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

PHILIP PALADE, et al. **PLAINTIFFS**

VS. **NO. 4:19CV00379 JM**

BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS, et al. **DEFENDANTS**

ORDER

Pending is the Defendants' motion to dismiss Plaintiffs' complaint. (Docket # 4).[1] Plaintiffs have filed a response and Defendants have filed a reply. For the reasons stated herein, the motion is GRANTED.

On May 31, 2019, Plaintiffs, tenured faculty members employed by the University of Arkansas System filed a Complaint and proposed class action against the Board of Trustees of the University of Arkansas and the individual members of the Board in their official capacities. Plaintiffs allege that on March 29, 2018, the Board adopted and passed revisions to Policy 405.1, governing faculty promotion, tenure and annual reviews (hereinafter "Revised Policy") which unilaterally and without the consent of the Plaintiffs or other purported class members made material changes to tenured and tenure-track faculty member's contractual rights and violated their constitutional rights. Specifically, Plaintiffs claim that "the Revised Policy makes highly significant qualitative changes to the definition of "cause" that provides the University of Arkansas System with greatly expanded authority to terminate faculty." (ECF No. 6, p. 7). Plaintiffs seek to invalidate the Revised Policy and request that the Court enjoin the Board

1 The Court will not consider any pleadings outside of the record in deciding the pending motion.

from applying the Revised Policy to the class as of March 29, 2018. Plaintiffs advance seven claims:

Count 1- Declaratory judgment and injunctive relief under the United States Constitution- Contracts Clause.

Count 2- Declaratory judgment and injunctive relief under the United States Constitution- Due Process Violations.

Count 3- Declaratory judgment and injunctive relief under the Arkansas Constitution-Contracts Clause.

Count 4- Declaratory judgment under Arkansas Contract Law.

Count 5- Declaratory judgment and injunctive relief under the United States Constitution- First Amendment Violation.

Count 6- Declaratory judgment and injunctive relief under the Arkansas Constitution- Free Communication Violation.

Count 7- Declaratory judgment and injunctive relief under the United States Constitution- Academic Freedom Violation

Defendants argue that Plaintiffs' state law claims in Counts 3, 4, and 6 are barred by the Eleventh Amendment and sovereign immunity; Plaintiffs lack standing; their claims are unripe; and, Plaintiffs' complaint fails to state a plausible claim for which relief can be granted.

Plaintiffs concede that the Eleventh Amendment likely prohibits the Court from deciding Plaintiffs' claims based on the Arkansas Constitution and Arkansas contract law. Accordingly, by concession, the Court dismisses Counts 3, 4 and 6. Plaintiffs challenge the dismissal of the remaining claims.

Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), "a 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 is plausible on its face "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.* However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted). When considering a motion to dismiss under Rule 12(b)(6), the court must accept as true all the factual allegations contained in the complaint and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001).

Discussion

Plaintiffs' claims against the University of Arkansas Board of Trustees are barred by sovereign immunity. *See Monroe v. Ark. State Univ*. 495 F.3d 591, 594 (8th Cir.2007) ("the University argues the Eleventh Amendment bars suit against the University for any kind of relief, not merely monetary damages. We agree."). *See also Buckley v. Univ. of Ark. Bd. of Trustees,* 780 F.Supp.2d 827, 830 (E.D.Ark.2011) ("The governing bodies of state universities enjoy the same immunity from suit as the universities themselves."). Plaintiffs' federal law claims against the individual board members in their official capacities for prospective declaratory and injunctive relief remain.

Defendants argue that Plaintiffs' federal claims are nonjusticiable. The jurisdiction of federal courts is limited to actual cases and controversies by Article III, § 2, of the United States Constitution. *Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003). To establish Article III standing, a plaintiff must establish three elements: (1) an "injury in fact"—an invasion of a legally protected interest which is both "concrete and particularized" and "actual or imminent; " (2) proof that the injury is "fairly ... trace[able] to the challenged action of the defendant; and (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id.* at 564, fn4 (internal citation and quotations omitted). "The existence of a case and controversy is a prerequisite to all federal actions, including those for declaratory or injunctive relief." *Philadelphia Fed'n of Teachers, Am. Fed'n of Teachers, Local 3, AFL-CIO v. Ridge,* 150 F.3d 319 (3d Cir. 1998), quoting, *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio,* 40 F.3d 1454, 1462 (3d Cir.1994).

