2016 IL App (2d) 151007-U
No. 2-15-1007
Order filed August 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JADWIGA KROL-BARYS,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-L-73
	)	
PETR VANYSEK and	)	
VICTOR RYZHOV,	)	Honorable,
	)	William P. Brady,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's section 1983 complaint, which alleged an equal-protection violation, as she did not allege that she was treated differently than others similarly situated or that there was no rational basis for any such treatment.

¶ 2 *Pro se* plaintiff, Jadwiga Krol-Barys, filed a third amended complaint under the federal Civil Rights Act (42 U.S.C. § 1983 (2012)), against defendants, Petr Vanysek and Victor Ryzhov, alleging violations of her right to equal protection under the fourteenth amendment (U.S. Const., amend. XIV). Defendants filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). The trial court

granted the motion as to both defendants, finding that plaintiff failed to state a claim (see 735 ILCS 5/2-615 (West 2014)). In addition, as to Ryzhov, the trial court also found that the claim was barred by the statute of limitations (see 735 ILCS 5/2-619(a)(5) (West 2014)). Because we find that the complaint was properly dismissed for failure to state a claim, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff's third amended complaint alleged that she was a doctoral student in chemistry at Northern Illinois University (NIU) from 2009 to 2011. Defendants were chemistry professors at NIU, and Vanysek was also the director of graduate studies. On May 21, 2011, plaintiff took a written "qualification examination" for purposes of entering the "research portion of the program." The written examination was created by four chemistry professors, including defendants. When plaintiff took the examination, two of the professors were not present: Ballantine and Ryzhov. After the examination, while Ballantine was on vacation and had "no opportunity to see [the] full exam," Vanysek issued a letter stating, " 'exam not passing.' " Plaintiff claimed that, when Ballantine returned from vacation, plaintiff learned that her examination "was not completely graded." She alleged that, although Ballantine was willing to give her points for the "not graded" portion of the examination, Vanysek would not grade "his omitted part of the exam" and would not "change the status of the exam to 'passing.' " Plaintiff appealed her grade through NIU procedures, but Vanysek, in his capacity as the director of graduate studies, never formed a graduate program committee to hear the appeal.

¶ 5 Based on these allegations, plaintiff claimed that defendants violated her equal-protection rights under the fourteenth amendment and section 1983. She stated that defendants "intentionally subjected [her] to unequal and discriminatory treatment" and engaged in "intentional misconduct" and a "policy, custom or pattern" of "discrimination and academic

malpractice." She also stated that their conduct was "intentional, willful and malicious and/or in deliberate indifference" to her rights. She stated that they caused her "great mental anguish, humiliation, physical and emotional pain and suffering, inconvenience, financial and other consequential damages." As relief, she asked for: a "free education" at NIU for her doctoral degree; an order that Vanysek form a graduate program committee to hear the appeal of her grade; and a declaration that her equal-protection rights were violated.

¶ 6 Defendants filed a combined motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). Defendants argued that the equal-protection claim should be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) because plaintiff did not allege that defendants treated her worse than anyone similarly situated. Alternatively, defendants argued that the claim should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), based on the doctrine of qualified immunity, because plaintiff did not show that they violated her clearly established constitutional rights. Finally, Ryzhov argued that the claim with respect to him should be dismissed under section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2014)) because it was barred by the statute of limitations.

¶ 7 Plaintiff filed a response. She again alleged that Vanysek gave her a " '[n]ot passing' " grade even though two of the four professors who wrote the examination had not yet graded their parts of it. According to plaintiff, defendants' conduct was "arbitrary and capricious," was a "substantial departure from accepted academic norms," and lacked "professional judgment." In claiming that their conduct violated her equal-protection rights, plaintiff asserted that, as a student, she was a member of a "protected class." She also asserted that defendants were not entitled to qualified immunity, because they violated clearly established NIU rules. To support this theory, she noted that Vanysek, as the director of graduate studies, was required to form a

graduate program committee to hear her appeal but never did. And Ryzhov, who was absent for the examination, should have acted once he realized that the examination had not been completely graded. As to Ryzhov's limitations argument, plaintiff argued that the five-year limitations period for an injury to personal property in section 13-205 of the Code (735 ILCS 5/13-205 (West 2014)) should apply because it was the most analogous to her section 1983 claim.

¶ 8 The trial court held a hearing on the motion to dismiss, but the record does not contain a transcript or substitute. The court entered an order granting the motion and dismissing the complaint with prejudice. Specifically, the court dismissed the equal-protection claim against defendants under section 2-615 of the Code for failure to state a claim. The court further dismissed the claim as to Ryzhov under section 2-619(a)(5) of the Code as time-barred. The court made no ruling on whether the action should be dismissed based on qualified immunity. Plaintiff timely appealed.

