

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Docket No. 07-30015-

BRIAN C. MARQUIS,)
Plaintiff)
)
v.)
)
UNIVERSITY OF MASSACHUSETTS)
AMHERST,)
BOARD OF TRUSTEES OF UNIVERSITY)
OF MASSACHUSETTS,)
JOHN V. LOMBARDI, Chancellor of the)
University of Massachusetts Amherst,)
CHARLENA SEYMOUR, Provost of the)
University of Massachusetts Amherst,)
JO-ANN VANIN and GLADYS RODRIGUEZ,)
Dean and Associate Dean for Student)
Affairs, University of Massachusetts)
Amherst,)
CATHERINE PORTER, Ombudsman, University)
of Massachusetts Amherst,)
PHILLIP BRICKER, Professor of Philosophy,)
University of Massachusetts Amherst, and)
JEREMY CUSHING, Teaching Assistant,)
University of Massachusetts Amherst)
)
Defendants)
)

MEMORANDUM OF UNIVERSITY DEFENDANTS IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to Fed.R.Civ.P. 12(b)(6), the defendants University of Massachusetts Amherst (“University”), John Lombardi, Charlena Seymour, Jo-Ann Vanin, Gladys Rodriguez, Catherine Porter, Philip Bricker, and Jeremy Cushing (hereafter “University defendants”) submit this memorandum in support of their motion to dismiss plaintiff’s complaint for failure to state a claim. The plaintiff, Brian Marquis, has filed his multi-count lawsuit in federal court naming a host of University defendants, and the wrong that he alleges that he has suffered is that he received the grade of “C” in a political philosophy course at the University. In response to this “C”, Marquis has filed a federal court complaint consisting of

15 counts. The University defendants now move to dismiss this complaint. In addition, the defendant Board of Trustees moves to dismiss this complaint for failure to complete service of process. Fed.R.Civ.P. 12(b)(5).

PROCEDURAL HISTORY

Marquis filed this lawsuit on January 31, 2007.¹ He completed service on May 29, 2007, by sending a letter via certified mail to the attention of John Lombardi, Chancellor of the University of Massachusetts Amherst, at the Whitmore Administration Building on that campus. This letter contained one complaint, and nine summonses: one summons for the University, one for each individual named as a defendant, and one summons purporting to serve all the Board of Trustees. On June 6, 2007, undersigned counsel wrote to Mr. Marquis informing him that although it doubted that this was effective service on all the named individuals, it would treat them as being served. Counsel also informed Mr. Marquis that the University defendants did not consider that the mailing of one summons to the Amherst campus was effective to serve the Board of Trustees. A copy of this letter is attached as Exhibit 1 to this memorandum.

FACTUAL ALLEGATIONS OF PLAINTIFF'S COMPLAINT

Marquis is a student at the University who resides in Lanesborough, Massachusetts. Complaint ¶ 1. Marquis refers to himself in this, and numerous other paragraphs of his complaint, as a “*matriculated*” student, but does not define what that term means. (Emphasis in complaint.) He is a transfer student at the University, who alleges that he has accumulated 67 credits out of 150 needed to graduate. Complaint ¶ 2.

¹Mr. Marquis has previously filed two other pro se lawsuits in the United States District Court in Springfield. These were: Brian Marquis v. Media News Group, et. al., 3:00-cv-30142-MAP, filed on August 22, 2000, and Brian Marquis v. Berkshire Community College, 3:00-cv-30059-MAP, filed on 3/23/04. In this second case, as he does in this case against the University of Massachusetts, Mr. Marquis asserted claims for violation of the First, Fifth, and Fourteenth Amendments, violations of 42 U.S.C. §§ 1983 and 1985, “breach of the special relationship,” and promissory estoppel.

Marquis has sued: the University of Massachusetts, a four-year residential undergraduate and graduate educational institution created by the state, Complaint ¶ 3; its Board of Trustees, in their individual and official capacity, Complaint ¶ 4; its Chancellor, John Lombardi, in his individual and official capacity, Complaint ¶ 5; the University's Provost, Charlena Seymour, in her individual and official capacity, Complaint ¶ 6; the University's Dean and Associate Dean for Student Affairs, Jo-Ann Vanin and Gladys Rodriguez, in their individual and official capacities, Complaint ¶ 7; the chairperson of the University's Philosophy Department, Philip Bricker, in his individual and official capacity, Complaint ¶ 9; and the graduate student who taught the course in which he received the grade of "C", Jeremy Cushing, in his individual and official capacity, Complaint ¶ 10.

Marquis alleges that during the fall semester of 2006, he enrolled in Philosophy 161, Problems in Social Thought, taught by defendant Cushing, a graduate student. He alleges that this class had approximately 50 students in it, and that defendant Cushing distributed a syllabus to each student at the beginning of the semester. Complaint ¶ 13-14.

