

CONSTITUTIONAL LAW—DUE PROCESS—THE PROPERTY INTEREST IN A TENURED PROFESSORSHIP WITH A STATE UNIVERSITY IS NOT ENTITLED TO SUBSTANTIVE DUE PROCESS PROTECTION—*Nicholas v. Pennsylvania State University.*, No. 98-7611, 2000 WL 1285698 (3d Cir. Sept. 13, 2000).

In 1966, the Noll Human Performance Laboratory at Pennsylvania State University appointed Dr. W. Channing Nicholas to the position of associate professor of physiology, and granted him tenure seven years later. *Nicholas v. Pennsylvania State University*, No. 98-7611, 2000 WL 1285698, at *1 (3d Cir. Sept. 13, 2000). To supplement his income from the University, Nicholas worked as an emergency room physician, and, as a result, did not work regular hours at Noll Lab. Nicholas' employment situation became an issue in 1993 when Dr. William Evans, the new director of Noll Lab, asked Nicholas to supply a written schedule for his work at the lab, an outline of his research plans, and an assurance that he would maintain a full-time schedule. Nicholas refused to provide the information or the assurance. Evans issued a series of warnings to Nicholas, culminating in two meetings in 1994 at which Nicholas was told that he would be terminated if he did not comply with Evans' requests. Again Nicholas refused, and on June 17, 1994, Evans fired him.

Nicholas appealed the termination, believing it to be the result of personal animosity against him on the part of Evans, whom Nicholas had reported to the State Board of Medicine earlier in the year for his plan to use non-medical personnel to perform certain lab functions. *Id.* at *1-*2. At the hearing, Nicholas was represented by counsel and was given the opportunity to call and cross-examine witnesses. *Id.* at *2. Nevertheless, the University's Committee on Tenure found Evans' charges constituted adequate cause for termination and upheld the dismissal. After leaving the University, Nicholas found full-time employment as a doctor and earned substantially more than he had as a professor.

In June, 1997, Nicholas filed a lawsuit against Pennsylvania State University and Evans, alleging that the defendants violated (1) his rights under the Fourteenth Amendment Due Process Clause and under the First Amendment, (2) 42 U.S.C. § 1983, based on violations of his substantive due process right, freedom of expression right, and age discrimination, (3) the Pennsylvania whistleblower law, (4) his tenure contract, and (5) ERISA. *Id.* The District Court for the Middle District of Pennsylvania

granted the defendants' motion for summary judgment on the first count, the fifth count, and the § 1983 substantive due process and age discrimination claims. *Id.* At the close of Nicholas' case, the district court granted the defendants' motion to dismiss the third count. *Id.* As to the remaining § 1983 First Amendment and breach of contract claims, the jury returned a special verdict that found: (1) the defendants provided Nicholas with notice of the charges leveled against him and a chance to respond; (2) the defendants failed to provide Nicholas with a fair hearing; (3) Nicholas' report to the State Board of Medicine regarding Evans was a motivating factor in his dismissal; (4) the University would have terminated Nicholas even if the report had not been filed; and (5) the University breached its tenure contract with Nicholas. *Id.* The district court granted defendants' motion for judgment notwithstanding the verdict as to Question 2, and entered judgment for the University on Nicholas' First Amendment claim, for Evans on all claims, and for Nicholas on the breach of contract claim against the University. *Id.* During trial, the district court granted discovery sanctions against Nicholas, excluding evidence regarding future lost earnings, punitive and compensatory damages, and detrimental reliance. *Id.* at *3. The jury awarded Nicholas nominal damages of \$1,000.00, which the court reduced to \$1.00. *Id.* The court further ordered that Nicholas receive one year's severance pay, but declined to order the University to give Nicholas his job back. *Id.*

Nicholas appealed, making five substantive arguments. *Id.* Nicholas disputed (1) the district court's dismissal of his substantive due process claim (the primary issue on appeal), (2) the court's judgment for the University on his First Amendment claim, (3) the jury verdict on his procedural due process claim, (4) the court's judgment for Evans on all claims, and (5) the jury charge on the breach of contract claim. *Id.* Nicholas also made three arguments relating to damages, disputing (1) the reduction of the damage award, (2) the denial of specific performance, and (3) the limitation of his damages to lost compensation only. *Id.* Finally, Nicholas raised three evidentiary points, arguing that the court erred in (1) limiting his time for cross-examination of Evans, (2) excluding character testimony about Evans, and (3) granting the defendants' motion for discovery sanctions against him. *Id.*

