No. _____

In The
Supreme Court of the United States

OLGA TARASENKO,

Petitioner,

v.

UNIVERSITY OF ARKANSAS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE EIGHTH CIRCUIT COURT OF APPEALS EMPLOY A DIFFERENT STANDARD OF PLEADING THAN MANDATED BY FED. R. CIV. P. 8(a) AND 12(b)(6) WHEN IT DENIED PETITIONER'S MOTION TO AMEND AND DISMISSED HER COMPLAINT WITH PREJUDICE?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Olga Tarasenko, Petitioner, who is an individual resident of the State of Arkansas; and the University of Arkansas, Respondent, which is an agency of the State of Arkansas; and individual Arkansas residents, Respondents University of Arkansas Board of Trustees; Jim Von Gremp, Ben Hyneman, Jane Rogers, Stephen Broughton, David H. Pryor, Malk Waldrip, John Goodson, Reynie Rutledge, C.C. Gibson, III, and Morril Harriman, each in their official capacities as Members of the University of Arkansas Board of Trustees; Donald L. Bobbitt, Individually and in his official capacity as the President of the University of Arkansas; Joel Anderson, Individually and in his official capacity as Chancellor of University of Arkansas at Little Rock; Sandra Robertson, Individually and in her official capacity as Interim Provost of University of Arkansas at Little Rock; Christina Drale, Individually and in her official capacity as Associate Vice Chancellor for Academic Affairs of University of Arkansas at Little Rock; Patrick Pellicane, Individually and in his official capacity as Dean of the Graduate School of University of Arkansas at Little Rock; Johanna Miller Lewis, Individually and in her official capacity as Associate Dean of the Graduate School of University of Arkansas at Little Rock; Michael Gealt, Individually and in his official capacity as Dean of the College of Science and Mathematics of University of Arkansas at Little Rock;

PARTIES TO THE PROCEEDING – Continued

John Bush, Individually and in his official capacity as Chair of the Biology Department of University of Arkansas at Little Rock; Haydar Al-Shukri, Individually and in his official capacity as Chair of the Applied Science Department of University of Arkansas at Little Rock and Associate Dean on Research of the College of Science and Mathematics of University of Arkansas at Little Rock; and Mindy Wirges, Individually and in her official capacity as Employee Relations Manager of Human Resources of University of Arkansas at Little Rock.

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PETITION FOR A WRIT OF CERTIORARI

Olga Tarasenko respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit which Petitioner seeks review is *Tarasenko v. University of Arkansas, et al.*, 616 Fed. Appx. 214, 2015 U.S. App. LEXIS 17240 (8th Cir. Ark. Oct. 1, 2015), App. 1, *reh'g denied*, 2015 U.S. App. LEXIS 19293 (8th Cir. Ark. Nov. 4, 2015), App. 33, after it adopted reasoning contained in the United States District Court, Eastern District of Arkansas, 2014 U.S. Dist. LEXIS 175498 (E.D. Ark. Dec. 19, 2014), App. 3, and in 63 F. Supp. 3d 910 (E.D. Ark. Oct. 23, 2014), App. 8. This appeal arises from the Eighth Circuit Court of Appeals' final order denying rehearing, 2015 U.S. App. LEXIS 19293 (8th Cir. Ark. Nov. 4, 2015), App. 33, from which comes this appeal.

The Circuit Court's final order brings the Petitioner before this Court because the Eighth Circuit Court of Appeals' ruling, 616 Fed. Appx. 214, 2015 U.S. App. LEXIS 17240 (8th Cir. Ark. Oct. 1, 2015), App. 1, has affirmed the district court ruling, 2014 U.S. Dist. LEXIS 175498 (E.D. Ark. Dec. 19, 2014), App. 3, which denied Petitioner's motion to amend and its dismissal of Petitioner's complaint with prejudice, *id.*,

which Petitioner argued has misinterpreted and misapplied Fed. R. Civ. P. 8(a) and 12(b)(6). The underlying complaint alleged Petitioner was a tenured university professor and was denied substantive due process under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution, but the District Court, 2014 U.S. Dist. LEXIS 175498 (E.D. Ark. Dec. 19, 2014), App. 3, and Eighth Circuit found her allegations were insufficient to state a cause of action. 616 Fed. Appx. 214, 2015 U.S. App. LEXIS 17240 (8th Cir. Ark. Oct. 1, 2015), App. 1. The lower limits of due process are unclear absent clarification by this Court due to the misapplication of procedural rules in light of existing precedent in how a complaint's allegations should be interpreted. This present ruling impacts Petitioner and others within the federal appellate judicial system.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, 616 Fed. Appx. 214, 2015 U.S. App. LEXIS 17240 (8th Cir. Ark. Oct. 1, 2015), App. 1, affirmed and denied a requested rehearing and rehearing *en banc*, 2015 U.S. App. LEXIS 19293 (8th Cir. Ark. Nov. 4, 2015), App. 33, on the specific issue of whether the district court misconstrued the requirements of Fed. R. Civ. P. 8(a) and 12(b)(6).

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1):

"§ 1254. Courts of appeals; certiorari; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . . "

28 U.S.C. § 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

U.S. Const. amend. XIV:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fed. R. Civ. P. 8(a)(1), (2), (3):

"Rule 8. General Rules of Pleading

"(a) Claim for Relief. A pleading that states a claim for relief must contain:

> "(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> "(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> "(3) a demand for the relief sought, which may include relief in the alternative or different types of relief."

Fed. R. Civ. P. 12(b)(6):

"(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

. . . .

> "(6) failure to state a claim upon which relief can be granted;"

STATEMENT OF THE CASE

Petitioner Olga Tarasenko was a tenured Biology professor at the University of Arkansas at its Little Rock campus, where she taught from 2005 through 2012, when she was terminated for cause based upon an alleged inappropriate comment between Dr. Tarasenko and a student for whom the Petitioner was a faculty advisor. District Court opinion, 2014 U.S. Dist. Lexis 175498 (E.D. Ark. Dec. 19, 2014), App. 3, incorporating its earlier opinion, 63 F. Supp. 3d 910 (E.D. Ark. Oct. 23, 2014), *id.* at 912, App. 8. There was an investigation and a termination, and upon appeal, there was a hearing before the Faculty Appeal Committee, which, after taking seven days of testimony, concluded the charges were without merit and that Petitioner was denied due process. *Id.* at 915, App. 8. The university president disagreed with the Committee and upheld the termination. *Id.* at 915, App. 8. Petitioner sued the president, board of trustees, and individuals involved in the investigation for alleged improprieties and bias to such an extent that her due process rights of 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution were denied. *Id.* at 912, App. 8. Petitioner alleged that the individual defendants each "acted knowingly, intentionally, and maliciously, without due process of law, and in violation of UA policy and Plaintiff's Constitutional rights by depriving Plaintiff of her protected property interest." Original and proposed amended complaints. App. 20-22, App. 150-51 (contained in the Eighth Circuit principal brief's appendix).