Marquis alleges that Cushing's syllabus set forth the approximate weight that would be allocated to each paper and exam, as well as the weight that would be given to in-class participation. Marquis further alleges that he should have received a final numeric grade of 92.5%, "translating, by universally accepted standards, into an "A-" letter grade. However, Marquis states that he received a grade of "C." Complaint ¶¶ 15-18.

Marquis states that after he saw this grade, he emailed his instructor, Cushing, and asked him to explain and/or reevaluate the grade which Marquis had received. Cushing responded on January 10, 2007, in an email which is attached as Exhibit B to plaintiff's complaint. Complaint ¶ 19-20, and Exhibit B. In pertinent part, this email from Cushing states:

You got a 4.5 out of 5 on the 4th response paper and a 19.5 out of 25 on the final exam. I was more strict on grading the final than the previous two exams, thinking that people had the whole semester to learn how to write for a philosophy class. There were students that showed a steady

improvement and a few that received their best grades on this third exam. I don't think your third exam was much worse than previous exams, but it didn't show much improvement either. As such, it was your worst grade, as it was for some of the other students.

This brought your final grade to an 84 for the class. The numerical grades were on the high side. I switched to a numerical scale for the assignments rather than letter grades and I should have been taking more points off of everyone's assignments than I was over the semester. To make the grades more representative of student performance, I set a curve (or, more accurately, I drew up a new grade scale). When I do that, I copy everyone's final grades into a new spreadsheet and sort them numerically. I look for natural divisions first and then set the other divisions in a way that seems fair, not having too high a number of students with any one grade or having any one grade occupy too large or too small a range. I do all that without knowing who has which numerical grades. As I am entering grades, I consider whether or not they seem fair, and I have gone back and reevaluated students in the past, but I thought your grade was a good reflection of your work. I hope this is enough detail, but I'm happy to keep working with you on this matter.

Complaint ¶ 20, Exhibit B. Marquis wrote to Catherine Porter, the University Ombudsperson, who wrote back to him on January 12, 2007. Complaint ¶ 21, and Exhibit C. Porter wrote to Marquis:

At your request, I explored your concerns regarding your grade in Phil 161. Jeremy Cushing met with me on January 11th. I was able to review his final grade roster for the entire class. The spread of grades was normal for such a course.

Faculty on this campus may develop their own grading scale. For example, 84 points could range anywhere from a "C" to possibly an "A-" at the extreme end. It all depends on how the overall class performs and every semester brings in a new set of students with more or lesser abilities. It is clear that you were not singled out in an arbitrary and capricious manner. You were not the only student to receive a grade of 84 and many students earned a lower score.

You may not be happy with the grade you received in Jeremy Cushing's course but there is no evidence that he purposely singled you out. In fact, he went out of his way to explain everything as the semester progressed, attempting to respond to your every concern.

I urge you to accept this grade and continue on with your course work as there are no grounds for an academic grievance.

Complaint ¶ 21, Exhibit C.

Marquis alleges that his numerical grade score of 84 should at least have gotten him a grade of a B, and instead he got a C, which he claims disproportionately hurts him, because he "deserved" a grade of "A-". Complaint ¶ 22. Marquis alleges that he has suffered significant damage because he received a "C" in this class.

By Cushing's arbitrary and capricious letter award of C, it has left Plaintiff's undergraduate transcript as a dismal record of non-achievement. Graduate institutions as having much credibility do not recognize Cs. They lend to the stigma that the applying student are somewhat lazy and inattentive to individual studies. Moreover, the chances of any student with C letter grades seeking

admission to graduate school is remote and probably not going to occur. Since Plaintiff did not earn a C final letter grade, he should not have to bear the burden of carrying this beast around with him forever.

Complaint ¶ 23. Marquis goes on to allege that he brings this complaint on his own behalf, and on behalf of others similarly situated, “DOES 1-25,000,” suggesting that there are as many as 25,000 other individuals in some class or classes which the court might certify. Complaint ¶ 24.

Marquis does set forth any facts of any action taken by the named defendants: John Lombardi, Chancellor of the University of Massachusetts Amherst, Charlena Seymour, Provost of the University of Massachusetts Amherst, Jo-Ann Vanin, Dean of Student Affairs of the University of Massachusetts Amherst, Gladys Rodriguez, Associate Dean of Student Affairs of the University of Massachusetts Amherst, and Phillip Brecker, Chairperson of the Philosophy Department of the University of Massachusetts Amherst. As discussed, Marquis does at least set forth a few facts related to his instructor, Jeremy Cushing, and Catherine Porter, the University Ombudsperson.

ARGUMENT

THE COURT SHOULD DISMISS PLAINTIFF’S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

1. Motion to Dismiss Standard

The standard of review on a motion to dismiss is familiar and clearly established.

