

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

JIM SISNEY, an individual,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 09-CV-253-TCK-PJC
)	
INDEPENDENT SCHOOL DISTRICT)	
NO. 3 OF TULSA COUNTY, a Political)	
Subdivision; and the BROKEN ARROW)	
SCHOOL BOARD,)	
)	
Defendants.)	

**OPENING BRIEF IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS**

The Defendant, Independent School District No. 3 of Tulsa County (the “Broken Arrow School District”) and the Broken Arrow School Board, respectfully submits this brief in support of its motion to dismiss this action.¹

The Plaintiff, Jim Sisney, is the former Superintendent of the Broken Arrow School District. The Board of Education voted to dismiss Sisney from his employment with the Broken Arrow School District on October 23, 2008. Sisney then brought this action alleging that he was terminated without due process. He asserts claims under 42 U.S.C. § 1983 for deprivation of property and liberty without due process of law. Sisney also asserts a state law claim for breach of contract resulting from his termination.

¹ The Board of Education of the Broken Arrow School District (the “School Board”) is the governing body of the Broken Arrow School District. OKLA. STAT. tit. 70, § 5-106 (2008 Supp.). It has no independent legal existence apart from the Broken Arrow School District and is not an entity capable of being sued separately from the School District. OKLA. STAT. tit. 70, § 5-105 (2001).

The Broken Arrow School District now moves to dismiss Sisney's complaint for failure to state a claim upon which relief can be granted.

The Tenth Circuit has explained that “[p]rocedural due process ensures that a state will not deprive a person of life, liberty or property unless fair procedures are used in making that decision.” *Kirkland v. St. Vrain Valley School District No. RE-1J*, 464 F.3d 1182, 1189 (10th Cir. 2006). The court explained that to determine whether a plaintiff was denied procedural due process, a two-step inquiry is necessary: “(1) Did the individual possess a protected interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?” *Id.*

In this case, the Broken Arrow School District acknowledges that Sisney had a protected property interest in continued employment by virtue of his contract as superintendent of schools. This case therefore turns on the second inquiry set forth above – was Sisney “afforded an appropriate level of process?”

Oklahoma law specifies the procedure to be followed in terminating the employment of a full-time certified administrator. OKLA. STAT. tit. 70, § 6-101.13 (2001). This statute provides that the administrator must be notified, in writing, of the proposed action and provided a list of the reasons for such action. The administrator then has ten (10) days after his receipt of the written notice to request a due process hearing before the local board of education. If the administrator timely requests a hearing, the board is required to conduct a due process hearing before voting on the possible termination. If the administrator does not timely request a hearing, Section 6-101.13 specifically provides that he has waived his right to a hearing.

The Supreme Court has observed that due process is a flexible concept that calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972). The Tenth Circuit has emphasized that the essential elements of procedural due process are notice and an opportunity for a hearing. *Darr v. Town of Telluride*, 495 F.3d 1243, 1251 (10th Cir. 2007), and *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984). Because Section 6-101.13 provides for notice and the opportunity for a hearing prior to any termination action, it satisfies the requirements of the Due Process Clause of the Fourteenth Amendment.

In his complaint, Sisney does not state whether he was offered an opportunity for a due process hearing. He merely alleges that he was deprived of a property interest by being terminated (Complaint, ¶ 23) and, upon being terminated, was not offered a “meaningful” opportunity to clear his name (Complaint, ¶ 28).

Sisney’s termination was covered extensively by the *Tulsa World* and other local news media. The news stories reported that Sisney was notified of the reasons for his possible termination and offered the opportunity for a due process hearing. Pursuant to FRE 201, this Court may take judicial notice of these facts. *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir. 1997) (affirming district court’s authority to take judicial notice of adjudicative facts on motion to dismiss). Moreover, a court may take judicial notice of adjudicatory facts without converting a motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56. *Pace v. Swerdlow*, 519 F.3d 1067, 1072 (10th Cir. 2008); *Buck v. Hampton Tp. School Dist.*, 452 F.3d 256, 260 (3rd Cir. 2006); *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Based on the foregoing authorities, this Court may – and should – take judicial notice that Sisney was notified in writing that the Board of Education intended to consider his possible termination, that he was advised of the reasons for which the Board of Education was considering this action, that he was offered the opportunity for a due process hearing, and that he did not request a due process hearing.