"The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000). The ripeness doctrine is intended to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.*, citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Under the ripeness doctrine, for the Court to hear a case,

there must be a "real, substantial controversy between parties having adverse legal interests ...." *Id*., citing, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). A claim does not meet the justiciability requirement if it is not ripe, meaning it is dependent on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

Although a declaratory judgment action can be sustained if no injury has yet occurred. *County of Mille Lacs v. Benjamin,* 361 F.3d 460, 464 (8th Cir.2004), before a claim is ripe for adjudication the plaintiff must face an injury that is "certainly impending." *Pub. Water Supply Dist. No. 8 of Clay Cty., Mo. v. City of Kearney, Mo*., 401 F.3d 930, 932 (8th Cir. 2005) citing, *Pennsylvania v. West Virginia,* 262 U.S. 553, 593, 43 S.Ct. 658, 67 L.Ed. 1117 (1923); *South Dakota Mining Ass'n, Inc. v. Lawrence County,* 155 F.3d 1005, 1008 (8th Cir.1998). "Whether the factual basis of a declaratory judgment action is hypothetical—or more aptly, too hypothetical—for purposes of the ripeness doctrine (and concomitantly Article III) is a question of degree." *Id.*

Plaintiffs argue that the most significant changes to the Revised Policy are to the definition of "cause." "Cause" in the Original Policy is defined as: "[C]onduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University." In contrast, the Revised Policy defines "cause" for termination as: "[C]onduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the University, or that otherwise serves as the basis for disciplinary action." (ECF No. 6, p. 5-6). Plaintiffs argue that the

additional language in the Revised Policy – "or that otherwise serves as the basis for disciplinary action" - exponentially expands the scope of the definition of "cause" for dismissal of a faculty member and modifies the faculty member's contract with the Board without the faculty member's consent. Importantly, however, no Plaintiff has alleged that he has faced disciplinary action, threatened action or termination under the Revised Policy.

The Court finds that the Plaintiffs claims are not ripe. Plaintiffs' allegations of the University's possible use of the Revised Policy to discipline or terminate a faculty member for reasons not covered or beyond those allowed in the original policy are speculative. Plaintiffs rely on *Maytag Corp. v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America*, 687 F.3d 1076 (8th Cir.2012) for the proposition that its' controversy with the University is ripe for decision. However, in *Maytag* the Court found that the employer had unilaterally modified the retirees' benefits. The parties had a 25 year history of dispute regarding retiree benefits and the Court found the contractual dispute was real, substantial and existing. In contrast, the policy changes here did not make changes to historically disputed benefits, but instead changed definitional language which may or may not be applied in the future in a manner different from the original policy definition or in a manner which violates federal law.

Finally, although reasonable self-censorship can be adequate to establish an injury in fact for a First Amendment challenge ‼"[t]he relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was 'objectively reasonable.' " *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794–95 (8th Cir. 2016) citations omitted. "Reasonable chill exists when a plaintiff shows 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute [or policy], and there exists

a credible threat of prosecution.'" *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) citing, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). Plaintiffs' allegations fail to establish that they were in danger of sustaining injury as a result of the Revised Policy or that the perceived injury was both real and immediate. Plaintiffs' allegations of possible, but not threatened, enforcement of the Revised Policy in a manner that might but might not violate federal law is insufficient to establish injury in fact. *Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003) (To establish an injury in fact, "[t]he plaintiff must show that he or she 'sustained or is immediately in danger of sustaining some direct injury as the result of the challenged ... conduct and [that] the injury or threat of injury [is] both real and immediate ....'").

For the reasons stated herein, Plaintiffs' claims are not ripe and therefore do not present a justiciable controversy. Defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED this 16th day of March, 2020.

James M. Moody Jr.
United States District Judge