[The court] “must accept all well-pled factual averments as true, and draw all reasonable inferences therefrom in [plaintiff’s] favor....In so doing, however, [the court] ‘eschew[s] any reliance on bald assertions, unsupportable conclusions, and ‘opprobrious epithets.’”.... We [the First Circuit] have repeatedly cautioned that, notice pleading notwithstanding, Rule 12(b)(6) is not entirely a toothless tiger. “Minimal requirements are not tantamount to nonexistent requirements. The threshold for stating a claim may be low, but it is real....”

Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989). Thus, in order to state a claim, a plaintiff must “set forth in [his] complaint ‘factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory.’” Dartmouth Review v. Dartmouth College, 889 F.2d at 16.

In evaluating a motion to dismiss, the court may consider documents which the plaintiff has attached to his complaint. In re: Polaroid Corporate Securities Litigation, 134 F.Supp.2d 176, 182, fn 10 (D. Mass. 2001)(“In evaluating a motion to dismiss, the Court may consider documents pertinent to the action and/or referenced in the complaint.”); Nationwide Mutual Insurance Company v. Otero Perez, 130 F.Supp.2d 242, 245-246, fn. 2 (D.Puerto Rico (2001)(“The Court hastens to add that consideration of a Rule 12(b)(6) motion to dismiss is generally limited to the facts stated on the face of the Complaint, documents appended to the Complaint, documents incorporated by reference, and matters of which judicial notice may be taken.); Koelsch v. Town of Amesbury, 851 F.Supp. 497, 499 (D.Mass. 1994).

2. The court should dismiss all federal law claims alleging violations of constitutional rights against the University of Massachusetts.

In counts 1, 2, 3, and 6, of plaintiff’s complaint, Marquis has asserted claims alleging violations of certain constitutional rights against the University and against University officials acting in their official capacities. “It is settled beyond peradventure, however, that neither a state agency nor a state official acting in his official capacity may be sued for damages in a section 1983 action.” Johnson v. Rodriguez, 943 F.2d 104, 108 (1st Cir. 1991) citing Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989); accord, Wang v. New Hampshire Board of Registration in Medicine, 55 F.3d 698, 700 (1st Cir. 1995). The University is, of course, a state agency. See, McNamara v. Honeyman, 406 Mass. 43, 47-48 (1989)(In a case involving the University of Massachusetts Medical Center, the Supreme Judicial Court held that “[a]n examination of G.L. c.75 makes clear that the university is an agency of the Commonwealth....”); Hannigan v. The New Gamma-Delta Chapter of Kappa Sigma Fraternity, Inc., 367 Mass. 658, 659 (1975)(University one and the same party as the Commonwealth). The court should therefore dismiss these counts as to the University, and as to all individual defendants acting in their official capacity.

3. The court should dismiss Counts 4 and 5, because the plaintiff has not even alleged that he is a member of a racial minority, and the statutes he cites are limited to that class.

In counts 4 and 5 of his complaint, Marquis sets forth claims under 42 U.S.C. §1981 and 42 U.S.C. §1982. These statutes were enacted to ban discrimination based on race. Marquis does not plead that he is a member of a racial minority.² The court should therefore dismiss these counts for failure to state a claim. Stephenson v. State Street Bank & Trust Co., 924 F.Supp. 1258, 1279 (D.Mass. 1996)(Section 1981 applies to purposeful discrimination based on race in the making and enforcement of contracts); accord, Alexis v. McDonald's Restaurants of Massachusetts, Inc., 67 F.3d 341, 346 (1st Cir. 1995). Jones v. Alfred H. Mayer, Co., 392 U.S. 409 (1968)(holding that Section 1982 applies to the right of non-white people to inherit, purchase, lease or sell real or personal property); Garrett v. Tandy Corporation, 295 F.3d 94, 103 (1st Cir. 2002); Bendetson v. Payson, 534 F.Supp. 539, 541 (D.Mass. 1982)(holding that minority plaintiffs may bring a claim for violation of §1982).

Marquis has not pled that he is a member of a racial minority. As such, his claims for relief under Sections 1981 and 1982 fail.

4. Marquis has failed to plead facts showing that he has been the victim of a civil conspiracy to deprive him of any rights, and the court should dismiss counts 7 and 8.

In counts 7 and 8 of his complaint, Marquis pleads that by virtue of his having received a “C” grade, the various defendants whom he has named in his complaint violated 42 U.S.C. § 1985 (Count 7) and §1986, that is, that they somehow “conspired” to deprive him of his constitutional or other legal rights. The court should dismiss each of these counts.

Section 1 of 42 U.S.C. § 1985 relates to conspiracies to threaten or coerce a person not to accept public office; that clearly is inapplicable to this case. Section 2 relates to conspiracies to obstruct justice or intimidate a person into declining to exercise his or her right to seek redress for wrongs in court, likewise inapplicable. The defendants assume that Marquis is attempting to assert a claim under 42 U.S.C. § 1985(3), which prohibits conspiracies to deprive a person of constitutionally protected rights.