By declining to exercise his right to a due process hearing, Sisney waived his right to claim that he was denied due process. *Pitts v. Board of Education of U.S.D. 305, Salina, Kansas*, 869 F.2d 555, 557 (10th Cir. 1989) (holding that teacher who “was fully informed of his considerable procedural rights” and failed to take advantage of those procedures “waived his right to challenge them in federal court”); *Cliff v. Board of School Comm’rs of City of Indianapolis*, 42 F.3d 403, 413-14 (7th Cir. 1995) (stating that the right to a due process hearing is waived “when the employer offers a pre-termination hearing and the employee fails to accept”); *Correa v. Nampa School Dist. No. 131*, 645 F.2d 814, 817 (9th Cir. 1981) (noting that “where adequate administrative procedures exist, a person cannot state a claim for denial of procedural rights when he has elected to forego a complete hearing”).

Because Sisney waived his right to a due process hearing, his claims that he was deprived of property and liberty without due process of law fail to state a claim upon which relief can be granted. Likewise, Sisney cannot claim that the Broken Arrow School District improperly terminated his contract when he declined to take advantage of his opportunity to contest whether his contract should be terminated.

Sisney’s complaint should therefore be dismissed pursuant to Rule 12(b)(6).

Argument and Authority

Introduction

Motions to dismiss were formerly analyzed under a stringent standard that authorized dismissal only if “it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Supreme Court expressly rejected that standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), noting that “this familiar observation has earned its retirement.” *Id.* at 563. Instead, the Court in *Twombly* held that to survive a motion to dismiss, a complaint must contain “enough facts to state a claim that is plausible on its face.” *Id.* at 570. The Court explained that plaintiffs must nudge their claims “across the line from conceivable to plausible.” *Id.*

The Tenth Circuit has expressly recognized and applied this new standard. *Ton Services, Inc. v. Qwest Corporation*, 493 F.3d 1225, 1236 (10th Cir. 2007); *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). Courts applying the *Twombly* standard continue to assume the truth of all well-pleaded factual allegations in a complaint and view such allegations in the light most favorable to the plaintiff. *Id.*

In this case, Sisney’s complaint does not state a claim that is plausible on its face. Although Sisney advances claims for denial of property and liberty without due process of law, the facts before this Court establish that Sisney was advised of his due process rights and expressly waived his right to a due process hearing. Sisney’s due process claims are therefore not facially plausible.

Likewise, Sisney's state law breach of contract claim does not state a plausible claim, because Oklahoma law specifically authorizes school districts to terminate the contracts of full-time certified administrators. OKLA. STAT. tit. 70, § 6-101.13 (2001). Sisney's claim that his contract was not properly terminated is not plausible in light of his decision not to contest the termination of his contract.

Proposition I

The Court Should Take Judicial Notice That Sisney Was Notified of His Due Process Rights and Waived His Right to a Due Process Hearing

FRE 201 allows a court to take judicial notice of adjudicative facts. As the advisory committee notes to FRE 201(a) explain, "Adjudicative facts are simply the facts of the particular case." FRE 201(b) specifies that a judicially noticed fact must be a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Federal courts have upheld the propriety of taking judicial notice of facts reported by the local news media. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (upholding trial court's decision to take judicial notice of fact reported in newspaper article because such fact was generally known in the area and was capable of accurate and ready determination). *See, also, Associated General Contractors of America v. City of Columbus*, 936 F.Supp. 1363, 1424-25 (S.D. Ohio 1996), *vacated on other grounds*, 172 F.3d 411 (6th Cir. 1999) (collecting cases discussing judicial notice of facts reported in newspaper articles).

The relevant facts of Sisney's dismissal are both generally known within the Northern District of Oklahoma (because of the coverage provided by the local news media) and capable of accurate and ready determination by resort to the official records of the Broken Arrow School District.

In a story published on October 8, 2008, the *Tulsa World* reported that the Board of Education of the Broken Arrow School District voted "to send a letter to Superintendent Jim Sisney outlining the reasons for his possible dismissal." See story entitled "All Sides Silent on BA Suspension" attached as exhibit 1.

