

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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GENERAL COUNSEL

THE UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES, a public body
corporate,

Plaintiff,

v.

Case No.

SAMI AL-ARIAN,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE,
TO STAY PROCEEDINGS PENDING RESORT TO ARBITRATION

Defendant, SAMI AL-ARIAN, urges the Court to dismiss this action for failure to state a claim upon which declaratory relief may be granted and for failure to join indispensable or necessary parties or, in the alternative, to stay proceedings pending resort to a grievance and arbitration procedure mandated by Florida law and the Collective Bargaining Agreement ("CBA") referred to in the complaint.

I. The Complaint's Allegations

Plaintiff, the University of South Florida Board of Trustees ("USF"), seeks a declaratory judgment endorsing its "right" to terminate the employment of the defendant, a tenured associate professor and an alien lawfully admitted to the United States for permanent residence and domiciled in Florida. The defendant is said to be subject to termination based on USF's claim that he has violated various provisions of the CBA in effect between the former Board of Regents/State University System of Florida and the United Faculty of Florida, which, although alleged in the

complaint, is not among the many exhibits attached to it. USF contends that the defendant's alleged violations of the CBA also constitute federal crimes under 18 U.S.C. § 2333, and alleges "upon information and belief" that defendant will sue USF and allege violations of his federal constitutional rights if termination proceedings are initiated against him.

USF then alleges that its contemplated termination of the defendant, which has been pending at least since December 19, 2001, has prompted an investigation and threatened censure of USF by the American Association of University Professors (AAUP). The AAUP has issued an interim report stating that USF would be subject to "censure" by the AAUP for initiating the defendant's termination, which USF seeks to avoid. The threatened censure action is presently based on the AAUP's conclusion that defendant's rights to academic freedom and due process would be violated by the defendant's termination based upon the information presently available to the AAUP.

USF bases its need for a declaratory judgment on its fear of the threatened censure by the AAUP, the "threat of a lawsuit" by defendant, and by its own inability to "resolve the federal constitutional issues" that will be raised by defendant in his threatened lawsuit, noting that an arbitrator appointed under the CBA could not resolve such federal constitutional issues based upon defendant's First Amendment or other constitutional rights.

The complaint does not allege that USF has made any effort to resolve its alleged dispute with defendant informally or through the Faculty Senate or the grievance and arbitration procedure in the CBA.

The CBA referred to in the complaint but not attached to it¹ contains a variety of provisions evincing USF's intent that disputes involving faculty members be resolved informally or through such non-judicial channels as the Faculty Senate and the grievance and arbitration procedure.² Most importantly for present purposes, Article 15, Section 15.12, provides that as a tenured faculty

¹The CBA and its arbitration provision are explicitly referred to in the complaint. The CBA, or at least its relevant provisions, should have been attached to the complaint. Rule 1.130(a), Fla.R.Civ.P. The CBA is also a public record and is posted on USF's website, and is thus a proper matter of which the Court may take judicial notice under Rule 201, Fed.R.Evid. The CBA is therefore appropriately attached to the Motion to Dismiss and may be considered by the Court without converting the motion to one for summary judgment under Rule 56, Fed.R.Civ.P. E.g., Greenberg v. Life Ins. Co. of Virginia, 146 F.3d 699, 706 (9th Cir. 1998); Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd., 181 F.3d 410, 426-427 (3d Cir. 1999).

²Thus, in the Preamble to the CBA, the parties "recognize the desirability of a collegial governance system for faculty and professional employees in areas of academic concern." It further provides that collegiality

can best be accomplished through Senates selected by representatives of the appropriate campus constituencies in accordance with each institution's constitution and tradition. Appropriate matters of concern should be brought before the Senate by its members or Steering Committee, or by the President of the university or representatives.

Similarly, Article 2, Section 2.2 of the CBA requires that the [University] Presidents or their representatives on each campus shall meet with the local UFF Chapter representatives to discuss matters pertinent to the implementation or administration of this agreement, university actions affecting terms and conditions of employment unique to the university, or any other mutually agreeable matters.