The United States District Court ruled that the complaint was insufficient but granted Petitioner leave to amend her complaint. *Tarasenko v. University of Arkansas, et al.*, 63 F. Supp. 3d 910 (E.D. Ark. Oct. 23, 2014), App. 8. Petitioner filed a motion for leave to amend, adding additional factual allegations but stated the termination investigation was biased that the individuals acted with the above-referenced malicious animus, and that the university president did not review the findings and evidence from the Committee, although he specifically stated he did so. *Id.* at 917. Petitioner alleged in her proposed amended complaint that the termination was without any basis in fact and that it was based upon trivial reasons or those unrelated to the educational process. App. 149 (contained in the Eighth Circuit principal brief's appendix).

After the Petitioner sought leave to amend, the District Court denied leave to amend and dismissed her complaint with prejudice on the basis of Fed. R. Civ. P. 12(b)(6). *Tarasenko v. University of Arkansas, et al.*, 2014 U.S. Dist. LEXIS 175498 (E.D. Ark. Dec. 19, 2014), App. 3.

The Petitioner appealed and the Eighth Circuit Court of Appeals affirmed and adopted the opinion of the District Court. *Tarasenko v. University of Arkansas, et al.*, 616 Fed. Appx. 214, 2015 U.S. App. LEXIS 17240 (8th Cir. Ark. Oct. 1, 2015), App. 1. The Petitioner sought a rehearing and rehearing *en banc*, which were denied. *Tarasenko v. University of Arkansas, et*

al., 2015 U.S. App. LEXIS 19293 (8th Cir. Ark. Nov. 4, 2015), App. 33.

Petitioner seeks review under 28 U.S.C. § 1257(a), on the grounds in Supreme Court Rule 10(b) and (c), since the Eighth Circuit Court of Appeals' decision violates federal procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution and conflicts with holdings of this Court.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS RECOGNIZED THAT A TENURED PROFESSOR HAS A PROPERTY INTEREST, WHICH IS GUARANTEED PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As a preliminary matter, the Court has held that a tenured professor has a property right under the Fourteenth Amendment, *Vail v. Board of Education*, 706 F.2d 1435, 1438 (7th Cir. 1983), *aff'd*, 466 U.S. 377, 104 S. Ct. 2144, 80 L.Ed.2d 377 (1984), and *Beilan v. Board of Public Education*, 357 U.S. 399, 78 S. Ct. 1317, 2 L.Ed.2d 1414 (1958). The right to teach, as any other right to exercise any livelihood that is contingent upon establishing a license, is highly protected and should not be lightly taken away without constitutionally permissible due process.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 1494, 84 L.Ed.2d

494, 504 (1985), this Court wrote, "We have frequently recognized the severity of depriving a person of the means of livelihood."

Minimal procedural due process has likewise been recognized as necessarily providing an opportunity to be heard prior to deprivation of property interests. *See generally In Re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1225-26, 20 L.Ed.2d 117, 122 (1968) (recognizing an attorney has a right to procedural due process in a disciplinary proceeding). *See also Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780, 786-87, 28 L.Ed.2d 113, 119 (1971) ("[A] state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."); *see generally Ex Parte Bradley*, 74 U.S. 364, 375, 19 L.Ed. 214, 218, 7 Wall. 364 (1868) (attorney); *Selling v. Radford*, 243 U.S. 46, 48, 37 S. Ct. 377, 377-78, 61 L.Ed. 585, 586 (1917) (attorney); *Barry v. Barchi*, 443 U.S. 55, 64, 99 S. Ct. 2642, 2649, 61 L.Ed.2d 364, 374 (1979) (racehorse trainer's license).

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," noted the Court in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L.Ed.2d 796, 801 (1975).

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976), observed that the

Court will examine three factors to determine if a property interest requires due process, namely:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

This Court has extended the right to a procedurally significant hearing in a variety of factual situations. *E.g.*, *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L.Ed.2d 90, 94 (1971) (involving suspension of a driver's license).

A tenured professor is entitled, both, to a fair and constitutionally sufficient investigation and decision-making process involving a termination of employment. *Vail v. Board of Education*, *supra.* Those state actors must not exercise a fruitless investigatory proceeding, which merely gives lip service to constitutional requirements. As noted in *Withrow v. Larkin*, 421 U.S. 35, 50, 95 S. Ct. 1456, 1466, 43 L.Ed.2d 712, 725 (1975), an action must be examined for fundamental fairness, because in a variety of cases, courts have found investigatory or adjudicatory proceedings were tainted, noting:

"Those cases in which due process violations have been found are characterized by factors not present in the record before us in this litigation and we need not pass upon their validity. In *American Cyanimid Co. v. FTC*, 363 F.2d 757 (CA6 1966), one of the commissioners had previously served actively as counsel for a Senate's subcommittee investigating many of the same facts and issues before the Federal Trade Commission for consideration. In *Texaco, Inc. v. FTC*, 118 U.S. App. D.C. 366, 336 F.2d 754 (1964), *vacated on other grounds*, 381 U.S. 739 (1965), the court found that a speech made by a commissioner clearly indicated that he had already to some extent reached a decision as to matters pending before that Commission. See also *Cinderella Career & Finishing Schools, Inc. v. FTC*, 138 U.S. App. D.C. 152, 158-161, 425 F.2d 583, 589-592 (1970). *Amos Treat & Co. v. SEC*, 113 U.S. App. D.C. 100, 306 F.2d 260 (1962), presented a situation in which one of the members of the Securities and Exchange Commission had previously participated as an employee in the investigation of charges pending before the Commission. In *Trans World Airlines v. CAB*, 102 U.S. App. D.C. 391, 254 F.2d 90 (1958), a Civil Aeronautics Board member had signed a brief in behalf of one of the parties in the proceedings prior to assuming membership on the board. See also *King v. Caesar Rodney School District*, 380 F. Supp. 1112 (Del. 1974)."

Fundamental fairness is necessary in any hearing. *Withrow v. Larkin*, *supra* (noting by citing cases that pre-formed opinions or bias is contrary to due process), as has been recognized in many cases. *E.g.*, *Llano v. Berglund*, 282 F.3d 1031, 1035-36 (8th Cir. 2002) (citing *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988), and noting that if decision-makers have already made up their minds, a due process violation occurs); *Klinge v. Lutheran Charities Association*, 523 F.2d 56, 60 (8th Cir. 1956) (entitlement to fairness in hearing, "before a panel of fair minded doctors"). *See also Shape v. Barnes County, North Dakota*, 396 F. Supp. 2d 1067, 1082 (D. N.D. 2005) (noting issues of impartial grievance committee).

The complaint and putative amended complaints stated causes of action since they challenged the investigations and decisions as contrary to fundamental fairness under the due process clause of the United States Constitution.

II. THIS CASE RAISES A SIGNIFICANT ISSUE: WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS HAS MISCONSTRUED FED. R. CIV. P. 8(a) AND 12(b)(6) IN DENYING PETITIONER'S MOTION TO AMEND AND IN DISMISSING HER COMPLAINT WITH PREJUDICE.

