v. Great Am. Fed. Sav. & Loan, 584 F.2d 1235, 1258 (3d Cir. 1978).

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<sup>7</sup> Because an action under 42 U.S.C. § 1986 requires the existence of a conspiracy under § 1985, Koorn v. Lacey Twp., 78 Fed. Appx. 199, 208 (3d Cir. 2003), our finding that no conspiracy existed also disposes of DeJohn's § 1986 claim.

Thus, in this case, since all three individual defendants are employees of the University, in any conspiracy also involving the University the individuals must be acting in a personal capacity.

DeJohn attempts to get around his lack of specific averments and the intracorporate-conspiracy doctrine by elaborating on the allegations in his response brief. There, DeJohn identifies two conspiracies to support his claim. Pl. Opp. 24-25. In the first, DeJohn alleges that, "Immerman, clothed in his official capacity, but acting as an individual, conspired with Defendants Temple University and Adamany to cut off History Department communications with DeJohn and dismiss him from his graduate degree...." Id. at 25. The second alleges that "Urwin conspired with Immerman and Adamany to punish DeJohn", id., by refusing to approve his transfer credits, refusing to advise or approve his thesis, lodging personal attacks in his review of the thesis, and requiring him to rewrite the thesis. None of these allegations, even if we are willing to read them into his complaint, is sufficient to allow DeJohn's conspiracy claim to stand.

In his construction of the first alleged conspiracy, DeJohn engages in a brazen attempt to avoid the intracorporate-conspiracy doctrine by claiming that Immerman was "clothed in his official capacity, but acting as an individual." Id. This strains common sense. Immerman<sup>8</sup> was able to cut off History

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<sup>8</sup> Giving DeJohn the benefit of the doubt because of the procedural posture, we assume for purposes of this motion that  
(continued...)

Department communications and modify DeJohn's enrollment status only because of his official status. Even though DeJohn alleges that Immerman's acts were motivated by personal, rather than professional, animus, that is not sufficient to remove an act done in Immerman's official capacity from the ambit of the intracorporate-conspiracy doctrine.<sup>9</sup> In addition, Adamany's inclusion in the conspiracy requires inference, one might even say speculation, far beyond what the pleadings support. DeJohn has not alleged that, at the time these events occurred, Adamany was even aware of DeJohn's existence, much less an active member of a conspiracy to rob DeJohn of his civil rights. Further, one scarcely assumes that the president of a major research university -- which in 2002 had nearly 34,000 students and more than 1,600 full-time faculty, see Temple University Fall 2002 Student Profile, at <http://www.temple.edu/factbook/profile02/profile.html> -- is personally involved in decisions regarding who receives

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<sup>8</sup> (...continued)

Immerman was, in fact, responsible for removing DeJohn from the e-mail list and modifying his enrollment status although the complaint nowhere alleges Immerman's direct involvement in those activities.

<sup>9</sup> DeJohn in fact admits that Immerman was acting in his official capacity when he allegedly "punish[ed] DeJohn for questioning [his] views," Pl. Opp., at 27, but claims that, because Immerman's e-mails opposing the war were sent in his personal capacity, the intracorporate-conspiracy doctrine does not apply. Immerman's e-mails were not themselves a violation of DeJohn's civil rights. The acts involved in the conspiracy -- removing DeJohn from the e-mail list and altering his matriculation status -- were clearly official acts. That they were preceded by personal acts that allegedly demonstrated antipathy toward DeJohn is not in any way relevant.

departmental communications from the graduate history department or the matriculation status of any particular student. Because Immerman cannot conspire with the University itself, and there are no viable allegations of Adamany's involvement, there can be no conspiracy.