The Court of Appeals for the Third Circuit, in a unanimous opinion, affirmed the holdings of the district court. *Id.* In particular, the court held that the property interest in a tenured position does not rise to the level of a "fundamental" interest, and thus is not entitled to substantive due process protection. *Id.* at *1. The court also held that the termination was not a retaliatory discharge in violation of the First Amendment, that the district court did not err in reducing Nicholas' nominal damage award to \$1 and in

limiting damages to those of a compensatory nature, and that the district court properly granted discovery sanctions against Nicholas. *Id.* at *9-*14.

Judge Alito, writing for the court, began with an analysis of the principal issue on appeal: Nicholas's assertions that his tenured professorship was a property right protected by the substantive component of the Due Process Clause of the Fourteenth Amendment, and that his termination was arbitrary, irrational, and improper and therefore unconstitutional. *Id.* at *3. Judge Alito initially noted that the United States Supreme Court has held that the Due Process Clause contains both a procedural element and a substantive element. *Id.* at *4. The procedural element, the judge explained, guarantees fairness in state procedures. *Id.* The substantive factor, the judge continued, consists of two conceptually distinct strains. *Id.* First, the judge explained that a plaintiff may challenge the constitutionality of a legislative act, the benchmark of which is whether the government can identify "a legitimate state interest that the legislature could rationally conclude was served by the statute." *Id.* Second, the judge further expounded that a plaintiff may challenge a non-legislative state action—even where the state satisfied its procedural due process obligation—with an allegation that the deprivation was "arbitrary, irrational, or tainted by improper motive." *Id.* (citations omitted). In this second situation, the court stated, the plaintiff must, as a threshold matter, show that he has a protected property interest. *Id.*

Judge Alito observed that the Third Circuit held in *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3d Cir. 1995), that a property interest must bear a "particular quality" to merit substantive due process protection. *Id.* at *5. Judge Alito noted that, although little judicial guidance exists to suggest what such a "particular quality" is, the United States Supreme Court has indicated that the "particular quality" should be determined not by reference to state law, but by an analysis of whether the property interest is "fundamental" under the United States Constitution. *Id.* (citing *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985)). Judge Alito adopted the approach of Justice Powell's concurring opinion in *Ewing*, which focused on the nature of the property interest and expressed the view that a "fundamental" interest is "closely tied to 'the respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.'" *Id.* at *6 (quoting *Ewing*, 474 U.S. at 229-30 (Powell, J., concurring)). The court avowed that in this regard, some property interests are clearly protected by substantive due process—land ownership is the classic example in the Third Circuit. *Id.* Judge Alito distinguished state-created property rights, however, which, while without

question are entitled to procedural due process protection, must be scrutinized with “the utmost care” in the determination of entitlement to substantive due process protection, particularly where no precedent exists. *Id.* (citations omitted). The court listed four cases in which the Third Circuit held that deprivation of the property right at issue did not raise a substantive due process claim: *Reich v. Beharry*, 883 F.2d 239 (3d Cir. 1989), concerning a service contract with the state; *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988), litigating a state-law entitlement to utility services; *Mauriello v. University of Medicine & Dentistry of New Jersey*, 781 F.2d 46 (3d Cir. 1986), analyzing a student’s interest in continuing school enrollment; and *Independent Enterprises Inc. v. Pittsburgh Water & Sewer Authority*, 103 F.3d 1156 (3d Cir. 1997), in which the Third Circuit held that a low bidder’s entitlement to a state contract was not a property interest implicitly protected by the Constitution. *Id.* at *6-*7. Judge Alito concluded that where a plaintiff challenges a non-legislative deprivation of a property interest, and that interest is not fundamental in nature, insofar as the government complies with the procedural due process requirements of adequacy and fairness, the plaintiff cannot state a claim for a violation of substantive due process. *Id.* at *7.