²There is good reason for that. He is, in fact, a white male.

The court in Aulson v. Blanchard, 83 F.3d 1, 3(1st Cir. 1996) upheld the dismissal of a claim brought under Section 1985(3).

Section 1985(3) proscribes certain enumerated conspiracies. To state a claim under § 1985(3) a plaintiff must allege the existence of (1) a conspiracy, (2) a conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an overt act in furtherance of the conspiracy, and (4) either (a) an injury to person or property, or (b) a deprivation of a constitutionally protected right or privilege. See Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971). In Griffin, the Supreme Court placed a gloss on these four elements, effectively adding a fifth requirement. It construed the statute's references to "equal protection" and "equal privileges and immunities under the laws" to signify that a plaintiff may recover thereunder only when the conspiratorial conduct of which he complains is propelled by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."

The court also held that a class is cognizable for purposes of § 1985(3)'s class-based animus requirement "only when it is comprised of a distinctive and identifiable group. For this purpose, distinctiveness connotes that a reasonable person can readily determine by means of an objective criterion or set of criteria who is a member of the group and who is not." Aulson v. Blanchard, 83 F.3d at 5-6. The court also holds that a class is most likely limited to a racial class, the class of women, or perhaps members of an oppressed political party or political minority. Id.

As a preliminary but very important matter, Marquis pleads no facts tending to show any conspiracy. In order to state a claim for an actionable conspiracy, Marquis would have to plead who conspired with whom, and to what end.

Second, Marquis does not plead that any persons conspired to deprive him of any constitutional or statutory rights. There is no constitutional right to receive a "A-" in a course as opposed to a "C".

Third, and perhaps most importantly, Marquis does not make any allegations that he is part of any class that is recognized as able to assert rights under 42 U.S.C. § 1985(3). He is not a person who falls under the protections of that statute, and the court should therefore dismiss count 7 of his complaint.

As to plaintiff's claim that the defendants somehow violated 42 U.S.C. §1986, that claim also fails. Section 1986 prohibits failing to take action to prevent a conspiracy in violation of Section 1985.

However, where plaintiff does not have a claim for violation of § 1985(3), there can be no violation of §1986. Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 834-5 (1st Cir. 1982). In addition, Marquis sets forth no facts that if proven would set forth a claim that some person or persons failed to take action to prevent some unspecified conspiracy against him from proceeding. The court should therefore dismiss his Section 1986 claim as well.

5. Marquis may not assert a claim for violation of 18 U.S.C. § 241.

Chapter 18 of the United States Code deals with criminal offenses. There is no private right of action for a citizen to bring an action under this statute. Only a United States Attorney may bring a claim related to alleged violation of this statute. Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989). The court should therefore dismiss count 10 of plaintiff's complaint alleging a violation of 18 U.S.C. § 241.

6. Marquis has not pled facts giving rise to a First Amendment Violation.

In count 1 of his complaint, Marquis alleges in conclusory fashion that the University "abruptly [shut] down the university's grievance procedure" and advised him to accept the grade he received, thereby somehow violating his rights under the First Amendment. Complaint ¶ 26. Taking these and the other allegations in his complaint as true, Marquis has failed to set forth factual allegations which state a claim for a First Amendment violation.

The First Amendment protects citizens from the government taking action against them because of something that person said. Marquis does not set forth facts that he suffered any adverse consequence from the University or any of its agents, after he started complaining about the grade he received. Moreover, Marquis himself admits that he spoke on several occasions with representatives of the University, and that nothing adverse happened to him because of that. Marquis pleads that he first complained about his grade to his instructor, Jeremy Cushing, and that Cushing explained why he gave him the grade of "C". Complaint ¶ 19-20. Plaintiff further alleges that he subsequently contacted Catherine Porter, the University Ombudsperson, and complained to her about the grade, and she looked into matters and advised

him to accept the grade he had received. Complaint ¶ 21.

Accepting as true that University officials “shut down” any grievance process after he complained to the Ombudsperson, Ms. Porter, those allegations do not set forth facts indicating that the University took action against him because of some statement or communication.³ In the school context, a student does of course retain the right to free speech, although students may not make communications that interfere with the work of the school or impinge upon the rights of other students. “A school need not tolerate student speech that is inconsistent with its ‘basic educational mission’... even though the government could not censor similar speech outside the school.” Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266-267 (1988)(holding that the school district had the right to censor certain articles proposed for publication in a student newspaper). However, there are no facts pled in this case indicating that the University or any of its agents took any steps to censor any statement by Marquis, and no allegation that the University or any of its agents acted to retaliate against him for any statement he made. Marquis received his grade of “C”, and he then started to complain about it. The complaints led to no adverse consequence for him. The only “consequence” was that the University did not change the grade he received.