The reason that this Court should grant certiorari in this case is that it brings before the Court the question of whether a district court and circuit court of appeals have unduly scrutinized the complaint's

allegations in this case, in contravention of this Court's rules, Fed. R. Civ. P. 8(a) and 12(b)(6), to deny hearing her claims of constitutional due process under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution, when the complaint as filed and the motion to amend and putative amended complaint alleged intentional acts by the university and individual state actors that refused an impartial review of the asserted justifiable termination from employment as a tenured professor in the state university system. Application of Fed. R. Civ. P. 8(a) and 12(b)(6) to this case and others is an issue which the courts continue to struggle with even after the Court's ruling in a litany of cases, including *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), and progeny.

In *Johnson v. City of Shelby*, 135 S. Ct. 346, 347, 190 L.Ed.2d 309, 310, 2014 U.S. LEXIS 7437, at *3 (2014), the Court, in granting certiorari and reversing, concluded there are no heightened pleading requirements in a section 1983 complaint.

The complaint must satisfy pleading a "short and plain statement of the claim showing that the pleader is entitled to relief," under Fed. R. Civ. P. 8(a)(2). Pleading requirements are not unnecessarily stringent. *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L.Ed.2d 868, 874 (2009) observed, "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

A complaint's allegations, treated as true, should only be insufficient under a motion filed under Fed. R. Civ. P. 12(b)(6) when on their face, there is no possibility of relief. "[D]etailed factual findings are not required." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L.Ed.2d 929, 940 (2007). The District Courts and Courts of Appeals should not engage in speculation to whether one may prevail, even if they deem a complaint's allegations "improbable." The question is *not* whether the plaintiff will in all likelihood ultimately succeed, as noted in many decisions, *Bell Atlantic Corp. v. Twombly*, *supra*; *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 184, 125 S. Ct. 1497, 1510, 161 L.Ed.2d 361, 377 (2005) (noting the question in a 12(b)(6) motion is whether one is entitled to present evidence). *Denton v. Hernandez*, 504 U.S. 25, 33, 112 S. Ct. 1728, 1733, 118 L.Ed.2d 340, 350 (1992), "Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without factual development is to disregard the age-old insight that many allegations might be 'strange, but true; for truth is always strange, Stranger than fiction.'" *Id.* (citation omitted).

A federal court should grant a leave to amend a complaint freely as justice requires under Fed. R. Civ. P. 15(a)(2). *E.g.*, *Johnson v. City of Shelby*, 135 S. Ct. 346, 190 L.Ed.2d 309, 2014 U.S. LEXIS 7437 (2014). If a complaint's amendment would be futile, the federal courts may deny a motion to amend,

considering the pleading requirements cited above, but that cannot be said to be the case here.

Pleading a claim under the federal procedural rules requires only that one plead a claim, whether or not it may ultimately result in a favorable verdict. The complaint in this case specifically pleaded that the termination investigation was biased, that the individuals acted with the above-referenced malicious animus, and that the university president did not review the findings and evidence from the Committee, although he specifically stated he did so. Opinion and Order, 63 F. Supp. 3d at 917, App. 18. The complaints alleged the decision was influenced because the University received substantial tuition from Iraq. The complaints alluded to ulterior motives and improper financial considerations of financial payments from the Iraqi government. Complaint, App. 19-20, Amended Complaint, App. 146 (contained in the appendix of the Eighth Circuit Brief).

Petitioner alleged the termination was without any basis in fact and that it was based upon trivial reasons or those unrelated to the educational process. Amended Complaint, App. 148 (which is contained in the Appendix of the Eighth Circuit brief). In construing the allegations in this case, the District Court and Eighth Circuit (which adopted its reasoning) concluded no claim was stated under Fed. R. Civ. P. 12(b)(6). This was error.

One may not deprive a teacher of their occupation arbitrarily and capriciously as they are entitled

to constitutionally mandated due process by the Fourteenth Amendment. *Beilan v. Board of Public Educ.*, 357 U.S. 399, 405, 78 S. Ct. 1317, 1322, 2 L.Ed.2d 1414, 1419 (1958); *Adler v. Board of Educ.*, 342 U.S. 485, 493, 72 S. Ct. 380, 385, 96 L.Ed. 517, 524-25 (1952). There must be a fair process. *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975), explained the necessity of fairness and an even-hand, which Petitioner's complaint alleged was absent in this case. As noted in *Withrow*, *supra*:

> "Those cases in which due process violations have been found are characterized by factors not present in the record before us in this litigation and we need not pass upon their validity. In *American Cyanimid Co. v. FTC*, 363 F.2d 757 (CA6 1966), one of the commissioners had previously served actively as counsel for a Senate's subcommittee investigating many of the same facts and issues before the Federal Trade Commission for consideration. In *Texaco, Inc. v. FTC*, 118 U.S. App. D.C. 366, 336 F.2d 754 (1964), *vacated on other grounds*, 381 U.S. 739 (1965), the court found that a speech made by a commissioner clearly indicated that he had already to some extent reached a decision as to matters pending before that Commission. See also *Cinderella Career & Finishing Schools, Inc. v. FTC*, 138 U.S. App. D.C. 152, 158-161, 425 F.2d 583, 589-592 (1970). *Amos Treat & Co. v. SEC*, 113 U.S. App. D.C. 100, 306 F.2d 260 (1962), presented a situation in which one of the members of

> the Securities and Exchange Commission had previously participated as an employee in the investigation of charges pending before the Commission. In *Trans World Airlines v. CAB*, 102 U.S. App. D.C. 391, 254 F.2d 90 (1958), a Civil Aeronautics Board member had signed a brief in behalf of one of the parties in the proceedings prior to assuming membership on the board. See also *King v. Caesar Rodney School District*, 380 F. Supp. 1112 (Del. 1974)."

421 U.S. at 50, 95 S. Ct. at 1466, 43 L.Ed.2d at 725.

In construing allegations in a complaint, they must be treated as true and not without some heightened degree of scrutiny. *E.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 1960, 167 L.Ed.2d 929, 935-36 (2007); *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 184, 125 S. Ct. 1497, 1510, 161 L.Ed.2d 361, 377 (2005) (noting the question in a 12(b)(6) motion is whether one is entitled to present evidence). The courts may not disbelieve allegations. *Neitzke v. Williams*, 490 U.S. 319, 327, 104 L.Ed.2d 338, 348, 109 S. Ct. 1827, 1832 (1980) (noting that Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations).