On October 17, 2008, the *Tulsa World* made available on its web site a copy of the letter the Broken Arrow School District sent to Sisney notifying him that the Board would consider his termination, listing the reasons for his possible termination, and advising him of his due process rights. See letter dated October 7, 2008, attached as exhibit 2.

The letter, which is signed by the Broken Arrow School District's attorney, recites that the Board has directed the attorney to notify Sisney, in writing, that the Board will consider and vote on Sisney's possible dismissal. The letter lists the following five reasons for the proposed action:

1. Significant evidence from several witnesses shows that you frequently treat staff, patrons and others in a demeaning and humiliating manner which imperils working relationships.
2. Witnesses have indicated that during duty time and while acting as superintendent of schools, you have made unprofessional, demeaning and derogatory statements to a District employee about other District employees, current and former board members and superintendents of other Tulsa area school districts.

3. Witnesses and a document show that you entered into an agreement, on behalf of the District, with an administrator in which the administrator is required to be paid for sick leave when he is not sick, requires the administrator to keep the agreement confidential when all such agreements are public records and which agreement you did not disclose to the school board.
4. Witnesses have indicated that you have made false public allegations against a District vendor as to that vendor's billing practices to the District.
5. Significant evidence from several witnesses shows that you are not a good leader nor do you work in a collaborative or collegial manner with staff or the community.

The letter then notifies Sisney of his right to request a due process hearing:

This is to notify you that you have the right to a hearing before the Board of Education prior to the Board taking any action with regard to your possible dismissal. If you wish to exercise your right to this hearing, you must, **WITHIN TEN (10) CALENDAR DAYS OF YOUR RECEIPT OF THIS NOTICE, NOTIFY THE CLERK OF THE BOARD OF EDUCATION IN WRITING.** If you fail to notify the Board Clerk in writing within the ten (10) calendar day period of your desire to have a hearing on your possible dismissal, you will be deemed to have waived your right to a hearing and the Board can proceed to make a decision concerning your possible dismissal without affording you any further notice or any further opportunities to present your side of the matter to the Board. The decision of the Board of Education concerning your possible dismissal is final and nonappealable.

(Emphasis original). The letter stated that if Sisney requests a hearing, the hearing will be scheduled as soon as possible and Sisney will be notified in writing of the date, time and place of the hearing.

On the same day, October 17, 2008, the *Tulsa World* published a story stating that Sisney had announced at a news conference "that he would not request a due process

hearing” before the Board of Education. *See* story entitled “Suspended BA Superintendent Says He Won’t Request Hearing,” attached as exhibit 3.

On October 23, 2008, six days after Sisney’s public announcement that he would not request a due process hearing, the Board of Education of the Broken Arrow School District held a meeting at which the Board voted to dismiss Sisney. The *Tulsa World* reported the Board’s action in a news story published the same day. *See* story entitled “BA School Board Ousts Embattled Superintendent in 3-2 Vote,” attached as exhibit 4.² The story also recited that Sisney’s contract provides that if the School District terminates Sisney’s employment for any lawful reason, Sisney must be paid the full amount of his annual salary for the remainder of the current fiscal year, which ends on June 30, 2009.

The Broken Arrow School District requests that this Court take judicial notice of the foregoing facts pursuant to FRE 201(b). FRE 201(d) provides that a court “shall take judicial notice if requested by a party and supplied with the necessary information” (emphasis added). To confirm the accuracy of the facts reported in the *Tulsa World* articles, the Broken Arrow School District has attached to this brief a true and correct copy of the notice letter given to Sisney that the Board of Education will consider his termination. *See* Exhibit 5. It is identical to the copy published by the *Tulsa World*. In addition, the Broken Arrow School District has also attached to this brief a copy of the minutes of the meeting of the Board of Education at which Sisney was terminated. *See* Exhibit 6. These documents from the files of the Broken Arrow School District establish

² These stories are currently available at the *Tulsa World*’s website, <http://www.tulsaworld.com/>, and may be accessed using the “Site and Archive Search” function.

that the facts reported by the *Tulsa World* are “not subject to reasonable dispute” because they are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

The Court should take judicial notice of these facts.

