NO. 22-654

In The

Supreme Court of the United States

KOLA HASANAJ,
Petitioner,

v.

DETROIT PUBLIC SCHOOLS COMMUNITY DISTRICT, STEVEN RHODES, CASSANDRA WASHINGTON, CINDY LANG, BRENDA CARETHERS, AND LAURI WASHINGTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did Petitioner state a plausible procedural due process claim under the Fourteenth Amendment, that he was deprived of a protected property interest in his continued employment as a public-school teacher, when he did not satisfy Michigan's statutory tenure requirements?
2. Did Petitioner state a plausible procedural due process claim under the Fourteenth Amendment that he was deprived of a protected property interest in his expectation that Respondents were required to comply with the Michigan teacher evaluation statute, M.C.L.A. § 380.1249, in order to fire him, when he had no constitutionally protected property interest in state law procedures?
3. Did Petitioner state a plausible procedural due process claim under the Fourteenth Amendment that he was deprived of a protected property interest in his Michigan teaching certificate, when he still holds a valid teaching certificate and remains entirely free to obtain employment with another Michigan school district?
4. Did Petitioner state a plausible procedural due process claim under the Fourteenth Amendment that he was deprived of a protected liberty or property interest in his right to contract, when he: (i) lacked a protected interest in continued employment; (ii) alleged that public dissemination of his performance evaluations was required by law; and (iii) failed to request a name-clearing hearing?

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STATEMENT OF THE CASE

Respondents disagree with how Petitioner has chosen to describe the factual background of this case. This case does not involve a national issue implicating any procedural due process claims under the Fourteenth Amendment. Rather, the Petition for Writ of Certiorari ("Petition") takes issue with the lower court's interpretation and application of Michigan law. The Petition is yet one more attempt by Petitioner, a non-tenured teacher formerly employed by Detroit Public Schools Community District ("District"), to challenge his termination despite having received three consecutive "ineffective" annual performance ratings for school years 2013-2014, 2014-2015 and 2015-2016, which thereby mandated his dismissal pursuant to Michigan statutory law, Mich. Comp. Laws Ann. § 380.1249(2)(j). Petitioner's appeal to the State Tenure Commission failed because the Commission concluded that it lacked jurisdiction given Petitioner's non-tenured status.

Petitioner then filed suit in the United States District Court for the Eastern District of Michigan ("District Court"). In his First Amended Complaint, Petitioner sued the District and four employees of the District (collectively "Respondents"), as well as former Emergency Manager Steven Rhodes, alleging four counts regarding his termination: (i) violation of procedural due process under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution; (ii) wrongful discharge in violation of the Michigan Supreme Court's decision in *Toussaint v. Blue Cross*

& Blue Shield of Mich, 292 N.W.2d 880 (Mich. 1980), and in violation of Michigan public policy as set forth in *Suchodolski v. Michigan Consolidated Gas Co.*, 316 N.W.2d 710 (Mich. 1982); (iii) violation of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*; and (iv) violation of the Michigan Whistleblowers Protection Act ("WPA"), Mich. Comp. Laws § 15.36 *et seq.*

It is undisputed that Petitioner failed to plead he had tenure under Michigan's Teacher Tenure Act, Mich. Comp. Laws Ann. § 38.91 *et seq.*

Respondents moved to dismiss under Fed. R. Civ. P. 12(b)(6). On April 14, 2021, the District Court dismissed all claims, including the procedural due process claims. The District Court held that Petitioner had no protected property interest in continued employment under *Perry v. Sniderman*, 408 U.S. 593 (1972), because he did not have tenure as required by Michigan's Teacher Tenure Act, Mich. Comp. Laws Ann. § 38.91 *et seq.* The District Court also held that Petitioner had no protected property interest in having the District fairly and impartially apply the teacher evaluation standards set forth in Mich. Comp. Laws Ann. § 380.1249. The District Court determined that compliance with such standards is a matter of state law, not to be policed by the federal courts under the Due Process Clause. Accordingly, the District Court dismissed the case on the grounds that Petitioner failed to state a claim on which relief could be granted.

Petitioner appealed, asserting a deprivation of four interests: (i) a property interest in his continued employment as a public teacher; (ii) a property interest in the government complying with the

teacher evaluation statute in order to terminate him under that statute; (iii) a property interest in using his Michigan teaching certificate; and (iv) a liberty interest in obtaining employment as a teacher in Michigan.