In *Johnson v. City of Shelby*, 135 S. Ct. 346, 347, 190 L.Ed.2d 309, 310, 2014 U.S. LEXIS 7437, at *3 (2014), the Court wrote:

> "Federal pleading rules call for 'a short and plain statement of the claim showing

> that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. See Advisory Committee Report of October 1955, reprinted in 12A C. Wright, A. Miller, M. Kane, R. Marcus, and A. Steinman, Federal Practice and Procedure, p. 644 (2014 ed.) (*Federal Rules of Civil Procedure 'are designed to discourage battles over mere form of statement'*); 5 C. Wright & A. Miller, § 1215, p. 172 (3d ed. 2002) (Rule 8(a)(2) 'indicates that a basic objective of the rules is to avoid civil cases turning on technicalities'). *In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke §1983 expressly in order to state a claim.* See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L.Ed.2d 517 (1993) (a federal court may not apply a standard 'more stringent than the usual pleading requirements of Rule 8(a)' in 'civil rights cases alleging municipal liability'); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002) (imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)')."

Id. (emphasis supplied).

The District Court and Eighth Circuit used a more stringent standard of review of the complaint's

allegations than has been provided in the federal rules. This Court should grant certiorari to take the opportunity to clarify the proper standard in this teacher dismissal case.

CONCLUSION

It is for these reasons the Petitioner respectfully requests her Petition for a writ of certiorari be granted.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 15-1159

Olga Tarasenko

Plaintiff-Appellant

v.

University of Arkansas, et al.

Defendants-Appellees

Appeal from United States District Court
for the Eastern District of Arkansas – Little Rock

Submitted: September 23, 2015
Filed: October 1, 2015
[Unpublished]

Before LOKEN, BOWMAN, and MURPHY, Circuit Judges.

PER CURIAM.

Olga Tarasenko appeals the dismissal of her 42 U.S.C. § 1983 complaint alleging that her termination as a tenured biology professor at the University of

Arkansas at Little Rock violated her federal constitutional rights to substantive and procedural due process, and the subsequent denial of her motion for leave to file an amended complaint. After careful de novo review of the record, *see Zutz v. Nelson*, 601 F.3d 842, 848-50 (8th Cir. 2010), we affirm for the reasons stated in the district court's[1] orders dismissing Ms. Tarasenko's due process claims and denying her motion for leave to amend. *See* 8th Cir. Rule 47B.

[1] The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

OLGA TARASENKO PLAINTIFF

v. No. 4:14CV00417 JLH

UNIVERSITY OF ARKANSAS, et al. DEFENDANTS

ORDER

Olga Tarasenko was a tenured biology professor at the University of Arkansas at Little Rock. She was terminated for cause in the fall of 2012 allegedly for making discriminatory and threatening comments to a student. Tarasenko commenced this action alleging that the University and other defendants discriminated against her based on her sex and her national origin and violated her Fourteenth Amendment due process rights. She asserted claims for violations of due process, equal protection, and free speech rights, and she claimed that she was subjected to sex discrimination, national origin discrimination, and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. She also alleged several state law causes of action.

The Court granted the defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing Tarasenko's complaint without prejudice, while granting her the opportunity to seek leave to file an amended complaint. Tarasenko has filed a motion for leave to file an amended complaint and has attached her proposed amended complaint.

The defendants have objected to the proposed amended complaint on the grounds that it does not remedy the defects in the original complaint and therefore granting the leave to amend would be futile. Tarasenko did not file a brief with her motion for leave to file an amended complaint, nor did she respond to the arguments made by the defendants in their objection to the motion for leave to amend.

The proposed amended complaint alleges only one federal cause of action, i.e., Count I, a claim under 42 U.S.C. § 1983 that the defendants denied Tarasenko the due process of law guaranteed by the Fourteenth Amendment. All of the other counts in the proposed amended complaint allege state-law causes of action: Count VII, violation of the Arkansas Civil Rights Act; Count VIII, breach of contract; Count IX, tortious interference with contract; and Count X, outrage.[1]

The Court explained at length in its original Opinion and Order that Tarasenko's complaint failed to allege a plausible claim that her due process rights were violated. As the defendants point out, the proposed amended complaint is not in substance different from the original complaint. For the reasons previously stated in dismissing the original complaint

[1] The proposed amended complaint omits the following counts that were contained in the original complaint: Count II, equal protection; Count III, free speech; Count IV, Title VII sex discrimination; Count V, Title VII national origin discrimination; and Count VI, Title VII retaliation.

under Rule 12(b)(6), the proposed amended complaint would not withstand a motion to dismiss under Rule 12(b)(6). Therefore, the motion for leave to amend will be denied as futile. *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010). Tarasenko's federal claims are dismissed with prejudice.

Having disposed of Tarasenko's claims that are based on federal law, the remaining claims are state-law claims over which this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The Court may decline to exercise supplemental jurisdiction after dismissing all of the claims that arise under federal law. *Id.* § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 619 n.7, 98 L. Ed. 2d 720 (1988). The Eighth Circuit has said: "We stress the need to exercise judicial restraint and avoid state law issues wherever possible. We also recognize within principles of federalism the necessity to provide, great deference and comity to state court forums to decide issues involving state law questions." *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990).

Tarasenko's claims, for the most part, are based on allegations that the officials at the University of Arkansas failed to follow the University's own

procedures. These issues implicate state law and questions relating to the public policy of the State of Arkansas. They are, therefore, issues that are best addressed by the state courts. Out of deference and comity to the state courts, the Court declines to exercise supplemental jurisdiction over Tarasenko's state-law claims, *See Glorvigen v. Cirrus Design Corp.*, 581 F.3d 737, 749 (8th Cir. 2009).

CONCLUSION

For the reasons stated, Olga Tarasenko's federal-law claims are dismissed with prejudice because the Court declines to exercise supplemental jurisdiction over her state-law claims, those claims are dismissed without prejudice.

IT IS SO ORDERED this 19th day of December, 2014.

/s/ J. Leon Holmes
J. LEON HOLMES
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

OLGA TARASENKO PLAINTIFF

v. No. 4:14CV00417 JLH

UNIVERSITY OF ARKANSAS, et al. DEFENDANTS

JUDGMENT

Pursuant to the Order entered separately today, Olga Tarasenko's claims arising under federal law are dismissed with prejudice. Her claims arising under state law are dismissed without prejudice.

IT IS SO ORDERED this 19th day of December, 2014.

/s/ J. Leon Holmes
J. LEON HOLMES
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

OLGA TARASENKO PLAINTIFF

v. No. 4:14CV00417 JLH

UNIVERSITY OF ARKANSAS, et al. DEFENDANTS

OPINION AND ORDER

Olga Tarasenko was a tenured biology professor at the University of Arkansas at Little Rock.[1] She was terminated for cause in the fall of 2012 for allegedly making discriminatory and threatening comments to a student. Tarasenko alleges that the University and other defendants discriminated against her due to her sex and her national origin and violated her Fourteenth Amendment due process rights during the investigation and appeals process. Based on those allegations, she has asserted claims for violations of her due process, equal protection, and free speech rights. She also alleges that she was subjected to sex discrimination, national origin discrimination, and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Lastly, she alleges under state law that the defendants violated the Arkansas Civil Rights Act (Ark. Code Ann. § 16-123-105)[2], breached her contract, tortiously

[1] UALR is a campus of the University of Arkansas System.