Proposition II

Sisney May Not Claim That He Was Denied Due Process After Waiving His Right to a Hearing

Sisney was notified of his right to a due process hearing and expressly waived such a hearing. For that reason, he cannot now claim that he was denied due process.

The Tenth Circuit addressed this specific issue in *Pitts v. Board of Education of U.S.D. 305, Salina, Kansas*, 869 F.2d 555 (10th Cir. 1989). There, the local board of education notified a tenured teacher that it did not intend to renew his contract for the following school year. The court explained that this action was “the first step in the lengthy process required by Kansas law for the dismissal of a tenured public school teacher.” *Id.* at 556. Upon receiving notice of the board’s decision and an outline of his due process rights, the teacher indicated that he wanted to exercise his right to a due process hearing before a committee selected for such purpose. Before the committee’s first meeting, the teacher filed a lawsuit in federal court, and neither the teacher nor his attorney attended the committee’s prehearing conference. The teacher then submitted a letter stating that he was waiving his right to a pretermination hearing. The district court subsequently entered summary judgment for the school district, and the teacher appealed.

The Tenth Circuit concluded that the teacher had waived his right to challenge the due process procedures available to him:

Pitts was fully informed of his considerable procedural rights. Indeed, he initially asserted them. The procedures mandated by Kansas law clearly meet the requirements of the due process clause. By knowingly failing to take advantage of those procedures, Pitts has waived his right to challenge them in federal court.

Id. at 557 (emphasis added; footnote omitted).

The teacher contended that the grounds relied on by the board were unsupportable and stigmatizing. He also argued that the court was improperly imposing the requirement that he exhaust his administrative remedies before bringing suit. The Tenth Circuit explained that the former argument was irrelevant while the latter was incorrect:

Pitts misunderstands the nature of his federal claim, which is an assertion that he was denied due process. Federal courts do not sit to second guess state decisions on the merits of a discharge decision, but only to ensure that employees are provided due process when the decision is made. Thus, our holding here is not that Pitts must exhaust his claim before he has a federal cause of action; rather, unless state law fails to afford Pitts adequate process, he has no federal constitutional claim to begin with. By waiving his hearing, Pitts deprived the school board of the opportunity to provide him with due process, and he gave up his right to test the correctness of the board's decision.

Id. (emphasis added).

Sisney's situation is identical. Sisney was provided written notice of the reasons the Board of Education of the Broken Arrow School District was going to consider his possible dismissal and provided an opportunity for a due process hearing. By waiving his right to a due process hearing, Sisney deprived the Board of the opportunity to provide

him with due process. When he made the choice to waive a hearing, Sisney also waived his right to dispute “the correctness of the board’s decision.”

The Tenth Circuit reached the same result in *Kirkland v. St. Vrain Valley School District No. RE-1J*, 464 F.3d 1182 (10th Cir. 2006). In that case, an assistant superintendent told the superintendent he would resign after serious financial irregularities were discovered. In return, the superintendent agreed that the school district would continue to pay the assistant superintendent’s salary for the remainder of the school year. The board of education rejected the agreement and placed the assistant superintendent on unpaid administrative leave. One board member was quoted in a local newspaper as stating that the assistant superintendent had lied to the board and falsified documents. The assistant superintendent requested a pretermination due process hearing before the board. Thereafter, the board and the assistant superintendent entered into a written termination agreement. The agreement contemplated that litigation would ensue and provided that the assistant superintendent would not request a due process hearing before the board, in return for which the board would terminate his employment without public comment.

After the board terminated him, the assistant superintendent brought suit, alleging that he had been deprived of property and liberty without due process of law. The district court denied the motion for summary judgment based on qualified immunity filed by the superintendent and board members, and they appealed. The Tenth Circuit concluded that the defendants did not deprive the assistant superintendent of property or liberty by rejecting the initial resignation agreement, suspending him without pay, or dismissing

him pursuant to the termination agreement. With regard to the dismissal action, the Tenth Circuit held that by entering into the termination agreement, the assistant superintendent had “waived any right to a pre-termination hearing.” *Id.* at 1195. The court explained that because the assistant superintendent, by signing the termination agreement, “waived any right to a pre-termination hearing, he has failed to allege a claim for the deprivation of due process.” *Id.* at 1196.