On May 19, 2022, a divided three judge panel of the U.S. Court of Appeals for the Sixth Circuit ("lower court") affirmed the District Court's dismissal *via* a written opinion ("Lower Court's Opinion"). Court of Appeals Opinion, Petitioner's App. A, 1a. While the majority stated that Petitioner had no liberty or property interest protected by the Due Process Clause, the dissent disagreed. Petitioner's petition for an *en banc* hearing was denied on July 8, 2022.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The Petition should be denied because the facts of this case do not involve an issue of national importance as suggested by Petitioner. Nor has there been any misapplication of Supreme Court precedent. Finally, the case does not involve conflicting lower court opinions. Though Petitioner now argues that this case is an ideal vehicle to ensure the legislative mandates of the No Child Left Behind Act are enforced, nowhere in his pleadings, or arguments below was that act mentioned in any way.

Rather, this case involves the routine dismissal of a case at the pleading stage due to Petitioner's basic failure to plead sufficient factual matter, accepted as true, to state facially plausible claims for relief. It is settled that to avoid dismissal under Fed.

R. Civ. P. 12(b)(6) the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim becomes plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Conclusory allegations or legal conclusions masquerading as factual allegations do not suffice. *Eidson v. Tenn. Dep't of Children's Servs.,* 510 F.3d 631, 634 (6th Cir. 2007). Thus, to avoid dismissal a party must make a showing, rather than a blanket assertion of entitlement to relief and "factual allegations must be enough to raise a right to relief above the speculative level" so that the claim is "plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 and 570 (2007).

The Due Process Clause of the Fourteenth Amendment forbids a State from depriving persons of ". . . liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1, cl. 3. For Petitioner to state a procedural due process claim, he must allege: (i) he was deprived of a protected liberty or property interest; and (ii) that the deprivation occurred without adequate procedural protections. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

The lower court properly applied precedent to conclude that Petitioner failed to plead sufficient factual matter to satisfy the first prong for each of his claims.

Accordingly, the Petition should be denied.

I. The Lower Court's Opinion is Consistent with Settled Law that Property Interests in Benefits Such as Continued Employment Are Created by Independent Sources Such as State Law, Not the Constitution.

The lower court properly applied settled law to affirm the dismissal of Petitioner's claim that he sufficiently pleaded a protected property interest in continued employment. The law is settled that if a teacher is not entitled to tenure under a governing statute, he has no "legitimate claim" to job tenure regardless of the institution's policies and conduct. *See e.g., Perry v. Sniderman,* 408 U.S. 593, 602, n.7 (1972) ("If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's due process claim would be defeated."). "A non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system." *Ryan v. Aurora City Board of Education*, 540 F.2d 222, 227 (6th Cir. 1976).

For public-school teachers in Michigan, "[c]ontinuing tenure is held only in accordance with" the Tenure Act. Mich. Comp. Laws § 38.91(1). The Tenure Act provides that a teacher "is considered to be on continuing tenure" only "[a]fter the satisfactory completion of the probationary period." *Id.* To complete the probationary period, a teacher must: (i) serve "at least 4 full school years of employment in a probationary period" and be "rated as highly effective on 3 consecutive annual year-end performance evaluations"; or (ii) serve "at least 5 full

school years of employment in a probationary period" and be "rated as effective or highly effective on his or her 3 most recent annual year-end performance evaluations." § 38.83b(1) and (2); "A teacher who is in a probationary period may be dismissed from his or her employment by the controlling [school] board at any time." Mich. Comp. Laws § 38.83(2).

Here, the majority correctly applied Rule 12(b)(6)'s standard for failure to state a claim: "Because Hasanaj has not alleged he satisfied the statutory probation requirements to acquire tenure, he was an at-will employee and thus lacked a protected property interest in his job. *Bishop v. Wood*, 426 U.S. 341, 345-47 (1976); Mich. Comp. Laws Ann.§§ 38.83(2), 38.91(1)." Court of Appeals Opinion, Petitioner's App. A, 21a. Accordingly, the majority correctly applied settled precedent to conclude that Petitioner "had no protected property interest in his job because he did not satisfy Michigan's statutory tenure requirements." Court of Appeals Opinion, Petitioner's App. A, 14a.

Further, the lower court properly applied precedent in rejecting Petitioner's argument that *Perry* and *Soni v. Board of Trustees*, 513 F.2d 347 (6th Cir. 1975) controlled the outcome. *Perry* is inapposite as it involved a college with "no explicit tenure system." Court of Appeals Opinion, Petitioner's App. A, 16a. Similarly, though *Soni* was relied on by the dissent and Petitioner for the proposition that "[t]he existence of such a system is but one factor for the trial court to consider in analyzing the due process claim of a formally nontenured professor," in fact, the state statute which barred tenure for plaintiff Soni because he was an alien

was no longer an obstacle for Professor Soni at the time he was terminated. "At that point, he was a United States citizen." *Soni* at 350.