[2] The Arkansas courts look to federal courts for guidance when interpreting the Arkansas Civil Rights Act. *Island v. Buena*

(Continued on following page)

interfered with her contract, and committed the tort of outrage.

The defendants have moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Tarasenko has responded, and the defendants have replied. For the following reasons, the motion to dismiss is granted.

I.

Tarasenko began as a tenure track assistant professor in the UALR biology department on July 1, 2005.[3] ¶ 34. She was granted tenure on April 13, 2011, and was promoted to associate professor effective July 1, 2011. ¶¶ 35 and 36.

In the spring of 2009, a graduate student named Souzan Eassa selected Tarasenko as her major Ph.D. advisor. ¶ 38. On February 14, 2012, Eassa submitted her proposal to her dissertation committee, which did not approve of it. ¶¶ 41 and 42. Eassa blamed Tarasenko for the lack of approval and confronted her on February 15, 2012, as she was entering a class

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Vista Resort, 352 Ark. 548, 556, 103 S.W.3d 671, 675 (2003). Consequently, Tarasenko's Arkansas Civil Rights Act claims stand or fall with her federal civil rights claims and will not be analyzed separately. *Gladden v. Richbourg*, 759 F.3d 960, 969 (8th Cir. 2014).

[3] This statement of facts is taken from Tarasenko's complaint. All factual citations are to the paragraph numbers in the complaint, Document # 1.

that she was about to teach. ¶¶ 43 and 44. Eassa claims that Tarasenko said, in front of the class, that Eassa was Iraqi and would kill a particular student. ¶ 46. On February 16, 2012, according to Eassa, Tarasenko said that she would kill Eassa and "made a gun gesture with her hand and pointed it at Plaintiff [sic]." ¶¶ 48 and 49. According to Tarasenko, no reports were made regarding these two incidents for two months. ¶¶ 47 and 50.

On May 8, 2012, Tarasenko suggested that Eassa apply for an "Incomplete" grade because otherwise Eassa would receive no credit. ¶ 51. The following day, Tarasenko filed an Academic Integrity Report on Eassa notifying the University that Eassa had committed academic fraud. ¶ 52. Sometime after this, Haydar Al-Shukri, who was chairman of the UALR Applied Science department, solicited written statements from students setting forth allegations against Tarasenko, including those pertaining to the events of February 15 and 16. *Id.* ¶ 54. On May 11, 2012, University administrators, including Patrick Pellicane (Dean of the graduate school), Al-Shukri, Michael Gealt (Dean of the College of Science and Mathematics), and Johanna Miller Lewis (Associate Dean of the graduate school) held a meeting with Eassa and several other students. ¶ 53. The same administrators, along with John Bush (Chairman of the Biology Department) and Tom Lynch[4] held a meeting on May

[4] Lynch is not named as a defendant in the complaint, nor is his position identified.

15, 2012 which resulted in Pellicane and Gealt visiting the University legal counsel, Mary Abernathy, after which Pellicane wrote a letter to Tarasenko outlining the allegations against her but not naming her accusers. ¶¶ 57 and 58.

On May 29, 2012, Interim Provost Sandra Robertson, Associate Vice Chancellor Christina Drale, Pellicane, Gealt, Lewis, and Al-Shukri held a meeting with Tarasenko to discuss the allegations. ¶ 65. Prior to this meeting, Lewis announced that she was assuming the role of Eassa's faculty advocate. ¶ 69. Tarasenko alleges that investigating student allegations against a professor is outside the scope of Drale and Lewis' job responsibilities. ¶¶ 67 and 68. At the May 29 meeting, Tarasenko informed the administrators that Bush made the following statements to her between 2006 and 2012: "No grants-gulag," "No Happy Students-gulag," and "No publications-gulag." ¶¶ 75 and 76. A gulag is a concentration camp where the former Soviet Union imprisoned people and Tarasenko's country of origin is a former member of the Soviet Union.[5] ¶¶ 77 and 78.

Pellicane initiated various meetings with students and administrators even though no University policy provided for him to do so. ¶¶ 83-86. Gealt admitted he thought Al-Shukri was biased, but Al-Shukri continued his involvement with the investigation.

[5] The complaint never states which of the former members of the Soviet Union is Tarasenko's country of origin.

¶ 88-89. On June 6, 2012, Gealt and Pellicane authored a letter to Robertson stating there was sufficient evidence to pursue further investigation of the allegations against Tarasenko. ¶¶ 90 and 94. Al-Shukri, Drale, and Abernathy also were involved in drafting this letter. ¶¶ 90-93.

A meeting was held with Tarasenko, Eassa, Drale, and Mindy Wirges (from the human resources department) regarding Eassa's grade appeal even though no policy exists allowing or requiring personnel from the human resources department to be present at such a meeting. ¶¶ 97-103. Although Drale provided Wirges with the documents that Eassa had provided supporting her appeal, she did not provide Wirges with any documentation that Tarasenko had provided. ¶¶ 98-99.

On July 23, 2012, Bush informed Tarasenko that the allegations against her were being investigated and that her fall duty assignments were being changed pending the outcome. ¶ 106. Two days later, on behalf of Eassa, Lewis filed a charge of discriminatory harassment against Tarasenko due to the February 14 and 15 incidents. ¶ 107. Wirges then initiated a human resources investigation into these incidents and interviewed Eassa and the other students making the accusations. ¶¶ 108 and 110. She also met with Tarasenko on August 17, 2012. ¶ 111. The students' identities were not divulged during that meeting. ¶¶ 111-13. On August 25, 2012, Tarasenko provided information controverting the allegations, including statements from other students present when the

incidents took place. ¶ 115. A meeting took place on August 30, 2012 between Anderson, Gealt, Robertson, Drale, Wirges, Pellicane and Bush to discuss Tarasenko's employment. ¶ 133. This meeting was not authorized or required by any University policy relating to investigations. ¶¶ 134-35.

During her investigation, Wirges did not interview the students who provided information opposite to that provided by Tarasenko's accusers. ¶ 116. When Wirges concluded the investigation on August 27, she reported that her investigation substantiated the allegations. ¶¶ 117-18. Wirges attempted to conduct her investigation in accordance with the staff handbook, even though Tarasenko is governed by the faculty handbook, not the staff handbook; and even then Wirges did not comply with the staff handbook. ¶¶ 119-22. The University policies require: a copy of the discrimination charge must be provided to the accused; a discrimination charge should be filed within thirty days of the incident or a written waiver request be obtained and notification of approval must be maintained in the file; an initial hearing with certain parties; and the accused must be given seven days to respond to the discrimination charge; but none of these procedures was followed. ¶¶ 123-28.

Tarasenko also alleges that Wirges violated University policy by failing to inform Tarasenko of additional time needed to complete the investigation, failing to inform her of the status of the investigation, failing to inform her of the revised deadline for the completion of the investigation, failing to inform her

and her supervisor of the investigative findings, failing to discuss alternative conflict resolution, and failing to provide Tarasenko with an opportunity to provide a rebuttal statement for the file and investigation report. ¶¶ 129-32.