In addition, Marquis sets forth no facts showing how any of the named individuals took any action against him because of his speech. In order to assert a claim, Marquis must set forth facts showing how one or more of the named defendants took some specific action to infringe upon his First Amendment rights. Dartmouth Review v. Dartmouth College, 889 F.2d at 16. His complaint is devoid of any such allegations, and the court should therefore dismiss it.

7. The court should dismiss plaintiff’s other constitutional claims.

In counts 2, 3, and 6 of his complaint, Marquis makes claims for violation of various purported

³Marquis may be attempting to recast a due process claim as a First Amendment claim. The University defendants will address later in this memorandum why he has no due process claim.

constitutional violations: violation of the Fifth Amendment (count 2), violation of the 14th Amendment (count 3), and violation of 42 U.S.C. §1983 (count 6). In both counts 2 and 3, Marquis alleges that all the defendants deprived him of his “procedure and substantial due process rights” (counts 2 and 3; Complaint ¶ 28 and 30), and that their conduct “was sufficiently willful, reckless, and acting and engaging in official state actions with callous indifference, wanton malevolence, malice, with intentional gross negligence....,” and thereby “caused irreparable constitutional harm to Plaintiff.” Complaint ¶ 36.

It appears that Marquis is attempting to assert in these counts that by virtue of giving him a “C” in a political philosophy course, the University and its agents violated his rights to procedural and substantive due process. As already discussed, the University and its employees acting in their official capacity are not proper parties to any such claim, and so those claims should be dismissed.

The claims are on no better ground with regard to the named defendants sued in their individual capacities. Marquis has no claim against any of the defendants for an alleged substantive due process violation. “Substantive due process is based on ‘the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of the court.’” Holland v. Breen, 623 F.Supp. 284, 288 (D.Mass. 1985), quoting Ramos v. Gallo, 596 F.Supp. 833, 837 (D.Mass. 1984). “In order to shock the conscience, the conduct must be ‘truly outrageous, uncivilized, and intolerable.’” McKonkie v. Nichols, 446 F.3d 258, 260 (1st Cir. 2006). Giving a student a “C” in a course is not conduct which properly shocks the conscience of the court. Marquis also sets forth no factual allegations of any conduct by any of the named defendants which is shocking or intrusive. In rare instances, a procedural due process claim might lie where the action of a defendant is arbitrary and capricious. However, the Supreme Court has held that the court is reluctant “to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom....” Regents of the University of Michigan v. Ewing, 474 U.S. 214, 226 (1985)(holding that where University of Michigan expelled Ewing from a combined undergraduate/medical

school program, the plaintiff had no substantive due process claim). The Court also stated that “they [judges] may not override it [educational judgment about academic achievement] unless it is such a substantial departure from academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.” Ewing, 474 U.S. at 225. Where the plaintiff has attached papers to his complaint showing the instructor’s entirely reasonable decision making process in awarding the grade in question, and where these same papers reflect that the plaintiff sought and obtained internal review of that decision, the court should hold that Marquis has no claim for an alleged substantive due process violation. More generally, the court should hold that the awarding of any passing grade is not arbitrary and capricious, such as in this case, a “C”, absent unusual circumstances such as an allegation of racial or sexual discrimination calling into question the reasonableness of the grade in question.

Marquis’ claim for procedural due process is also without merit. Marquis appears to argue that he had a right to further review of the grade with which he was displeased, and that the University and its agents had some obligation to offer him other and further avenues for appealing his grade and attempting to make the argument that he was entitled to a higher grade. “To establish a procedural due process violation, a plaintiff must identify a protected liberty or property interest, Redondo-Borges, 421 F.3d at 7, and allege ‘that the defendants, acting under color of state law, deprived [them] of that ... interest without constitutionally adequate process,’ PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 30 (1st Cir.1991).” Aponte-Torres v. University of Puerto Rico, 445 F.3d 50, 56 (1st Cir. 2006). Due process requires that reasonable notice under the circumstances must be given before the states takes away some property or liberty right, and that the interested party should have an opportunity to present his case. Newman v. Commonwealth of Massachusetts, 884 F.2d 19, 23 (1st Cir. 1989). However, “[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment’s protection of liberty and property.” Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir. 1980). “The Constitution does not create property interests; instead, they are created and their dimensions are

defined by existing rules or understandings that stem from an independent source such as state law....' Figueroa-Serrano v. Ramos-Alverio, 221 F.3d 1, 6 (1st Cir.2000) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))". Colon-Santiago v. Rosario, 438 F.3d 101, 108 (1st Cir. 2006). "To establish a constitutionally protected property interest, a plaintiff 'must have more than an abstract need or desire for [a thing] ... [and] more than a unilateral expectation of it.' Roth, 408 U.S. at 577, 92 S.Ct. 2701. A plaintiff instead must 'have a legitimate claim of entitlement to it.' Id. Here, however, we are unable to find any clear statement of the precise property interest that the plaintiffs contend is at stake." Redondo-Borges v. U.S. Dept. Of Housing and Urban Development, 421 F.3d 1, 7 (1st Cir. 2005).