Thus, the majority opinion correctly determined that both *Perry* and *Soni* were distinguishable from this case because, unlike this instant case, "state law" did not preclude those plaintiffs from claiming job tenure. Court of Appeals Opinion, Petitioner's App. A, 18a.

Petitioner's argument relies heavily on the dissent's statement that the "majority even cites in a footnote that it is a crime for the District to assign a teacher to teach outside of his certification . . . . The District did not comply with this law." (Petition for Writ of Certiorari, p.8). However, that argument must fail for two reasons.

First, the statute at issue, Mich. Comp. Laws Ann. § 388.1763(1) and (6), contains a notice provision. As quoted by the majority in footnote 1, ". . . if a teacher is "not *appropriately placed* under a valid certificate" *after the State notifies the school official*, "the school official is guilty of a misdemeanor punishable by a fine of $1,500.00 for each inciden[t]." *Hasanaj v. Detroit Public Schools Community District*, 35 F.4th 437, 443, fn.1 (6th Cir. 2022) (emphasis added). Petitioner never pleaded or argued that the state of Michigan notified Respondents that Petitioner was not appropriately placed and thereafter Respondents continued to inappropriately place him.

Accordingly, no basis existed to conclude Respondents were in violation of the law.

Second, even if Respondents were in knowing violation of § 388.1763(1) and (6) (which they were

not), "[r]eview of actions of school authorities under the Teachers' Tenure Law of Michigan is the prerogative of the courts of that State and not of the federal judiciary." *Ryan*, 540 F.2d at 226-27.

Petitioner has failed to demonstrate that the lower court misapplied precedent in affirming the dismissal of this claim for failure to state a claim upon which relief could be granted.

II. The Lower Court's Opinion is Consistent with Settled Law That There is No Protected Property Interest in Governmental Compliance with State Law Procedures that Relate to Property Rights.

The lower court properly applied precedent to affirm the dismissal of Petitioner's claim that he sufficiently pleaded a protected property interest in Respondents' compliance with state law procedures related to property rights. Petitioner claimed that Respondents violated Mich. Comp. Law § 380.1249(2)(j) by requiring him to teach courses he was not certified in, then terminating him after he was rated ineffective on 3 consecutive annual year-end evaluations. Mich. Comp. Law § 380.1249(2)(j) states, in pertinent, " . . . if a teacher is rated as ineffective on 3 consecutive annual year-end evaluations, the school district . . . *shall* dismiss the teacher from his or her employment."(emphasis provided). Thus, statutory compliance is mandatory.

The law is settled that "property cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). This

Court has expressly stated that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). Accordingly, it has been held that a plaintiff "can have no protected property interest in the procedure itself." *Richardson v. Twp. of Brady*, 218 F.3d 508, 517-18 (6th Cir. 2000).

Indeed, in *Ryan*, *supra*, the Court held that the school board's violation of its regulations, which required a statement of reasons for teacher dismissal, did not trigger constitutional scrutiny. *Ryan* at 228-229. The *Ryan* court concluded that "[r]eview of actions of school authorities under the Teachers' Tenure Law of Michigan is the prerogative of the courts of that State and not of the federal judiciary." *Id.* at 227.

Petitioner has failed to demonstrate that the lower court misapplied the foregoing precedent in affirming the dismissal of this claim for failure to state a claim upon which relief could be granted.

III. The Lower Court's Opinion is Consistent with Settled Law That a Property Interest in a State-issued License to Pursue an Occupation is Not Deprived When the License Remains Valid and the Holder of the License is Not Completely Excluded from Pursuing His Occupation.

The lower court properly applied precedent to affirm the dismissal of Petitioner's claim that he sufficiently pleaded a protected property interest in his Michigan teaching certificate. The lower court

properly rejected Petitioner's argument that by assigning him three consecutive ineffective ratings and then terminating his employment (as required by Mich. Comp. Law § 380.1249(2)(j)), Respondents rendered his license valueless because a dozen school districts refused to hire him.

In rejecting Petitioner's argument that his teaching license was valueless, the lower court first noted that "[b]y all accounts, Hasanaj still holds a valid teaching certificate. His certificate was never suspended or permanently revoked . . . " Court of Appeals Opinion, Petitioner's App. A, 24a. The lower court further noted that the statute under which Respondents dismissed Petitioner, § 380.1249(2)(j), does not operate to permanently remove him from teaching because it "says nothing about future employment." Court of Appeals Opinion, Petitioner's App. A, 25a.