While DeJohn's second alleged conspiracy theory successfully avoids the intracorporate-conspiracy doctrine by alleging that only individuals were involved, it cannot in any way be said to provide defendants "with the degree of particularity that animates the fair notice requirement of [Rule 8]." Loftus, 843 F. Supp. at 988. "While the pleading standard under Rule 8 is a liberal one, mere incantation of the words 'conspiracy' or 'acted in concert' does not talismanically satisfy the Rule's requirements." Id. at 987. In the paragraphs of the complaint dealing with the alleged wrongful acts of this conspiracy, see Compl. ¶¶ 40-44, 54, 64-66, Adamany is mentioned not at all and Immerman is referenced only as having been an attendee at the November 18, 2005 meeting to discuss DeJohn's status. Indeed, the messages that required DeJohn to rewrite his thesis came not from one of the alleged conspirators, but from his advisor, Lockenour. See Compl. Exs. T & U. The supplementary information in DeJohn's Response Brief does nothing to clarify the extreme lack of focus in the complaint as to the nature of the conspiracy.

"To withstand a motion to dismiss, a complaint alleging a civil rights conspiracy should identify with particularity the

conduct violating plaintiffs' rights, the time and place of these actions, and the people responsible therefor." Boddorff v. Publicker Indus., Inc., 488 F.Supp. 1107, 1112 (E.D. Pa. 1980) (citing Hall v. Pa. State Police, 570 F.2d 86 (3d Cir. 1978)).<sup>10</sup> Even incorporating the embellishments in his Response Brief, DeJohn's complaint fails to meet that standard. Because we find that DeJohn has not alleged a conspiracy, we need not reach the other elements of the test in Scott in order to find that his conspiracy claim must be dismissed.

### 3. Count 4: Promissory Estoppel

DeJohn's fourth count claims that he enrolled at Temple in reliance on its promises of, inter alia, "freedom of inquiry and freedom of expression," "educational opportunities ... without regard to [students'] status or station in life," and the ability of students to "tailor their programs to their own

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<sup>10</sup> Our Court of Appeals has not squarely addressed the question of whether Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993), which held that § 1983 claims could not be required to meet a heightened pleading standard, had any effect on the specificity of pleading required for civil rights conspiracies under § 1985(3). The courts that have applied the liberal pleading standard of Rule 8(a) to allegations of conspiracy, however, have continued to consider issues of time and place, names of conspirators, conduct, and object and purpose in assessing the sufficiency of the complaint. See In re Bayside Prison Litig., 190 F. Supp. 2d 755, 765-66 (D.N.J. 2002); Loftus, 843 F. Supp. at 987-88. Because we find that DeJohn's allegations of conspiracy are insufficient to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," Conley v. Gibson, 355 U.S. 41, 47 (1957), we need not hold DeJohn to a heightened pleading standard in order to determine that his complaint is insufficient.

particular interests," Compl. ¶¶ 15-17, and that, having broken those promises, Temple is liable to him, under Pennsylvania state law, on a promissory estoppel theory.<sup>11</sup>

To state a cause of action for promissory estoppel, DeJohn must allege that "1) [Temple] made a promise that [it] should have reasonably expected to induce action or forbearance on the part of [DeJohn]; 2) [DeJohn] actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise." Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000). As a preliminary, therefore, we must identify the promises the University made that we are being asked to enforce.

DeJohn cites to four different documents, each of which, he alleges, contains promises upon which he reasonably relied.<sup>12</sup> In these documents, we find neither an enforceable promise nor a promise that the University has not fulfilled. Because we think a fair reading of the phrase "injustice can be avoided only by enforcing the promise" under these circumstances

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<sup>11</sup> Given that the cases DeJohn cites talk about the policies of the University as creating a written contract between the student and the institution, see Swartley v. Hoffner, 734 A.2d 915, 919 (Pa. Super. 1999), it is unclear why he frames his action as one in promissory estoppel rather than a more straightforward breach of contract action. Nevertheless, we will evaluate the issue as DeJohn has chosen to plead it.

<sup>12</sup> While we are unsure these promises are sufficiently definite to be enforceable, at this stage of the proceedings we will make every attempt to assume that they are. In addition, because the promises cited are all promises made by the University rather than by individual members of the faculty and administration, we assume that this claim applies only to the University and not to the individual defendants.

requires that the court refrain from intervention unless the University has breached or disclaimed those promises, we find that DeJohn has not adequately alleged his claim for promissory estoppel.

