IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DENNIS D. CARSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 05C-10-002-PLA
	)	
SPRINGFIELD COLLEGE	)	
WILMINGTON, DELAWARE	)	
CAMPUS,	)	
	)	
Defendant.	)	

Submitted: June 14, 2006
Decided: August 4, 2006

UPON DEFENDANT SPRINGFIELD COLLEGE'S
MOTION TO DISMISS PLAINTIFF'S FIRST
AMENDMENT CLAIM
(COUNT II OF THE AMENDED COMPLAINT)
GRANTED

Dennis D. Carson, *Pro Se*.

Andrew D. Cordo, Esquire, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, J.

Before the Court is Defendant Springfield College's Motion to Dismiss Plaintiff's claim for relief under the First Amendment of the United States Constitution for failure to State a claim upon which relief can be granted. Because Plaintiff would not be entitled to a recovery under the facts he has pled, even if all are accepted as true, Defendant's Motion to Dismiss is GRANTED.

I. Statement of Facts

Plaintiff Dennis Carson ("Plaintiff" or "Carson") was a student for two semesters at Springfield College ("the College"), a private educational institution. On April 6, 2005, the College allegedly informed Plaintiff that at the end of the semester, he would no longer be allowed to continue his studies because he lacked requisite experience in his field of study. Carson, upset by the College's decision, later commented in class to another student, "what I feel like doing today is going home and putting bullets in my fifteen M14 rifle clips." The course instructor, a former State police officer, overheard the comment and escorted Carson from the building with the assistance of a College security guard. Plaintiff later filed this action arguing that the College's refusal to permit him to continue his studies constitutes a breach of contract, and that his removal from the building was a

violation of his right to free speech under the First Amendment to the United States Constitution. Now before the Court is the College's motion to dismiss Count II of Plaintiff's Amended Complaint.

II. Analysis

A court may not dismiss a plaintiff's complaint for failure to state a claim unless it appears to a certainty that the plaintiff may not recover under any set of facts that would entitle him to relief.[1] In evaluating a motion to dismiss, the court's review is limited to the well-pleaded allegations in the complaint, which must be accepted as true.[2] In the instant case, even accepting all of plaintiff's non-conclusory allegations in Count II as true, his First Amendment claim fails as a matter of law.

The First Amendment to the United States Constitution states in relevant part: "Congress shall make no law… abridging the freedom of speech."[3] Although the guarantees in the First Amendment apply only to acts of Congress,[4] those protections have been extended to include State actions by the Fourteenth Amendment, which provides that, "[n]o State shall

[1] *Spence v. Funk*, 396 A.2d 967 (Del. 1978); *Nix v. Sawyer*, 466 A.2d 407 (Del. Super. Ct. 1983); *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. Ct. 1982).
[2] *Barni v. Kutner*, 76 A.2d 801 (Del. 1950).
[3] U.S. Const. amend. I.
[4] *See, e.g., Pub. Util. Comm'n of the Dist. of Columbia v. Pollak*, 343 U.S. 451, 461 (1952).

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States…," as well as 42 U.S.C. § 1983.[5]

While the Fourteenth Amendment and Section 1983 do extend constitutional protection to include State action, as a matter of substantive constitutional law, "most rights secured by the Constitution are protected only against infringement by governments."[6] That is to say, the First Amendment cannot prohibit private conduct unless "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself."[7] The Supreme Court has mandated careful adherence to this requirement because it "preserves an area of individual freedom by limiting the reach of federal law."[8] The core issue before the Court, therefore, is whether the College's acts may fairly be treated as that of the State.[9]

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[5] 42 U.S.C. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

[6] *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978).

[7] *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citations omitted).

[8] *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982).

[9] The Court notes that Plaintiff cited a number of cases for the purposes of illustrating that individuals may sue private entities for violations of the First Amendment. Plaintiff's cases were inapposite, however, because in each case the entity in question was a public school, operated and funded by the State, e.g., *San Filippo v. Bongiovanni*, 961 F.2d 1125 (3rd Cir. 1992)(involving Rutgers, the State University of New Jersey); *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000).