Article 6, Section 6.2(a), of the CBA states that "neither the Board nor the UFF shall discriminate against any employee based upon. . . religious creed, national origin. . . or [political affiliation]. . . Personnel decisions shall be based on job-related criteria and performance. "Article 6, Section 6.5, provides: "Claims of such discrimination by the Board or universities may be presented as grievances pursuant to Article 20, Grievance Procedure. It is the intent of the parties that matters which may be presented as grievances under Article 20, Grievance Procedure, be so presented and resolved thereunder instead of using other procedures." Article 8, Section 8.3(m), requires that the substance of these non-discrimination provisions be incorporated into each faculty member's contract of employment.

member, defendant can only be terminated for "just cause," as defined in Article 16, Section 16.1. Article 16, Section 16.4, requires that all notices of disciplinary action shall include a statement of the reasons therefor and a statement advising the employee that the action is subject to Article 20, Grievance Procedure. Article 19 provides comprehensive regulations regarding outside activities of faculty members. Article 20 sets forth the grievance and arbitration procedure. Section 20.1 provides that "the procedures hereinafter set forth shall be the sole and exclusive method for resolving the grievances of employees as defined herein." Section 20.2, entitled "Resort to Other Procedures," provides:

It is the intent of the parties to first provide a reasonable opportunity for resolution of a dispute through the grievance procedure and arbitration process. Except as noted below, if prior to seeking resolution of a dispute by filing a grievance hereinunder, or while the grievance proceeding is in progress, an employee requests, in writing, resolution of the matter in any other forum, whether administrative or judicial, the Board or University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

Section 20.3 defines a grievance as "a dispute. . . concerning the interpretation or application of a specific term or provision of this agreement. . . . Article 20.8(a)(3) states, "This grievance procedure shall be the sole review mechanism for resolving disputes regarding rights or benefits which are provided exclusively by this agreement." Article 20.8(f)(6) provides that the decision or award of the arbitrator shall be final and binding.

On the other hand, there is nothing in the CBA suggesting that USF can file suit against its faculty members over matters covered by the CBA.

II. Argument

A. The Complaint Fails to State A Claim Upon Which Relief May Be Granted.

USF's position largely boils down to its contention that, if it can prove that defendant violated a federal criminal statute codified at 18 U.S.C. § 2333, this would take precedence over any First Amendment or other federal constitutional rights that defendant might assert in a potential lawsuit challenging his termination. Jurisdiction over the action in this Court is based both on USF's assertion of a right based on the construction of the federal criminal statute it invokes, Ayers v. General Motors Corp., 234 F.3d 514, 518-19 (11th Cir. 2000), and by basing its right to declaratory relief on allegations showing that the defendant could bring a coercive action against the plaintiff arising under federal law. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 (1983); Columbia Gas Transmission Corp. v. Drain, 237 F.3d 366, 370-371 (4th Cir. 2001). But the threshold question is whether the complaint's allegations suffice to allow the Court to exercise its discretion in favor of granting the requested declaratory relief.

A number of factors have been developed for evaluating the wisdom of entertaining a request for declaratory relief, which is always discretionary. 28 U.S.C. § 2201(a). Even where the Court is satisfied that the plaintiff can show a factually developed, justiciable dispute that is sufficiently ripe for adjudication without constituting a mere advisory opinion, it must also examine considerations of practicality and wise judicial administration, and decide whether the requested declaratory decree will terminate the controversy between the parties, if not, or if other unexhausted remedies might deal with the dispute better or more effectively, the Court should decline to issue a declaratory judgment. E.g., Wilton v. Seven Falls Company, 515 U.S. 277, 288 (1995); McNeill v. United States, 508 U.S. 106, 110-113 (1993). The Court should also decline the request for declaratory relief if it appears that the

declaratory judgment is sought for purposes of forum shopping, e.g., Ven-Fuel, Inc. v. Dept. of Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982), or reflects an attempt at “procedural fencing,” e.g., Casualty Indemnity Exchange v. High Croft Enterprises, Inc., 714 F.Supp. 1190, 1193-94 (S.D.Fla. 1989). If the Court is not satisfied that the issues raised are those “the resolution of which would be essentially unaffected by further factual development,” it should also decline to entertain the request for declaratory relief. Government Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267, 1275 (7th Cir. 1992), cert. denied, 113 S.Ct. 977 (1993). Nor may a party to a contract circumvent the arbitration clause in the contract through resort to state court litigation. See Commonwealth Edison Co. v. Gulf Oil Co., 400 F.Supp. 888 (N.D. Ill. 1975), affirmed, 541 F.2d 1263 (7th Cir. 1976), and cases cited therein. Indeed, employers may be enjoined from taking any action that would tend to impair the arbitration process or the ability of an arbitrator to resolve the dispute effectively. E.g., IBEW Local 733 v. Litton Systems, 906 F.2d 149 (5th Cir. 1990).

