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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DR. LARRY CUNNINGHAM,

Plaintiff-Appellee (21-6005),
Plaintiff-Appellant (21-6174),

v.

DAVID

COUNSEL

ARGUED: Joe F. Childers, CHILDERS & BAXTER, PLLC, Lexington, Kentucky, for Plaintiffs. Bryan H. Beauman, STURGILL, TURNER, BARKER & MOLONEY, PLLC, Lexington, Kentucky, for Defendants. **ON BRIEF:** Joe F. Childers, CHILDERS & BAXTER, PLLC, Lexington, Kentucky, for Plaintiffs. Bryan H. Beauman, Donald C. Morgan, STURGILL, TURNER, BARKER & MOLONEY, PLLC, Lexington, Kentucky, William E. Thro, UNIVERSITY OF KENTUCKY, Lexington, Kentucky, for Defendants. Ronald G. London, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, Washington, D.C., for Amicus Curiae in 21-6172.

SUTTON, C.J., delivered the opinion of the court in which BATCHELDER, J., joined, and DONALD, J., joined in part. DONALD, J. (pp. 19–23), delivered a separate opinion concurring in all but Parts III.A.1. and III.B.2. of the majority opinion.

OPINION

SUTTON, Chief Judge. The University of Kentucky investigated two dentistry professors for entering false data about whether they, or their students, had performed services for patients at a university clinic and whether they, or the clinic, should be paid for those services. While the investig770 gAQ0.00000912nive7p2s

On top of their salaries as professors, Cunningham and Shehata received pay for their

In October 2018, Short briefly met with Cunningham and Shehata to inform them he was almost done with his investigation and asked if they had any more information to provide. Short emailed each of them the next day to offer an opportunity to respond to the investigation "in writing." CR.92-22 at 2; SR.107-22 at 1. Neither professor responded to the substance of the allegations.

On January 16, 2019, Provost David Blackwell removed Kyrkanides, and Doctor Larry Holloway stepped in as Interim Dean.

The next day, Blackwell and Short met with Cunningham to tell him that the University would start dismissal proceedings unless he resigned. Cunningham asked if he could wait until June. Blackwell told Cunningham that he could remain there until June but that he could not see clinic patients in the interim.

Shehata, meanwhile, sent a letter to Blackwell explaining his actions. In June, Shehata and Blackwell met again, along with Holloway. After the meeting, Blackwell renewed Shehata's teaching contract but continued to prevent him from doing clinical work. Holloway signed Shehata's contract on July 2, 2019.

After Shehata and the College agreed to the new contract, Thro offered to allow him to resume clinical duties if he satisfied certain terms. Foremost among the terms, Thro required that Shehata admit that he "intentionally altered patient notes which resulted in false documentation being submitted to third-party payors." SR.1-2 at 55. Shehata refused. In September 2019, Thro informed him that his employment would end nine months later on June 30, 2020. One week after leaving the University, Shehata began working as an assistant professor and predoctoral program director at the School of Dentistry at the University of Maryland at Baltimore.

Shehata and Cunningham sued the University and various administrators, including Blackwell, Holloway, and Thro. Each raised a slew of federal and state law claims, including due process claims under the Fourteenth Amendment and retaliation claims under the First and Fourteenth Amendments.

The parties filed cross-motions for summary judgment. The district court, as an initial matter, allowed the professors' state law claims for breach of contract and wage-and-hour violations to proceed as well as a defamation claim by Cunningham against Blackwell. *See* Ky. Rev. Stat. §§ 45A.245, 337. Those claims are not at issue in this appeal.

The district court separately permitted the professors' due process claims regarding the suspension of their clinical duties to proceed, finding genuine issues of material fact and denying qualified immunity to Blackwell, Holloway, and Thro. It rejected as a matter of law three other federal claims: a due process claim by Shehata about the timing of his departure, a free speech claim by Cunningham that administrators retaliated against him for giving testimony in another case against the dean, and a free speech claim by Shehata that the administrators did not renew his contract because he refused to sign the sworn statement.

Phillips v. McCollom, 788 F.3d 650, 653 (6th Cir. 2015). If so, the question becomes whether the state actors provided adequate process. *Id.* The answer turns on three factors: the government's interest, the individual's stake in the matter, and the suitability of the procedures. *Gilbert v. Homar*, 520 U.S. 924, 931–32 (1997).

This "flexible" inquiry is more standard than rule, more guidance than formula. *Id.* at 930 (quotation omitted). Different circumstances call for different processes. While notice and an opportunity to be heard remain the hallmarks of due process, they need not necessarily arrive before the deprivation does. *Id.* While "some kind of a hearing" generally must occur before the State fires a tenured employee, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 & n.7 (1985), the same is not true for other discipline. When the State imposes a lighter penalty, such as a suspension, a post-deprivation hearing or a combination of pre- and post-deprivation safeguards may suffice. *Gilbert*, 520 U.S. at 932; *Ramsey v. Bd. of Educ. of Whitley Cnty.*, 844 F.2d 1268, 1273

professors' accounts and offered them a chance to respond in writing. From the outset, he emphasized that the situation was serious and listened to the professors' concerns. In their meetings with Blackwell, both Cunningham and Shehata asked him to delay any dismissal proceedings, and he did just that.

letters. Any uncertainty about whether additional evidence existed did not prevent them from engaging with the allegations in their January 2019 letters. The administrators reasonably could conclude that the underlying evidence offered little incremental procedural value.

Cunningham and Shehata, fourthly, say that their post-deprivation process came too late. But they sent letters within weeks and had follow-up meetings with the administrators within a few months of the revocation of their clinical duties. Without more, it is difficult to maintain that a few months' delay became constitutionally dilatory. *See Loudermill*, 470 U.S. at 547 (upholding nine-month delay in providing post-deprivation adjudication).