A private entity's actions may be attributable to the State if: (1) the private entity exercises powers that are traditionally exclusively reserved to the State[10] (the public function test); (2) the State exercised such coercive power that the private actor was compelled to act as it did[11] (the state compulsion test); or (3) the State is intimately involved in the challenged private conduct so as to be a joint participant[12] (the symbiotic relationship test).[13]

Plaintiff cannot establish that the College is a State actor under the public function test. The public function test requires that the private entity exercise powers that are traditionally exclusively reserved to the State, such as holding elections,[14] or exercising eminent domain.[15] Higher education is not a traditionally exclusive public function. This is due to the fact that many private entities, the College among them, operate for educational purposes. The mere fact that a private entity serves the public, or that its services overlap with those provided by the State, does not make the conduct in question attributable to the State.[16]

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[10] *Flagg Bros.*, 436 U.S. at 149.
[11] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).
[12] *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).
[13] The Third Circuit Court of Appeals, as well as the District Court for the District of Delaware, have recognized and applied these tests for the purposes of determining whether private action may be treated as that of the State. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3rd Cir. 1994); *Thompson v. Cmty. Action of Greater Wilmington, Inc.*, 567 F. Supp. 1159 (D. Del. 1983).
[14] *Flagg Bros.*, 436 U.S. at 149.
[15] *Jackson*, 419 U.S. at 352.
[16] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

Plaintiff is similarly unable to establish that the State exerted coercive power such that the act of the College must be considered to be that of the State. This test requires that the act be the product either of State coercion or significant encouragement.[17] This is generally the case where a State enacts regulatory requirements with which private entities must comply.[18] The College's action in ejecting Plaintiff was not in reaction to any State regulatory scheme, nor can Plaintiff demonstrate that the College otherwise acted at the State's behest.

Finally, Plaintiff cannot establish that the College was a state actor under the symbiotic relationship test. Pursuant to this test, the actions of a private party constitute state action if the State has "so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity."[19] Plaintiff makes two arguments for state action under this test. First he argues that the College is a state actor because a number of students pay their tuition at the College with loans obtained from the federal government. The Supreme Court, however, has consistently held that financial aid to an institution, without more, is not sufficient to elevate a private entity's conduct to the

[17] *Blum v. Yaretsky*, 457 U.S. 991 (1982).
[18] *Id.*
[19] *Burton*, 365 U.S. at 725.

level of state action.[20] In *Rendell-Baker v. Kohn*, the institution in question, a nursing home, received money directly from the government. The State subsidized the operating and capital costs of the home, and paid the medical expenses of more than 90 percent of the patients. In this case, an unknown number of students independently applied for, and received, loans from the federal government to finance their education. However, even if the College received this money directly from the federal government, instead of from the students, that fact is insufficient to transform the College's private actions into State action.

Plaintiff additionally alleges that the State should be considered a joint participant because the College instructor that escorted him from the building had formerly been employed as a state police officer. The instructor, however, was acting as an employee of the College, not under the color of State authority. Indeed, the instructor, as a *former* police officer, had no ability to invoke State power.

Finally, the Court notes that the First Amendment does not protect all speech. Specifically, the First Amendment does not protect "those words, which by their very utterance inflict injury or tend to incite an immediate

[20] *Rendell-Baker*, 457 U.S. at 842.

breach of the peace."[21] More specifically, the First Amendment does not protect threats of violence.[22] Finally, although Plaintiff contends that his words were not sufficient to sustain a criminal conviction for terroristic threatening, the Court notes that a fundamental element of private property is the right to regulate access to it.[23] The College was well within its rights to exclude Plaintiff for making threats of violence on its campus.

III. Conclusion

For all the foregoing reasons, the Defendant's Motion to Dismiss Count II is hereby **GRANTED**. Accordingly, the August 28, 2006 hearing has been removed from the Court's calendar.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

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[21] *Virginia v. Black*, 538 U.S. 343 (2003) (citations omitted).
[22] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).
[23] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).