All of the foregoing considerations militate against the propriety of declaratory relief in this case. First, the CBA provisions outlined above conclusively show that if defendant is terminated, he is entitled to challenge that termination as being without “just cause” through the grievance and arbitration procedure, which constitutes the exclusive remedy for all questions involving interpretation or application of the CBA. To the extent that USF seeks a judicial determination of such issues, its attempt must be rejected as being inconsistent with its contractual commitment and statutory obligation under § 447.401, Fla. Stat. (2001)³ to resolve such questions under the grievance and

³The statute provides, in pertinent part, that:

Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee. . . involving the interpretations or application of a collective

arbitration machinery in the CBA. That being so, it becomes apparent that the relief sought by USF would not terminate the controversy between the parties, as any declaratory decree could not address the provisions of the CBA, and the defendant would still be free to pursue his claims in that forum. Moreover, allowing the parties to resort to that forum might obviate the need for any litigation over difficult constitutional issues or issues involving the interpretation or application of a federal criminal statute. By seeking to jump the gun and address these constitutional and other issues first, USF also runs afoul of the well-established principle that courts should avoid constitutional questions wherever possible.

There is also strong evidence on the face of the record of an effort at forum shopping and procedural fencing by USF in seeking premature resort to a judicial forum. Almost immediately after filing its action in state court, USF also served a notice seeking to take defendant's deposition (copy attached to removal petition), presumably in an effort to try to develop evidence which it would then seek to use as a basis to justify his termination in court proceedings. It is readily apparent that nothing in the CBA would countenance such an overbearing and oppressive tactic in a typical termination proceeding, and the Court well knows that one of the reasons for the strong federal (and state) policy favoring arbitration is the avoidance of costly and time-consuming adjuncts of litigation such as discovery and depositions. USF's early and most unusual, not to say unprecedented, invocation of the judicial remedy also seems intended to deprive defendant of his clear right under the CBA to his choice of forum in the event he is terminated and wishes to challenge that termination.

bargaining agreement. . . [which] shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties. . . . All public employees shall have the right to a fair and equitable grievance procedure. . . .

Such attempts to gain an unfair advantage over another litigant militate against the propriety of declaratory relief.

USF also premises its request for declaratory relief on the alleged intention of the AAUP to censure USF for the way it has treated defendant. Yet, the AAUP has not even been made a party to USF's action, and thus would not be bound by it. The decree that USF seeks, then, insofar as it purports to deal with the AAUP's endeavors, invites the Court to issue a decree that would be little more than an empty gesture, an invitation this Court should readily decline. We fail, in any event, to see how the Court could have any constitutional or legal basis to throttle an organization like the AAUP, which, according to the complaint's allegations, appears merely to be exercising its own First Amendment rights by taking a public stance on USF's activities with respect to the defendant. Indeed, AAUP may well view this very lawsuit as constituting an attack on the rights of university professors, as it carries with it the threat that any professor whose public statements are deemed troublesome by university administrators or trustees may be subjected not only to termination, but to a pre-termination lawsuit forcing the faculty member to retain counsel and go to the vast expense of modern-day litigation in order to protect his or her interests. We fail to see how this Court, or any court, could constitutionally silence the AAUP in airing this view, or any others it might have.

This posture of the suit also gives rise to obvious and grave questions as to the practical wisdom of accepting USF's invitation that the judiciary intervene in this case. Quite obviously, USF is struggling to decide whether it should initiate termination proceedings against the defendant in the face of what it sees as legal and other pitfalls that may result from such action. But as difficult as such decisions may be, they are decisions that are entrusted by law to the USF Board and administration, and not to the judiciary, state or federal. At its core, the decision faced by the USF Board and

administration in this case is no different than decisions faced by perhaps thousands of employers, governmental and private sector, practically every day of the week. By accepting USF's invitation to intervene here, the Court would set a precedent that would tempt any employer faced with such a decision to rush into court in an attempt to obtain a kind of insurance policy, in the form of a judicial blessing, against an unwise decision. The "flood of litigation" may be a cliché, but it is a realistic possibility, if not a probability, should USF have its way. And quite apart from the burden such a precedent would work on the courts, it would also be potentially disastrous for employees throughout the country who in the main lack the resources to absorb the potentially ruinous costs of pre-termination litigation initiated against them by their employers, who are well aware of the gross imbalance of economic power between them and their employees and would no doubt seek assiduously to exploit it. For these reasons, then, the Court should dismiss the complaint for failing to state a proper claim for declaratory relief.