The court ruled that his waiver also waived his right to a name-clearing hearing:

Kirkland alleges that Defendants deprived him of this liberty interest without due process when he asked for, but never received, a “name-clearing” hearing. But again, Kirkland waived his right to any hearing through his termination agreement with the District. Further, Kirkland acknowledges that he never requested a hearing to clear his name separate from his request for a pre-termination hearing. In light of that, Kirkland’s decision to waive the hearing before the Board, in the April termination agreement, was sufficient to waive any right Kirkland may have had to a name-clearing hearing separate from a pre-termination hearing.

Id. The Tenth Circuit reversed the lower court’s ruling, holding that the assistant superintendent’s due process claims failed to allege a constitutional violation. *Id.*

Other circuits have reached the same result. In *Cliff v. Board of School Comm’rs of City of Indianapolis*, 42 F.3d 403 (7th Cir. 1995), the Seventh Circuit held that a teacher waived her right to a due process hearing by submitting a letter to the board withdrawing her request for a hearing and asking the board to defer any decision on her nonrenewal until an arbitrator ruled on her latest grievance. The board responded by acknowledging the teacher’s withdrawal of her request for a hearing but declining to defer its decision until the pending grievance had been resolved. The teacher made no attempt to reinstate her request for a hearing, and the board ultimately voted not to renew

her contract. The Seventh Circuit held that the teacher had waived her right to a due process hearing. “[T]he right to such a hearing is generally waived when an employer offers a pre-termination hearing and the employee fails to accept.” *Id.* at 414. The court observed that an employee “cannot sue in federal court to secure a right which he declined when it was voluntarily offered to him.” *Id.*, quoting *Suckle v. Madison Gen. Hosp.*, 499 F.2d 1364, 1367 (7th Cir. 1974).

In *Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981), a school employee sued the school district after her contract was not renewed. The district court held that the plaintiff “had waived her right to claim a due process violation because she knowingly and voluntarily chose to forego the District’s administrative procedures and instead pursued a claim through the Office of Civil Rights.” *Id.* at 816-17. The Ninth Circuit affirmed, noting that “where adequate administrative procedures exist, a person cannot state a claim for denial of procedural rights when he has elected to forego a complete hearing.” *Id.* at 817.

In *Birdwell v. Hazelwood School District*, 491 F.2d 490 (8th Cir. 1974), the Eighth Circuit held that a teacher could not pursue a due process claim after waiving his right to a due process hearing. The teacher was recommended for dismissal after he made disruptive comments about military recruiters visiting campus. The teacher chose not to attend the board meeting where his dismissal was considered, and the board then voted to dismiss him. In rejecting the teacher’s claim that he was denied due process, the court noted that the teacher had no right to complain of the alleged deficiencies in the due process procedure he was offered:

He was aware of the time and place of the Board meeting, that his continued employment was at stake, and that his dismissal was being recommended because of his statements in class and his actions toward the servicemen in the building. Nevertheless, with this knowledge, and after conferring with legal counsel, it was his decision not to attend the meeting.

Id. at 494-95. Based on the foregoing facts, the court found the teacher had waived his right to challenge his due process hearing:

The opportunity thus demanded was here afforded but appellant deliberately chose not to avail himself of it and not to present to the Board the arguments made to us. He cannot now scour the record of the hearing he thus ignored for flaws in its conduct. We find a voluntary and knowing waiver.

Id. at 495.

The foregoing authorities establish that Sisney may not claim that he was denied due process after he knowingly waived his opportunity for a pretermination due process hearing. Sisney's due process claims therefore fail to state a claim upon which relief can be granted.

Likewise, Sisney cannot claim that the Broken Arrow School District's termination of his employment was a breach of his contract when he declined to take advantage of his opportunity to challenge such termination. The Broken Arrow School District terminated Sisney's employment pursuant to the provisions of OKLA. STAT. tit. 70, § 6-101.13 (2001). Sisney has no breach of contract claim.

Conclusion

For the reasons set forth in this brief, the Broken Arrow School District requests that Sisney's complaint be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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