The First Circuit has held that procedural due process is not implicated when a school awards a student a particular grade, although the due process clause may be implicated in disciplinary actions taken by a college or university.

The purpose behind the constitutional requirement that a student should be offered the opportunity to be heard in regard to disciplinary determinations lies in the resemblance that such determinations bear to 'traditional judicial and administrative factfinding.'Because those considerations do not obtain in respect to academic determinations, the Constitution typically does not require a hearing in connection with the imposition of academic sanctions. Indeed, judicial intrusion of this kind into the academic community could do irreparable harm to the traditional faculty-student relationship.

Hennessy v. City of Melrose, 194 F.3d 237, 251-2 (1st Cir. 1999).

There is no Massachusetts statute or regulation (and no federal law) or Massachusetts common law that gives Marquis an entitlement to an "A-" (or any particular grade) as opposed to a "C", or which creates a property right in receiving a certain grade. Marquis attempts to set forth the claim that the syllabus distributed by Cushing, his instructor, at the beginning of the semester, gives him some kind of contractual or quasi-contractual right to a certain grade, but there is no authority for the proposition that a course syllabus creates any contractual rights in the students who receive the syllabus.

Even if the court were to hold that the syllabus did create some sort or other of contractual or

quasi-contractual right, such a claim would not be enough to support a due process claim. “A claim of breach of contract by a state actor without ‘any indication or allegation that the state would refuse to remedy the plaintiffs’ grievance should they demonstrate a breach of contract under state law,’ Casey v. Depetrillo, 697 F.2d 22, 23 (1st Cir.1983) (per curiam), does not state a claim for violation of the plaintiffs’ right of procedural due process. In Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 196-98, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001), the Supreme Court held that a claim under color of state law, for breach of a contract to pay money would not support a due process claim unless state contract remedies were closed to the plaintiff.” Ramirez v. Arlequin, 447 F.3d 19, 25 (1st Cir. 2006). In order to prevail on a claim of a deprivation of a liberty or property interest without due process, the plaintiff must either avail him- or herself of the remedies guaranteed by state law, or prove that the available remedies are inadequate. Hudson v. Palmer, 468 U.S. 517, 539, 104 S.Ct. 3194, 3207(1984)(O’Connor, J., concurring). “When a deprivation of a property interest is occasioned by random and unauthorized conduct by state officials [as opposed to the application of an allegedly unconstitutional established procedure] ... the [Supreme] Court has repeatedly emphasized that the due process inquiry is limited to the issue of the adequacy of postdeprivation remedies provided by the state.” Krennerich v. Inhabitants of the Town of Bristol, 943 F.Supp. 1345, 1353 (D.Me. 1996) citing Lowe v. Scott, 959 F.2d 323 (1st Cir. 1992). Marquis has not pled that he could not proceed on a breach of contract theory in state court, or that the courts would be foreclosed to considering such a claim⁴. Thus, even if the court held that Marquis had some vague property interest created by the course syllabus, he would not have a cognizable property interest entitling him to pursue a claim for an alleged violation of the due process clause.

8. Marquis may not bring a Chapter 93A claim against the University or its agents.

⁴This is not to say that such a claim would survive a motion to dismiss, as will be discussed within. However, Marquis still could attempt to bring such a claim under state common law for breach of contract, and there is no authority for the proposition that any law or regulation would preclude him from doing so.

The court should dismiss Marquis' claim, because he failed to send a demand letter, as required by Chapter 93A, §9, and to wait 30 days for a response to the demand letter, prior to filing his suit. Entrialgo v. Twin City Dodge, Inc., 368 Mass, 812, 813 (1975); Richards v. Arteva Specialties, 66 Mass.App.Ct. 726, 731 (2006). Sending such a demand letter is an absolute precondition to suit, and the plaintiff has not sent such a letter (nor has he pled that he sent one).

Plaintiff's complaint also fails to state a claim upon which relief may be granted. Chapter 93A prohibits any "person who engages in trade or commerce" from engaging in unfair and deceptive trade practices. The University is not a "person" for purposes of Chapter 93A, Bretton v. State Lottery Commission, 41 Mass.App.Ct. 736, 738 (1996)(upholding dismissal of Chapter 93A claim against State Lottery Commission). Moreover, when the University, or any governmental entity is performing actions related to its governmental functions, it is not an entity in trade or commerce subject to suit under Chapter 93A. United States Leasing Corporation v. City of Chicopee, 402 Mass. 228, 232-3 (1988)(holding that where city school department entered into lease agreement for computers for its schools, it was not engaged in trade or commerce subjecting it to liability under Chapter 93A); M. O'Connor Contracting, Inc. v. City of Brockton, 61 Mass.App.Ct. 278, 284-5 (2004)(holding that where city contracted for construction of a building, it was not a person engaged in trade or commerce subjecting it to potential Chapter 93A liability, and vacating arbitration award against city awarding 93A damages against it).