B. The Complaint is Subject to Dismissal for Failing to Join Parties Under Rule 19

To the extent that USF seeks a declaration of rights involving either interpretation or application of the CBA, it seems clear that UFF, as one of the parties to the CBA, is a necessary or indispensable party to this action. In declaratory judgment actions regarding a contract, the plaintiff must serve all private parties interested in the outcome. Advisory Committee Note to 1937 adoption of Fed.R.Civ.P. 57. UFF is clearly entitled to be heard on any judicial attempt to interpret or declare rights under its own Collective Bargaining Agreement.

The AAUP would also appear to be a necessary or indispensable party to the extent that USF seeks some judicial condemnation or restraint upon AAUP's activities and statement of its views regarding this dispute.

C. If it Does Not Dismiss the Action, the Court Should Stay Proceedings Pending Resort to the Grievance and Arbitration Provisions in the Collective Bargaining Agreement.

The Federal Arbitration Act broadly applies to arbitration provisions in any agreement evidencing or involving transactions in interstate commerce, except for employment contracts or collective bargaining agreements involving actual transport workers. Circuit City Stores, Inc. v. Adams, ___ U.S. ___, 121 S.Ct. 1302 (2001); Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1060-61 (11th Cir. 1998). Thus, the exclusion does not apply to a contractual dispute between an assistant professor and his university. Brennan v. King, 139 F.3d 258 (1st Cir. 1998).

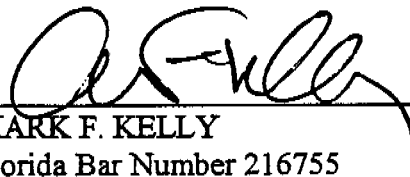
Apart from urging that an arbitrator cannot resolve constitutional issues, the complaint shows no basis for questioning the availability or efficacy of the grievance and arbitration provisions in the CBA. As there is no dispute that the parties are subject to a valid agreement to arbitrate, Prima Paint Corp. v. Flood and Conklin, 388 U.S. 395 (1967), the Court is therefore authorized to stay judicial proceedings under 9 U.S.C. § 3 pending resort to the grievance and arbitration proceedings mandated by the contract covering the parties. Such action is consistent with the strong federal policy favoring arbitration,⁴ which Florida law shares. § 682.03(3), Fla. Stat. (2001); e.g., Sun City Diner v. Century Financial Advisors, 662 So. 2d 967 (Fla. 4th DCA 1995). Accordingly, the Court is urged to dismiss the complaint or, in the alternative, to stay judicial proceedings pending the parties' opportunity to invoke the grievance and arbitration provisions of the CBA.

I HEREBY CERTIFY that a true and correct copy of this document has been forwarded by First Class U.S. Mail to R.B. Friedlander, Interim General Counsel, University of South Florida, 4202 e. Fowler Avenue, ADM 250, Tampa, FL 33620; Thomas M. Gonzalez, Esquire, THOMPSON,

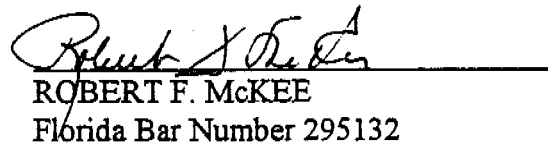
⁴See 9U.S.C. §§ 1, 2; e.g., Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

SIZEMORE & GONZALEZ, P.O. Box 639, Tampa, FL 33601-0638; Gregory W. Kehoe, Esquire, JAMES, HOYER, NEWCOMER, et al., 4830 W. Kennedy Blvd., Suite 147, Tampa, FL 33609-2517; and Bruce Rogow, Esquire, and Beverly Pohl, Esquire, BRUCE S. ROGOW, P.A., Broward Financial Centre, Suite 1930, 500 E. Broward Blvd., Ft. Lauderdale, FL 33394, on this 16th day of September, 2002.

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