The dissent offers three other reasons of its own to question the procedures the administrators used: the informality of the proceedings, the lack of an opportunity to call witnesses, and the partiality of the decisionmakers. At the threshold, the professors' failure to mention these points suggests that they probably do not think that resolving the alleged deficiencies would have made the proceedings any fairer. In any event, the Due Process Clause did not clearly require the administrators to proceed differently.

Start with the informal nature of the meetings. It is function, not formality, that guides our analysis. *See Buckner*, 901 F.2d at 495 ("While the charges against him were not formally presented, Buckner knew the gist of the allegations against him.").

Second, the dissent objects that the administrators should have given the professors the chance to call witnesses. The professors have not explained which witnesses they would have called and for what purpose. Without specifics, we cannot conclude that these additional safeguards would have offered "probable value" relative to the procedures used. *Gilbert*, 520 U.S. at 931 (quotation omitted).

As a third offensive, the dissent questions the ad

follow a suspension. To the contrary, "[m]ere familiarity with the facts of a case" or taking "a position, even in public, on a policy issue related to the dispute" does not disqualify a decisionmaker without a specific showing of bias. *Hortonville Joint Sch. Dist. No. 1 v.* , 426 U.S. 482, 493 (1976); *see Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 926–27 (6th Cir. 1988); *Riggins v. Goodman*, 572 F.3d 1101, 1111–13 (10th Cir. 2009). No such showing exists here.

Finally, the dissent faults us for asking the professors to do too much to overcome qualified immunity. But we do not demand a case on all fours, only one with enough overlap to place the constitutional question beyond dispute. Due process is flexible and fact intensive. *Cafeteria & Rest. Workers Union, Loc. 473 v. McElroy*, 367 U.S. 886, 895 (1961). The more discretion a constitutional guarantee gives a state actor, the less likely it will be clearly violated in a case without similar facts. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam). We have no such case here, and the professors have not otherwise placed the unconstitutionality of the administrators' conduct "beyond debate." *Id.* at 1152 (quotation omitted).

2.

Cunningham separately seeks relief for constructive discharge—that the suspension made his job so miserable that it forced him to resign. But this claim fails as a matter of law for many

Cunningham remained less severe than if the University had fired him outright in January. He continued to make money and perform several duties for five months. That delay gave him a

into Cunningham's conduct began in February 2018 and predated the deposition. His January 2019 suspension postdated the deposition by eight months. And dismissal proceedings began a full year later, in May 2019. Nothing connects the documentation scandal and the *Mullins* lawsuit except that Cunningham happened to be involved in each.

Cunningham resists. He argues that the fraud allegations were pretextual, pointing to evidence suggesting that the administrators initially thought the claims against him were unfounded and claiming they baselessly reversed course only months later. But that does not do justice to the record. While the evidence says that in September 2018 Blackwell described the compliance report as "skimpy" and said that the University's President wanted him "to dig a little deeper," CR.62-1 at 120–21, Blackwell in fact kept digging. That the administrators ultimately found the charges worth pursuing does not establish that they pursued charges for a different reason, let alone a constitutionally prohibited reason.

Cunningham contends as well that the administrators' divergent treatment of Shehata establishes that they punished Cunningham more severely because of his deposition. But Blackwell entered the January 2019 meetings planning to fire them both. Cunningham convinced Blackwell to allow him to resign much later. Shehata convinced Blackwell to investigate further. Negotiations proceeded separately, and the men made their own choices from there. Differences in circumstances readily explain these differences in treatment.

In his reply brief, Cunningham auditions a distinct divergent-treatment argument, contending in a sentence that the University has responded to other documentation issues by educating or training faculty members, not suspending them. But the naked assertion that other providers have entered incorrect data does not show—without any evidentiary data backing it up—that they have anything else in common with Cunningham. He has not established a genuine dispute about whether the administrators imposed disparate discipline.

Cunningham, finally, reaches for timing, noting that the suspension occurred soon after the *Mullins* case settled for roughly half a million dollars. But Cunningham must point to more than just timing. , 453 F.3d 724, 737 (6th Cir. 2006). The timing checks out in any event. Blackwell explained that he waited to suspend Cunningham

We

For these reasons, we reverse the district court's decision denying summary judgment to the administrators on the professors' due process claims involving the suspension of their clinical duties and Cunningham's constructive discharge. We affirm the district court's decision granting summary judgment to the administrators on Shehata's due process claim involving the early end to his appointment. We affirm the district court's decision granting summary judgment to the administrators on the professors' First Amendment retaliation claims.

activities. Fearing a loss of income and clinical faculty status, the professors retained legal counsel and informal settlement negotiations ensued. Over the next several weeks, the professors' counsel drafted letters explaining why they engaged in the copy-delete-paste practice. The majority relies heavily on these "detailed letters explaining what they did and why" and the "follow-up meetings with the administrators" to find the post-deprivation process sufficient.

But those informal settlement negotiations cannot amount to the type of post-deprivation process owed. The University Defendants negotiated with the sleight of hand. Drs. Cunningham and Shehata knew of the general fraud allegations against them, but they never received any supporting evidence. Their counsel was left to negotiate without the internal investigation report; the external auditor report; the resident interviews; or the allegedly falsified medical records with the patients treated, dates of service, and treatment provided. In addition, counsel

677, 680 (6th Cir. 1991). Thus, it has been clearly established for over thirty years that a public employee cannot be compelled to speak.

The majority narrowly construes the matter to ask whether Dr. Shehata had a clearly