None of the individual defendants engaged in trade or commerce with the plaintiff. Marquis has not pled that any of them engaged in unfair or deceptive acts of practices. The court should dismiss count 9 of plaintiff's complaint alleging a violation of Chapter 93A as to all defendants.

9. The court should dismiss plaintiff's claims for breach of contract and promissory estoppel.

As a preliminary matter, Marquis pleads no facts suggesting that he was in a contractual relationship with any of the named individual defendants, and the court should therefore dismiss his contract claim (count 13) as to them.

Marquis also has no breach of contract claim against the University. Breach of contract is a failure to fulfill the terms of a contract for which legal excuse is lacking. Realty Development Co., Inc. v. Wakefield Ready Mixed Concrete Co., 327 Mass. 535, 537 (1951). In his complaint, he makes the claim that the University breached a contract it entered into with him by virtue of failing to adhere to the terms of the course syllabus. There is no authority for the proposition that a course syllabus handed out in the beginning of the semester (after a student has already signed up for a course) creates any binding contractual rights. Pacella v. Tufts University School of Dental Medicine, 66 F.Supp.2d 234, 241 (D.Mass. 1999)(following Jackson v. ABCD, Inc., 403 Mass. 8 (1988), and holding that the terms of a student handbook did not give rise to contractual rights).

In Massachusetts, in the employment context, the Supreme Judicial Court has established standards regarding when an employment manual may give rise to binding contractual obligations for the employer and employee. Jackson v. ABCD, Inc., 403 Mass. 8 (1988); O'Brien v. New England Telephone and Telegraph, 422 Mass. 686, 691-2 (1996). The University notes that an employment manual is much more like a contract, insofar as it sets forth mutual obligations of employer and employee, than is a course syllabus.) In Jackson, the court held that the personnel manual in question did not give rise to a contract, and among the factors it considered were the fact that the employer retained the right to modify unilaterally the personnel manual's terms, the fact that there was no evidence that when hired, or afterward, that the employer called special attention to the manual, the fact that the parties had not negotiated over the terms of the personnel manual, and the fact that no term of employment was stated in the manual. Jackson v. ABCD, 403 Mass. 14-15; see also, Pearson v. John Hancock Mutual Life Insurance Co., 979 F.2d 254, 256-7 (1st Cir. 1992)(applying Massachusetts law, and holding that John Hancock's personnel manual did not give rise to contractual rights).

Applying these factors, Marquis has no claim that the University breached a contract it had with him, and the court should hold that the course syllabus for Philosophy 161 does not give rise to any

contractual rights. Marquis did not bargain over the terms of the course syllabus. The course instructor could modify the syllabus at any time, unilaterally. The “terms” of the course syllabus were not an offer to perform services, and there was no separate consideration given or received in connection with the distribution of the course syllabus.

The syllabus does not create contractual rights, and the court should dismiss the plaintiff’s breach of contract claim. The court should likewise dismiss the plaintiff’s promissory estoppel claim. The plaintiff has also failed to plead facts that establish a claim for promissory estoppel. A claim for promissory estoppel consists of showing a promise “that becomes enforceable because of the promisee’s reasonable and detrimental reliance.” Rooney v. Paul D. Osborne Desk Co., Inc., 38 Mass. App. Ct. 82, 83 (1995). The elements of a promissory estoppel claim are “(1) a promisor makes a promise which he should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (2) the promise does induce such action or forbearance, and (3) injustice can be avoided only by enforcement of the promise.” Loranger Construction Corp. v. E.F. Hauserman Co., 6 Mass. App. Ct. 152, 154 (1978).

First, as a general matter, estoppel claims do not lie against the Commonwealth or its agencies, such as the University of Massachusetts, when the government agency Commonwealth is fulfilling its governmental functions. Municipal Light Company of Ashburnham et al. v. Commonwealth of Massachusetts, 34 Mass. App. Ct. 162, 167 (1993); Langlitz v. Board of Registration of Chiropractors, 396 Mass. 374, 378, (1985)(court upholds dismissal of plaintiff’s due process claim, and at the same time holds that it will not apply principles of estoppel to board’s actions). In this case, the University was fulfilling its educational mission of providing educational opportunities to its students. (It also made no promise upon which any student, including Marquis, could reasonably rely.) The estoppel claim does not lie against the University.

As to the other named defendants, Marquis has not pled any facts indicating that the named

individual defendants made any promise to him to induce him to do or not to do anything. In fact, he sets forth virtually no facts about all of the individuals he has sued. Virtually the only person about whom he alleges a few facts is the course instructor, Jeremy Cushing, who handed out a course syllabus to all the students in the class after they had enrolled in Philosophy 161. Mr. Cushing handed out the course syllabus as part of his job as a course instructor. He did not do so to induce Marquis, or any of the named students, to do anything. There was not, and cannot be, any reasonable reliance on the course syllabus, and that syllabus is not a promise by Mr. Cushing to do any particular act.

The court should dismiss the plaintiff's claims for breach of contract and for promissory estoppel.

10. The court should dismiss the plaintiff's tort claims against the University defendants.

Marquis throws into his complaint three tort claims: for intentional infliction of emotional distress (count 14), for tortious interference with advantageous relations (count 15), and for "breach of the Special Relationship" (count 12). The court should summarily dismiss all of these

First, claims for intentional infliction of emotional distress and for tortious interference with advantageous relations do not lie against an agency of the Commonwealth. M.G.L. c. 258, §10 (c).

Second, with regard to all his tort claims, before filing suit, the plaintiff had a statutory obligation to serve a presentment letter on the University. Under the Massachusetts Tort Claims Act ("MTCA"), M.G.L.c. 258 §4, a party cannot bring any civil action for a tort against a state agency "unless the claimant shall have first presented his claim in writing to the executive officer of such public employer." The Tort Claims Act's presentment requirement acts as a condition precedent to the initiation of a civil action.

Robinson v. Commonwealth, 32 Mass. App. Ct. 6 (1992)(University is an agency of the Commonwealth for purposes of the Tort Claims Act; upholding dismissal of suit against Medical School for failure to make proper presentment.).

Last, with regard to the individual named defendants, the plaintiff has not pled any facts indicating that any of them committed any of the named torts. The wrong he complains of is that he got a "C" in one

class. There is nothing about this that gives rise to a claim for intentional infliction of emotional distress, for tortious interference with advantageous relations, or for “breach of the Special Relationship” (whatever that is).

11. As a matter of public policy, the court should dismiss plaintiff’s complaint.

Marquis has filed a lawsuit in Federal District Court, because he got a “C” in one course. This is significant waste of the court’s time, and a waste of time for the University defendants. Significantly, this is not even a case where the University expelled a student. It simply gave him a grade of “C” in one course.

Lawyers have spoken in the past, probably too many times, about the dangers of opening the “floodgates of litigation” by allowing some new kind of claim or other to proceed. Unfortunately, lawyers have probably invoked this argument so many times that it has lost much of its meaning. However, for the court to hold that the plaintiff does state any viable legal claim on the facts alleged does run the risk of opening up a vast new realm of litigation. Does the court really want to put itself in the business of reviewing, under some constitutional or federal statutory doctrine, the propriety of the grades which a student has received? Respectfully, the court should answer this question with a resounding, “No,” and it should dismiss plaintiff’s claim with prejudice.

12. The court should dismiss the plaintiff’s claim against the University’s Board of Trustees for failure to complete service within 120 days.

As noted above, Mr. Marquis filed his complaint on January 31, 2007, but he did not make efforts to complete service of the complaint until May 29, 2007, when he caused a single certified mail letter to be sent to the Whitmore Administration Building at the University of Massachusetts Amherst. In this letter, he included a single copy of his complaint, along with nine summonses, including one summons purporting to be for the Board of Trustees. This is not good service on the all the individual members of the Board of

Trustees, none of whom live or work at the University of Massachusetts Amherst. Because the plaintiff has failed to complete service of process on the Board of Trustees within 120 days after filing his complaint, the court should dismiss his complaint. Fed.R.Civ.P. 4(m).⁵ Fed.R.Civ.P. 12(b)(5).

CONCLUSION

For all of the foregoing reasons, the University defendants ask that the court dismiss plaintiff's complaint with prejudice.

Dated: June 12, 2007

UNIVERSITY OF MASSACHUSETTS
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JO-ANN VANIN, GLADYS RODRIGUEZ,
CATHERINE PORTER,
PHILIP BRICKER, and
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By their attorneys,

/ s / - Peter Michelson

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CERTIFICATE OF SERVICE

I, Peter Michelson, certify that I served a copy of the above document on Brian Marquis, pro se, by mailing a copy of same to Brian Marquis, 6 Billings Street, Lanesborough, MA 01237-9750, and also by transmitting this document electronically, on the above date.

/ s / - Peter Michelson

Peter Michelson

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⁵In the event that the court rules that the plaintiff has completed service on the defendant Board of Trustees, then the University defendants ask that the court dismiss all claims against the Board for failure to state a claim, for all of the reasons set forth in this memorandum.