On September 18, 2012, Gealt informed Tarasenko he would recommend her termination the next day. ¶ 136. Tarasenko still had not been provided with her accusers' identities. ¶ 137-38. On September 19, 2012, Gealt sent a memorandum to Robertson and UALR Chancellor Joel Anderson, recommending that Tarasenko be terminated and that she be suspended immediately. ¶¶ 139-40. Robertson and Anderson approved the termination recommendation. ¶ 141. Anderson also determined that an emergency existed that required immediate suspension. ¶ 143. These determinations were discussed with the President of the University, Donald L. Bobbitt, and, ultimately, Bobbitt made the final decision to terminate Tarasenko. ¶ 141-44.

When Tarasenko requested that an informal faculty hearing committee review her case, her request was declined; but she requested a formal faculty appeal hearing review it, and that request was approved. ¶¶ 145-47. The faculty appeal committee conducted a hearing between April 15 and May 2, 2013, receiving seven days of testimony, hundreds of pages of documents as evidence, and closing briefs. ¶ 148 and ¶ 150. By a vote of four to one, the committee found that the University had failed to provide sufficient evidence to dismiss Tarasenko's tenure for

cause and that it had violated Tarasenko's due process rights in several instances. ¶¶ 152-53.

Bobbitt rejected the committee's findings and terminated Tarasenko. ¶ 156. The dismissal letter stated:

> I have reviewed the recommendations of Chancellor Anderson, Dean Gealt and the Grievance Panel concerning your dismissal . . .
>
> * * *
>
> As part of my review, I considered the entire record submitted to me (including the testimony, written records, the exhibits) and I agree with Chancellor Anderson and Dean Gealt that "cause", as defined by Board Policy 405.1, exists to support your dismissal for cause. Based upon my professional judgment and my independent review of the record, I find that your conduct toward students and your dishonesty when questioned by University Officers indicates an unwillingness to perform your duties and fulfill your responsibilities to the University.

Document # 1 at 67. Tarasenko appealed this decision to the Board of Trustees, which upheld it. ¶¶ 158-59. She then filed a timely EEOC charge and received a Dismissal and Notice of Rights. ¶ 160.

II.

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required, the complaint must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). The court must accept as true all of the factual allegations contained in the complaint, *Twombly*, 550 U.S. at 572, 127 S. Ct. at 1975, and must draw all reasonable inferences in favor of the nonmoving party. *Cole v. Homier Distrib. Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010). The complaint must contain more than labels, conclusions, or a formulaic recitation of the elements of a cause of action, which means that the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.

III.

A. Substantive Due Process[6]

The Eighth Circuit has held that a tenured professor at a state university has "a substantive due process right to be free from discharge for reasons that are 'arbitrary and capricious,' or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact." *Morris v. Clifford*, 903 F.2d 574, 577 (8th Cir. 1990). *See also Herts v. Smith*, 345 F.3d 581, 587 (8th Cir. 2003); *O'Neal v. Batesville Sch. Dist. No. 1*, E.D. Ark. No. 4:11CV00221-KGB, 2013 WL 593515, at *3 (E.D. Ark. February 15, 2013). "This is a high standard, as '[s]ubstantive due process is concerned with violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally

[6] The University moved to dismiss Tarasenko's section 1983 monetary damage claims against it and its officials in their official capacities based on Eleventh Amendment immunity. In response, Tarasenko has stated that she is asserting no such claims, so the Court will not address the issue. The University also argues that the official capacity claims for injunctive relief against the administrators other than Bobbitt must be dismissed because Bobbitt is the only person who can reinstate her and because the complaint does not identify a policy or custom that would permit relief under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Because the complaint fails to plead a claim upon which relief may be granted under section 1983, the Court need not reach those issues.

shocking to the conscience.'" *Christiansen v. West Branch Community Sch. Dist.*, 674 F.3d 927, 937 (8th Cir. 2012) (quoting *C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 634 (8th Cir. 2010)). "The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Id.* at 938 (quoting *Bishop v. Wood*, 426 U.S. 341, 350, 96 S. Ct. 2074, 48 L. Ed. 2d 984 (1976)).

In Tarasenko's response brief, she states that examples of truly irrational and sufficiently outrageous conduct include:

> Defendant Bobbitt's one paragraph termination in opposition to the lengthy opinion of the Faculty Appeal Hearing Committee which took 7 full days of testimony from witnesses in this matter and reviewed hundreds of pages of evidence. Defendant Bobbitt did not attend any of this hearing, review transcripts of that hearing, or review any of the evidence or briefs submitted at that hearing . . . Wirges's abject failures throughout her 'investigation' of this matter including the complete lack of knowledge related to the different handbooks . . . the inappropriate influence exerted on the entire process by Defendant Lewis . . . [c]omplete failures to comply with the investigation process by various Defendants are listed throughout the Complaint.

Document #17 at 7. But these are procedural complaints and allegations of negligence, not examples of

conduct that would violate Tarasenko's right to substantive due process.

Bobbitt terminated Tarasenko based on the allegations that Tarasenko had made discriminatory and threatening remarks to a student – that is the conduct on which Tarasenko's substantive due process claim must be based. Tarasenko does not allege that Bobbitt's decision to terminate her employment was inspired by malice or sadism, nor does she allege that the reasons given for her termination are trivial, unrelated to the educational process, or wholly unsupported by a basis in fact. Tarasenko alleges in her complaint that Eassa reported that she made an "ethnically charged comment" in class, "saying to another student that Eassa was Iraqi and would kill the other student," and that Tarasenko threatened to kill Eassa. ¶¶ 47 and 49. The comments that Eassa reported are grounds for termination of Tarasenko's employment, and her report of them is some factual basis for them. Tarasenko's substantive due process rights were not violated. *Cf. Christiansen*, 674 F.3d at 938 (complaint alleging that a school bus driver was terminated based on false accusations that the school knew or should have known were false failed to state a substantive due process claim); *Herts*, 745 F.3d at 588 (non-renewal of a teacher contract when the teacher testified in a civil rights case against the school district did not violate the teacher's substantive due process rights).

B. Procedural Due Process

To establish a violation of due process, the plaintiff must prove that she was deprived of some life, liberty, or property interest without due process. *De Llano v. Berglund*, 282 F.3d 1031, 1034 (8th Cir. 2002). While Tarasenko's status as a tenured professor gave her a property interest in continued employment, the allegations in her complaint do not show that her due process rights were violated. "A public employee with a protected property interest in continued employment receives sufficient due process if he receives notice, an opportunity to respond to the charges before his termination, and post-termination administrative review." *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001). "A pre-deprivation hearing need only provide the employee with 'oral or written notice of the charges against him [or her], an explanation of the employer's evidence, and an opportunity to present his [or her] side of the story.'" *Floyd-Gimon v. Univ. of Ark. For Med. Sciences ex rel. Bd. of Trustees of Univ. of Ark.*, 716 F.3d 1141, 1146 (8th Cir. 2013) (quoting *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985)). "[T]he pre-termination 'hearing,' though necessary, need not be elaborate." *Loudermill*, 470 U.S. at 545, 105 S.Ct. at 1495.