Having established this framework, Judge Alito turned to the particulars of Nicholas’ case. *Id.* at *8. The judge initially pointed out that the majority of courts of appeals have held that a tenured position with a state university is a state-created contract right that does not rise to the level of a fundamental property interest, and therefore does not warrant substantive due process protection. *Id.* The court announced that the Third Circuit would join their ranks: A tenured professorship, it reasoned, is neither “deeply rooted in the Nation’s history and traditions,” nor is “implicit in the concept of ordered liberty like personal choice in matters of marriage and family.” *Id.* The court stated that a tenured professorship more closely resembles those interests, like a service contract with the state, which the Third Circuit previously ruled did not merit substantive due process protection. *Id.* (citations omitted). In so holding, Judge Alito commented that the court’s conclusion would do no violence to the caution of the United States Supreme Court that the federal courts not become the venue through which state employees might air their grievances with their employers, for “the United States Constitution cannot feasibly be construed to require federal judiciary review for every such [personnel decision in] error.” *Id.* at *8-*9 (quoting *Bishop v. Wood*, 426 U.S. 341, 359-60 (1976)).

The court then shifted its attention to Nicholas’ second substantive argument: That his discharge was in retaliation for his statements about Evans to the State Board of Medicine, and therefore violated the First

Amendment's guarantee of freedom of expression. *Id.* at *9. Judge Alito explained that the appropriate analysis for a § 1983 retaliation claim is set forth in *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977); a plaintiff must first show that his constitutionally protected speech was a substantial or motivating factor in his termination, at which point the burden shifts to the defendant who, by a preponderance of the evidence, must establish that the plaintiff's discharge would have occurred even in the absence of protected speech. *Id.* (citations omitted). In this case, the judge concluded, the jury found that Nicholas had satisfied his burden to show that his report to the Board of Medicine was a substantial factor in his discharge, but also found that the University would have fired Nicholas regardless of his comments. *Id.* at *10. Therefore, the court held, the University successfully established its *Mount Healthy* affirmative defense, and the judgment against Nicholas was appropriate. *Id.* The court rejected Nicholas' contention that because the jury found that the University was in breach of contract, it should also have inferred that the discharge was wrongful. *Id.* The jury, the court explained, may simply have found that the University was in breach of the tenure contract because the reasons for Nicholas' termination did not constitute adequate cause—not because they were unconstitutional. *Id.* Judge Alito also rejected Nicholas' argument that the district court should have submitted an instruction on pretext, according to the standard of the Title VII "dual motive" cases. *Id.* The judge pointed out that under *Mount Healthy*, Title VII analysis is inapplicable in the First Amendment context. *Id.*

The court summarily disposed of Nicholas' remaining three substantive issues on appeal. *Id.* Nicholas' assertion that the evidence did not support the jury verdict against him on his procedural due process claim was of no consequence, the court held, because Nicholas never made a motion for a judgment notwithstanding the verdict. *Id.* Likewise, the court disagreed with Nicholas' challenge to the judgment for Evans on the breach of contract claim. *Id.* at *11. Nicholas did not even allege he had a contract with Evans, the court observed. *Id.* Finally, the court rejected Nicholas' objections to the jury instructions for the breach of contract claim: the charge correctly stated Pennsylvania law, the court held, and even if it was in error, the error would have been harmless, because the jury found for Nicholas on this particular claim. *Id.*

At this point in its opinion, the court concentrated on Nicholas' three arguments concerning the lower court's treatment of damages. *Id.* Judge Alito reasoned that Nicholas' first contention—that the district court erred in reducing the damages for the breach of contract claim from \$1,000.00 to \$1.00—was without merit, because in both Pennsylvania and the Third Circuit, the standard award of nominal damages is \$1.00, or the basic unit

of American currency. *Id.* at *12. The court likewise held against Nicholas' second assertion that the district erred in declining to order the University to reinstate him. *Id.* The judge confirmed that under Pennsylvania law, and according to the Restatement (Second) of Contracts, specific performance is an inappropriate remedy for the breach of a contract for personal services. *Id.* Because the University's liability was solely contractual, the court concluded that an order for reinstatement would have been improper. *Id.* Nicholas' third argument, the court noted, urged that the lower court erred in excluding his evidence concerning punitive damages and compensatory damages arising from mental depression. *Id.* The court once again referred to Pennsylvania law and found that (1) punitive damages are not recoverable for a claim based on breach of contract alone; and (2) compensatory damages for emotional distress are only recoverable if the plaintiff alleges physical injury. *Id.* at *12-*13 (citations omitted). Because Nicholas did not allege physical injury, the court held that the district court did not err in precluding Nicholas from introducing evidence of punitive and compensatory damages. *Id.* at *12.