¶ 9 II. ANALYSIS

¶ 10 Plaintiff contends that the trial court erred in granting defendants' combined motion to dismiss under section 2-615 of the Code and, as to Ryzhov, under section 2-619(a)(5) of the Code. Defendants respond that dismissal on those bases was proper and, in the alternative, argue that we should find that plaintiff's claim was barred by the doctrine of qualified immunity and dismiss the action under section 2-619(a)(9) of the Code.

¶ 11 We first consider whether the complaint was properly dismissed under section 2-615 of the Code. A section 2-615 motion to dismiss tests the legal sufficiency of the complaint. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). On review, the question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are

sufficient to establish a cause of action upon which relief may be granted. *Id*. Illinois is a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to bring his claim within the cause of action asserted. *Id*. A complaint is insufficient if it states mere conclusions of fact or law, and it must, at a minimum, allege facts sufficient to set forth the essential elements of a cause of action. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 27. Our review of an order granting a section 2-615 motion to dismiss is *de novo*. *Id*.

¶ 12 To prevail in a section 1983 claim, a plaintiff must prove that (1) the defendants' actions deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States, and (2) the defendants acted under color of state law. 42 U.S.C. § 1983 (2012); *Dennis E. v. O'Malley*, 256 Ill. App. 3d 334, 347 (1993). Here, plaintiff alleged that defendants violated her rights to equal protection under the fourteenth amendment (U.S. Const., amend. XIV). The equal protection clause of the fourteenth amendment most typically reaches state action that treats a person poorly because of the person's race or other suspect classification, such as sex, national origin, religion, or political affiliation, or because the person has exercised a "fundamental right," or because the person is a member of a group that is the target of irrational government discrimination. See generally *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 601 (2008); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Srail v. Village of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). The Supreme Court has also recognized the prospect of a so-called "class-of-one" equal-protection claim. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The "class-of-one" theory of equal protection "presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review." *Engquist*, 553 U.S. at 605. A plaintiff alleging a class-of-one equal-protection claim must establish that (1) a state actor has intentionally treated

him differently than others similarly situated, and (2) there is no rational basis for the difference in treatment. *Olech*, 528 U.S. at 564; *Srail*, 588 F.3d at 943.

¶ 13 Here, plaintiff claims that her complaint sufficiently pleaded a "class-of-one" equal-protection claim. We disagree. A review of her complaint makes clear that she failed to allege that she was treated less favorably than other similarly situated students with regard to the May 2012 written examination. She made no reference at all to other examinees. In addition, although she alleged that defendants acted "intentionally," "willful[ly]," "malicious[ly]," and with "deliberate indifference," such allegations are unsupported legal conclusions, which we do not consider when deciding whether a plaintiff stated a claim. See *Razor Capital*, 2012 IL App (2d) 110904, ¶ 27. Even if plaintiff had alleged that she was the only student whose exam was not completely graded, she did not allege that there was no rational basis for this action. Indeed, it is entirely possible that, given plaintiff's performance on the portion of the exam that had been graded, there was no possibility of obtaining a passing grade on the exam even if the remaining portions received perfect scores.

¶ 14 Relying on *Geinosky v. City of Chicago*, 675 F.3d 743 (7th Cir. 2012), plaintiff argues that her "allegations tell a story that clearly suggests a vindictive purpose." She seems to suggest that a general allegation that defendants treated her differently than similarly situated students is sufficient. We disagree. First, we note that *Geinosky* is readily distinguishable. In that case, the plaintiff brought a "class-of-one" equal-protection claim against the City of Chicago and eight police officers arising out of his receipt of 24 bogus traffic citations. The reviewing court found that the general allegation in his complaint, that defendants " 'intentionally treated plaintiff differently than others similarly situated' " was sufficient. *Id.* at 748. However, this conclusion was based on the court's finding that "the pattern and nature of defendants' alleged conduct do

the work of demonstrating the officers' improper discriminatory purpose." *Id*. No such pattern is present here. Moreover, and in any event, plaintiff's complaint did not even contain a general allegation that she was treated differently than similarly situated students.

¶ 15 Because we find that the trial court's dismissal under section 2-615 was proper, we need not consider the remaining issues.

¶ 16 III. CONCLUSION

¶ 17 For the reasons stated, we affirm the judgment of circuit court of De Kalb County dismissing plaintiff's complaint.

¶ 18 Affirmed.