The lower court properly relied on *Med Corporation v. City of Lima*, 296 F.3d 404 (6th Cir. 2002) to conclude that Petitioner's teaching license was not valueless. *Med Corporation* rejected an ambulance company's argument that the city had rendered its license valueless by suspending the company from receiving 911 dispatches for one week. The reason was because the company did not show that the proposed suspension would "completely" destroy the value of its license and there was no evidence to show that 911 dispatches constitute all, or even a majority of the company's business. 296 F.3d at 413.

The lower court stated:

> [a]s in *Med Corporation,* Hasanaj 'remains entirely free to obtain employment' with another Michigan school district. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961). A third-party's decision not to hire Hasanaj based on a history of unfavorable performance reviews is not dictated by the State or his former employer. And as explained, the performance review procedures alone are not property interests.

Court of Appeals Opinion, Petitioner's App. A, 25a.

The Petitioner has failed to show that the lower court misapplied the foregoing precedent in affirming the dismissal of this claim for failure to state a claim upon which relief could be granted.

IV. The Lower Court's Opinion is Consistent with Settled Law That There is No Deprivation of a Liberty or Property in the Right to Contract for Employment When One Lacks a Protected Interest in a Job and One Fails to Request a Name-Clearing Hearing.

The lower court properly applied settled law to affirm the dismissal of Petitioner's claim that he sufficiently pleaded a protected property interest in his right to contract. The lower court framed Petitioner's argument as "a reformulation of his license argument" because Petitioner claimed that the ineffective ratings, coupled with the operation of Mich. Comp. Law § 380.1249(2)(j) imposed a disability that prevented him from obtaining employment in his

chosen profession. Court of Appeals Opinion, Petitioner's App. A, 26a.

The lower court determined that this claim required the combination of two components: (i) the liberty to engage in any of the common occupations of life; and (ii) the right to due process where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him. Court of Appeals Opinion, Petitioner's App. A, 26a and 27a. The lower court continued that a liberty interest in reputation is only sufficient to invoke the procedural protection of the Due Process Clause if combined with some more tangible interests such as employment. Court of Appeals Opinion, Petitioner's App. A, 27a.

Applying those basic requirements, the lower court stated Petitioner must allege the following: (i) the stigmatizing statements must be made in conjunction with the plaintiff's termination from [protected] employment [or foreclose future employment opportunities]; (ii) a plaintiff is not deprived of his liberty interest when the employer has alleged merely improper or inadequate performance, incompetence, neglect of duty or malfeasance; (iii) the stigmatizing statements or charges must be made public; (iv) the plaintiff must claim that the charges made against him were false; and (v) the public dissemination must have been voluntary. *Crosby v. University of Kentucky,* 863 F.3d 545, 555-56 (6th Cir. 2017). Court of Appeals Opinion, Petitioner's App. A, 27a.

The lower court correctly determined that Petitioner failed to satisfy the first, second and fifth elements. Court of Appeals Opinion, Petitioner's App.

A, 27a. The lower court determined that Hasanaj: (i) lacked a protected interest in his job, and he "remains as free as before to seek another" teaching job in Michigan; (ii) was "not deprived of his liberty interest" merely by virtue of the District disseminating his "inadequate performance" review; and (iii) alleged, and Michigan's teacher evaluation system seemed to suggest, that public dissemination (*i.e.*, posting performance evaluations online) was required, not voluntary. Court of Appeals Opinion, Petitioner's App. A, 28a. The lower court correctly concluded that "beyond those deficiencies, Hasanaj does not allege he requested a name-clearing hearing, and 'failure to request a name-clearing hearing is fatal to a claim alleging a deprivation of a liberty interest without due process. *Kaplan v. Univ. of Louisville,* 10 F.4th 569, 584-585 (6th Cir. 2021).'" Court of Appeals Opinion, Petitioner's App. A, 28a.

The Petitioner has failed to show that the lower court misapplied the foregoing precedent in affirming the dismissal of this claim for failure to state a claim upon which relief could be granted.

CONCLUSION

This case involves the routine application of settled law governing basic pleading requirements under Fed. R. Civ. P. 12(b)(6). Further, the case involves matters of Michigan law, which have no national importance. Finally, there has been no showing by Petitioner of the misapplication of Supreme Court precedent.

Accordingly, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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