Finally, the court reviewed Nicholas' three evidentiary objections. *Id.* at *13. First, the court noted, Nicholas contended that the lower court improperly restricted his time to cross-examine Evans. *Id.* At the beginning of the trial, Judge Alito explained, both parties agreed to limit the time used for questioning witnesses to move the case along quickly. *Id.* Judge Alito observed that Nicholas waived his right to appeal the time limitation because he never objected to it at trial—in fact, Nicholas consented to it; therefore, the court held, the lower court's ruling would stand. *Id.*

Second, Judge Alito continued, Nicholas protested the district court's exclusion of the testimony of one of Nicholas' witnesses concerning Evans' truthfulness. *Id.* Judge Alito, indicating the lower court's ruling would be reviewed only for abuse of discretion, pointed to Federal Rule of Evidence 608(b), which states that "specific instances of the conduct of a witness, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence [evidence offered through other witnesses.]" *Id.* (citing Fed. R. Evid. 608(b)). The Third Circuit has construed Rule 608, Judge Alito clarified, as *requiring* the exclusion of extrinsic evidence concerning a witness's prior conduct; a party, then, must rely on his right to cross-examine to bring the witness's credibility into question. *Id.* (quoting *United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989)). Therefore, the court declined to overrule the district court's decision to exclude Nicholas's witness's testimony. *Id.*

Finally, Judge Alito addressed Nicholas' last argument on appeal:

That the district court erred in granting the defendants' motion for discovery sanctions against Nicholas and in precluding the introduction of evidence concerning lost future earnings. *Id.* The lower court, Judge Alito explained, had sanctioned Nicholas for his failure to promptly reveal that the institution at which he worked part-time as an emergency room doctor had notified him that his position would be eliminated; this rendered information previously disclosed about his current employment materially inaccurate. *Id.* Remarking that its review was for abuse of discretion, the court cited Federal Rule of Civil Procedure 26(e), upon which the lower court had relied, which provides that a party has a duty to supplement or correct material information previously furnished, but no longer complete or correct. *Id.* at *14. Moreover, Judge Alito continued, under Federal Rule of Civil Procedure 37(c)(1), exclusion of that evidence may be proper as a sanction against the non-disclosing party, based on a consideration of four factors: (1) the surprise or prejudice of the party against whom the evidence would be introduced; (2) the capacity of the prejudiced party to cure; (3) the extent to which inclusion of the non-disclosed evidence would disrupt the trial; and (4) the bad faith of the non-disclosing party. *Id.* In this case, the judge agreed with the lower court that Nicholas' non-disclosure did prejudice the defendants, who would have to gather additional evidence and create a new rebuttal argument to Nicholas' claim of lost future earnings, and would delay the trial, as the defendants would need more time to prepare. *Id.* Therefore, the court found the exclusion of this evidence was an appropriate sanction, and affirmed the ruling of the lower court. *Id.*

The Third Circuit addressed myriad issues in this case, affirming, across the board, the district court's evidentiary and damages rulings and substantive holdings. Clearly, however, the substantive due process question was the most interesting and significant in the case. In holding that a tenured position is not a fundamental property interest and is therefore not entitled to substantive due process protection, the Third Circuit has finally weighed in on a problem that is currently the subject of a circuit split.

The court's conclusion followed logically from Supreme Court and Third Circuit jurisprudence: A tenured professorship is more like a state-created property interest (not entitled to substantive due process protection), and is less like a fundamental property interest (like land ownership—entitled to substantive due process protection). Certainly tenure is an important and valuable concept: the security it provides guarantees a greater academic freedom and serves as an incentive to bring

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bright, qualified individuals into the teaching profession. But tenure is, at its core, a job contract, protected, like other contracts, by state law and subject to procedural due process standards. It does not rise to the level of a constitutionally protected interest.

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