In the University's Mission Statement, Temple promises to "provide superior educational opportunities for academically talented and highly motivated students, without regard to their status or station in life" and to "provide access to superior education for committed and capable students of all backgrounds." Compl. ¶ 15. Although DeJohn alleges that he was treated inequitably, he does not identify any educational opportunity to which the University or the faculty denied him access. DeJohn alleges that the wrongs have prevented him from completing his degree, caused him personal distress, and cost him money, but they notably have not (according to DeJohn's complaint) resulted in lack of access to any of the opportunities that Temple has to offer. Thus, DeJohn has failed to identify a breach of the promises made in the Mission Statement.

DeJohn also quotes the University's Student Code of Conduct, which states "Temple University is a community of scholars in which freedom of inquiry and freedom of expression are valued," Compl. ¶ 16, and the History Department Graduate Bulletin, which states that "students are encouraged to tailor their programs to their own particular interests." Compl. ¶ 17. These statements are vague and sweeping and it is difficult to imagine what sort of reliance they could be expected to induce.

Further, it is clear that DeJohn has been allowed to tailor his program to his own particular interests. There are no allegations that DeJohn proposed research topics or coursework in his program but was refused permission to proceed.<sup>13</sup> He alleges no attempt to dissuade him from writing his thesis on his chosen topic. These "promises" are simply too broad and vague to support a claim for promissory estoppel. See C & K Petroleum Prods. v. Equibank, 839 F.2d 188, 192 (3d Cir. 1988).

Finally, DeJohn alleges that the University breached its promise to provide him with a thesis advisor. Pl. Opp. at 36. The policy that DeJohn cites, however, makes it clear that it is the student's responsibility to select the advisor. See Compl., Ex. H, at ¶ 2 ("How do I select my permanent advisor?... The student should notify the Graduate Secretary as soon as s/he has selected a permanent advisor.") (emphasis added). Further, even if a promise to provide DeJohn with an advisor were made, DeJohn has an advisor, Dr. Jay Lockenour. See Compl. Ex. L.

Because DeJohn has not alleged any promise on which he reasonably relied and which requires court intervention to avoid injustice, his promissory estoppel claim must fail.

#### **4. Count 5: Tortious Interference with Contractual Relations**

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<sup>13</sup> The only allegation DeJohn has made about coursework stems from the Vietnam War course, for which he ultimately received credit.

DeJohn's fifth count alleges that, under Pennsylvania state law, the University tortiously interfered with the contractual relationship between him and AES when it notified AES that DeJohn would graduate in May, 2005. DeJohn's claim requires four elements: "(1) the existence of a contractual, or prospective contractual relation between [DeJohn] and [AES]; (2) purposeful action on the part of the [University], specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the [University]; and (4) the occasioning of actual legal damage as a result of the [University's] conduct." Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. 1987). The first and fourth elements are not disputed, so we will concentrate on elements two and three.

Here, although DeJohn alleges that Temple intentionally notified AES of his graduation, there is no allegation that Temple did so with the intent to "harm the existing relation." It is notable that it is not sufficient for DeJohn to show that the action was intended to harm him; he must show that the action was intended to harm him by interfering with the relationship. See, e.g., Birl v. Phila. Electric Co., 167 A.2d 472, 474 (Pa. 1960) ("[T]he actor must act ... for the purpose of causing this specific type of harm to the plaintiff."). Not only is there no allegation that the University intended to harm the contractual relationship, there was, in fact, no harm to the relationship. Although the notification that he was graduating resulted in the

activation of contractual terms that were unfavorable to DeJohn, the contract remained in force. Temple's action, in fact, could not have had the effect of harming the contractual relationship.

In addition, DeJohn does not, and cannot, reasonably allege that the University notified AES without privilege or justification. It was, after all, DeJohn who notified the University of his intent to graduate. Compl. ¶ 52 & Ex. L. Further, DeJohn notified the University of his intent to graduate not at the behest of one of the defendants here, but of Lockenour. Compl. ¶¶ 51-52. Although the History Department later notified DeJohn that he would not be allowed to graduate, it will not surprise anyone who has ever dealt with a sizable bureaucracy that the notification to AES was sent anyway. DeJohn's allegations simply do not add up to a showing that the University's action in notifying AES was improper or unjustified. Indeed, because the complaint is not specific about when DeJohn discovered that he would be unable to graduate, see Compl. ¶ 52, it is not even clear that the notification was sent after that date.