Tarasenko first received notice of the allegations against her in a meeting without her accusers named on May 15, 2012. ¶¶ 55-57. Sometime after this meeting, a letter outlining the allegations was provided

to her. ¶ 57. University administrators met with Tarasenko on May 29, 2012, to discuss the allegations. ¶¶ 65 and 82. On August 17, 2012, Tarasenko met with Wirges regarding the ongoing investigations and still was not informed of her accusers' identities. ¶ 111. Tarasenko submitted information to Wirges on August 25, 2012 controverting the allegations. ¶ 115. Taking all the facts alleged in the complaint as true, as late as September 18, 2012, Tarasenko had not been informed of her accusers' identities. ¶ 136. However, by her own admission Tarasenko knew enough to submit information controverting the allegations on August 25, 2012. ¶ 115. She had notice of the charges against her and an explanation of the evidence.

Tarasenko was also given the opportunity to respond. As noted, a meeting took place on May 29, 2012, during which administrators discussed the allegations with Tarasenko. ¶ 65. Tarasenko submitted information in opposition to the allegations on August 25, 2012. ¶ 115. Thus, she had an opportunity to respond to the allegations, and she took advantage of that opportunity to do so.

In addition, a faculty appeal committee held hearings between April 14 and May 2, 2013. ¶ 148. Tarasenko was represented by counsel and participated in the hearings. Document #1 at 30. Tarasenko also submitted a closing brief. ¶ 150. Nowhere does her complaint allege that the identities of her accusers were withheld from her until the hearing or a date so close to the hearing that she could not prepare.

Although the faculty appeal committee concluded that there was not enough evidence to support her termination, Bobbitt disagreed and terminated Tarasenko for cause. ¶¶ 152-53 and 156. A post-termination administrative review occurred when Tarasenko appealed this decision to the Board of Trustees. ¶¶ 158-59. Tarasenko was invited to attend and was allowed to have representation at the Board meeting. Document #1 at 67-68. Thus, Tarasenko received both a pre-deprivation hearing and a post-termination administrative review, during which she was allowed to be represented by counsel.

While the University may have violated its procedures during the investigation, this does not amount to a violation of the constitutional right to due process. "[F]ederal law, not state law or [University] policy, determines what constitutes adequate procedural due process." *De Llano*, 282 F.3d at 1035. "Minimum procedural requirements are a constitutional guarantee and they cannot be enlarged or reduced by the internal [University] handbook outlining termination procedures." *Id.* Accordingly, Tarasenko's complaint fails to state a claim upon which relief can be granted for a violation of her rights to procedural due process.

C. Sex and National Origin

"The Eighth Circuit Court of Appeals has held that a § 1983 claim based on alleged violation of equal protection in the employment context is analyzed in

the same way as a Title VII claim of sex, race, or religious discrimination." *Mummelthie v. City of Mason City, Ia.*, 873 F. Supp. 1293, 1333 (N.D. Iowa 1995) *aff'd* 78 F.3d 589 (8th Cir. 1996). At the summary judgment stage, "if the plaintiff lacks direct evidence of discrimination, the plaintiff may survive the defendant's motion for summary judgment by creating an inference of unlawful discrimination under the burden-shifting framework established in *McDonnell Douglas.*" *McGinnis v. Union Pacific R.R.*, 496 F.3d 868, 873 (8th Cir. 2007). However, "a plaintiff need not plead facts establishing a prima facie case of discrimination under *McDonnell Douglas* in order to defeat a motion to dismiss." *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1014 (8th Cir. 2013). Still, the plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965). "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Id.* (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 998, 152 L. Ed. 2d 1 (2002)).

In *Hager*, the court held that the allegation that the plaintiff "was discharged under circumstances summarily [sic] situated nondisabled males, younger people, or those that did not require leave or accommodation were not" was insufficient to raise the allegations above a speculative level. *Id.* at 1014-15.

Tarasenko alleges: that "Plaintiff's compensation was less than similarly situated male professors";[7] that "Defendants' conduct constitutes gender discrimination"; that the "acts and omissions . . . against Plaintiff . . . amount to disparate impact based on gender. Specifically, Defendants' policies and practices relating to compensation, utilization of start up funds, and investigation of student allegations have a disparate impact on female professors;" and that the defendants "disciplined and terminated Plaintiff because of her gender . . . Defendants treated male employees who engaged in the same or similar alleged conduct more favorably." ¶¶ 162, 190, 198, and 199. Although Tarasenko's complaint gives a blow-by-blow account of the events that led to her termination, her sex discrimination allegations are conclusory, unsupported by any factual allegations. She identifies no comparable male employees who were treated differently, nor does she make any other factual allegations that would raise her sex discrimination claim above the speculative level.

Tarasenko's claim that she was subjected to discrimination based on her national origin are similarly conclusory: she alleges that Gealt is of Russian descent and engaged in the conduct described in her complaint because he believed that she was of Ukrainian descent; that the acts and omissions of the defendants "amount to disparate treatment

[7] Despite this allegation, Tarasenko has not alleged a claim under the Equal Pay Act, 29 U.S.C. § 206(d).

based on national origin"; that "Defendants' policies and practices relating to compensation, utilization of start up funds, and investigation of students allegations have a disparate impact on people of former Soviet Union descent"; and that "Defendants treated employees outside of Plaintiffs' protected class who engaged in the same or similar alleged conduct more favorably." ¶¶ 164-66, 202-04. These conclusory allegations fall short of the pleading standards of the Federal Rules of Civil Procedure as interpreted by *Twombly* and *Hager*.

While Tarasenko alleges that Bush made discriminatory comments regarding her national origin, these comments are not evidence of direct discrimination and are not enough to withstand a motion to dismiss. "Direct evidence is evidence that establishes 'a specific link between the [alleged] discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the employer's decision.'" *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 933 (8th Cir. 2006) (quoting *Putman v. Unity Health Sys.*, 348 F.3d 732, 735 (8th Cir. 2003)). It does not include "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process itself." *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 635 (8th Cir. 1998) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 1804-05, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring)).

The discriminatory remarks were allegedly made by Bush between 2006 and 2012 and include, "'No grants-gulag,' 'No Happy Students-gulag,' and 'No publications-gulag.'" ¶ 76. Tarasenko informed the administrators for the first time about this on May 29, 2012. ¶¶ 70 and 75. According to Tarasenko's complaint, Bush was involved in the decision-making process to the following extent: he was Tarasenko's direct supervisor, took part in the investigation, informed Tarasenko that the allegations were being investigated on July 23, 2012 and participated in a meeting to discuss Tarasenko's employment on August 30, 2012. ¶¶ 21-22, 106, and 133. Tarasenko does not allege that Bush was an actual decision-maker in this case, nor that there was a connection between Bush's comments and the decision to terminate her employment. Gealt, Anderson and Robertson made the termination recommendation to Bobbitt, and Bobbitt made the final decision to terminate Tarasenko. ¶¶ 139-44.