Because the University's action, as DeJohn alleges it, was not improper and could not have been intended to harm the contractual relationship between DeJohn and AES, DeJohn's claim for tortious interference with a contractual relationship must also fail.

## 5. Count 6: Educational Leave Act

DeJohn's sixth, and most original,<sup>14</sup> claim is under the Education Leave of Absence provision ("ELA") of Pennsylvania's Military Affairs title. The statute requires educational institutions to grant leaves of absence to members of the military on active duty and to return them to their former educational status without penalty upon their return. 51 Pa. C.S. § 7313. DeJohn alleges that, upon his return from active duty, he was notified that he had been dismissed from the University. Compl. ¶ 35. This notice, however, was remedied quickly enough<sup>15</sup> that DeJohn was able to register for classes in the Fall of 2003, the first semester following his return, Compl. ¶ 39.<sup>16</sup> Therefore, DeJohn has not alleged any harm as a result of Temple's error. Because, even under the facts as alleged, Temple has not violated the ELA provisions, DeJohn's sixth count will be dismissed.

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<sup>14</sup> According to a Westlaw search, the documents in this case are the only citing references to this statute. It is not surprising, therefore, that neither party provides the Court with citations to relevant case law.

<sup>15</sup> DeJohn's citation to Shakespeare notwithstanding, see Pl. Opp. at 33 n.9 ("[T]he die is cast."), we decline the invitation to construe ELA as a strict liability statute from which no corrective action is possible.

<sup>16</sup> It is now clear that the University considers DeJohn as having been on leave while he was on active duty since his program requires completion within 3 years, Compl. ¶ 17, yet he remains an actively enrolled student more than 4 years after he began his program.

**6. Counts 7 & 8: Challenges to University Sexual Harassment Policy**

DeJohn's seventh and eighth causes of action<sup>17</sup> embody his challenge to Temple University's Student Code of Conduct and related policies, in particular as they address questions of sexual harassment. DeJohn alleges that, when read in connection with the sexual harassment definitions provided by the Tuttleman Counseling Services Web site, these policies result in an unconstitutional restriction on freedom of expression within the Temple community.

DeJohn claims that, like the regulation at issue in Saxe v. State Coll. Area School Dist., 240 F.3d 200 (3d Cir. 2001) (Alito, J.), the policy here is facially overbroad. Although on their faces the regulations are quite different, when we consider the limiting construction of the State College policy Saxe adopted, we are unable to distinguish between Temple's policy and the policy found unconstitutional there. The Saxe panel, finding that "we must first determine whether [the regulation] is susceptible to a reasonable limiting construction," Id. at 215, determined that the regulation, narrowly construed, prohibited "(1) verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics (3) that has the purpose or effect of either (3a) substantially interfering with a student's educational

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<sup>17</sup> We are at a loss to distinguish between the allegations of count 7 and count 8. Because both parties address them collectively, we will do the same.

performance or (3b) creating an intimidating hostile, or offensive environment." Id. at 216. Finding that element 3b went beyond the requirement of Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969), that "a school must reasonably believe that speech will cause actual, material disruption before prohibiting it," Saxe at 217, the court found the regulation unconstitutional.

The Temple policy challenged here reads, in relevant part: "all forms of sexual harassment are prohibited, including ... expressive, visual, or physical conduct of a sexual or gender-motivated nature, when ... (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment." Compl. Ex. X, at 2. We cannot find a material difference between Temple's policy and the Court of Appeals's limited construction of the policy in Saxe. Accordingly, Temple's motion to dismiss DeJohn's counts challenging the policy must be denied.

### **C. Conclusion**

For the reasons enumerated above, defendants' motion to dismiss will be granted in part. Counts 3, 4, 5, and 6 of DeJohn's complaint will be dismissed.

An appropriate Order follows.

BY THE COURT:

/s/ Stewart Dalzell, J.