In short, Tarasenko's complaint fails to state a claim upon which relief can be granted for discrimination based on her national origin.

D. Free Speech

Tarasenko claims that she was terminated in retaliation for exercising her right to free speech. She generally describes her speech as "regarding educational quality, academic grading, grade appeals, and academic integrity." ¶ 193. More specifically, she

alleges that she reported academic fraud by Eassa to UALR (¶ 52) and that she reported academic violations to the faculty senate executive committee (¶ 95).

"In the First Amendment context, when deciding whether a public employee's speech is protected, the threshold question is whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern." *Hylla v. Transp. Commc'ns Int'l Union*, 536 F.3d 911, 917 (8th Cir. 2008) (quotations, citations, and alterations omitted). "To decide whether speech addressed a matter of public concern, we examine the speech's content, form, and context." *Bausworth v. Hazelwood Sch. Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993). The focus is on the employee's role in conveying the speech rather than the public's interest in the topic. *Id.* "When focusing on the employee's role, we consider whether the employee attempted to communicate the speech to the public at large and the employee's motivation in speaking." *Id.* "Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment." *Buazard v. Meridith*, 172 F.3d 546, 548 (8th Cir. 1999). "When a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern." *Id.*

Tarasenko was a professor at a public university and, according to her complaint, in that capacity reported academic fraud and academic violations to her employer. Her motivation in providing this information was not to communicate it to the public at

large but to communicate it to the University; and her role was that of a University employee, not a concerned citizen. This was not a speech of public concern and, therefore, was not protected speech under the First Amendment. *Cf. McCullough v. Univ. of Ark. for Med. Sciences*, 559 F.3d 855, 865-67 (8th Cir. 2009) (an employee's internal complaints about sexual harassment were not matters of public concern); *Kozisek v. Cnty. of Seward, Neb.*, 539 F.3d 930, 937 (8th Cir. 2008) (the first amendment "does not protect expressions made as part of the employee's job duties"); *Wingate v. Gage County Sch. Dist. No. 34*, 528 F.3d 1074, 1081 (8th Cir. 2008) (speech "as an employee concerned with the District's internal policies and practices" was not a matter of public concern).

Tarasenko's complaint fails to state a claim upon which relief may be granted for violation of her right to free speech under the First Amendment.

E. Title VII Retaliation

Tarasenko alleges that the defendants retaliated against her for engaging in activity protected by Title VII, including but not limited to her complaints of discrimination in the work place and comments about her national origin. ¶ 207. The factual basis for this claim appears to be Tarasenko's allegation that at a meeting on May 29, 2012, with Robertson, Pellicane, Gealt, Drale, Lewis, and Al-Shukri regarding Eassa's allegations against her, she informed them of ethnic

comments directed toward her by Bush between 2006 and 2012. ¶¶ 65-75. The defendants note that these comments were made more than seventeen months prior to the date that Bobbitt terminated her employment (November 18, 2013) and four months prior to the date that Gealt and Robertson recommended that she be terminated (September 19, 2012). The defendants argue that as a matter of law a four to eighteen-month time-gap is too long to support the inference of retaliation and that, in any event, Tarasenko does not allege that Bobbitt knew that she had reported Eassa's ethnic comments at the meeting on May 29, 2012. Tarasenko has not responded to defendants' arguments on this point. Therefore, the defendants' motion to dismiss Tarasenko's Title VII retaliation claims are granted.

F. State-Law Claims Against the University

The defendants have moved to dismiss all of Tarasenko's state-law claims against the University based on sovereign immunity. It is well settled that the University of Arkansas is the State of Arkansas for purposes of the Eleventh Amendment and therefore is immune from suit. *See Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615, 622 (8th Cir. 2001); *Buckley v. Univ. of Ark. Bd. of Trustees*, 780 F. Supp. 2d 827, 830 (E.D. Ark. 2011). Furthermore, the University is immune from suit on Tarasenko's state-law claims by virtue of Article 5, Section 20 of the Arkansas Constitution. *See Arkansas Tech. Univ. v. Link*, 341 Ark. 495, 501-02, 17 S.W.3d 809, 813

(2000); *Grine v. Bd. of Trustees, Univ. of Ark.*, 338 Ark. 791, 798, 2 S.W.2d 54, 59 (1999). That immunity extends to actions against state officials in their official capacities. *Brown v. Ark. State Heating, Ventilation, Air Conditioning and Refrigeration, Licensing Bd.*, 336 Ark. 34, 38, 984 S.W.2d 402, 403-04 (1999). Consequently, all of Tarasenko's state-law claims against the University and the University administrators in their official capacities must be dismissed.

G. Tortious Interference With Contract

Tarasenko alleges that the individual defendants tortiously interfered with her contract with the University. "A party to a contract and its employees and agents, acting within the scope of their authority, cannot be held liable for interfering with the party's own contract." *Faulkner v. Ark. Children's Hosp.*, 347 Ark. 941, 959, 69 S.W.3d 393, 405 (2002). All of the actions taken by the individual defendants in this case were actions taken in their capacities as agents and employees of the University. Therefore, the complaint fails to state a claim upon which relief can be granted for tortious interference with a contract.

H. Tort of Outrage

To establish the tort of outrage under Arkansas law, a plaintiff must prove: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of

his conduct; (2) the conduct was extreme and outrageous, beyond all possible bounds of decency, and was utterly intolerable in a civilized society; (3) the defendant's actions were the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Crawford Cnty. v. Jones*, 365 Ark. 585, 597, 232 S.W.3d 433, 442 (2006). The Arkansas Supreme Court "takes a strict view in recognizing an outrage claim, particularly in the context of employment relationships." *Id.* Tarasenko's complaint does not meet this strict standard.[8]

CONCLUSION

Olga Tarasenko's complaint fails to state a claim upon which relief may be granted and therefore is dismissed without prejudice. If Tarasenko wishes to file an amended complaint, she may seek leave to do so within thirty days from the entry of this Opinion and Order. If she fails to seek leave to amend her complaint within thirty days, a judgment will be entered dismissing this action without prejudice.

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[8] Because all of Tarasenko's claims are dismissed, the Court will not address at this time the issues of whether the individual defendants are statutorily immune pursuant to Ark. Code Ann. § 19-10-305(a) and whether Tarasenko has stated a claim for punitive damages.

IT IS SO ORDERED this 23rd day of October, 2014.

/s/ J. Leon Holmes
J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-1159

Olga Tarasenko

Appellant

v.

University of Arkansas, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:14-cv-00417-JLH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Smith did not participate in the consideration or decision of this matter.

November 04, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans