

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREGORY NICHOLAS STESHENKO,
Plaintiff,
v.
THOMAS MCKAY, et al.,
Defendants.

Case No. [09-cv-05543-RS](#)

**ORDER RE REMAINING PRE-TRIAL
MOTIONS**

Docket No. 889

Defendants previously moved in limine for an order “excluding from the courtroom any evidence, whether offered in the form of testimony, documents or comment of Plaintiff or his witnesses, that nursing students constitute employees who are entitled to receive wages under Federal or State law because they are assigned to clinical rotations in local area hospitals as part of the Cabrillo Nursing Program.” Plaintiff responded that the motion was “moot” because “the related causes of action were dismissed.” The motion was granted, as the matter appeared not to be in controversy. Plaintiff now seeks leave to file a motion for reconsideration, contending some aspect of the issue was not previously dismissed. Plaintiff apparently wishes to introduce evidence that he made complaints to the effect that nursing students should be paid in light of the tasks they were asked to perform. In clarification, the in limine ruling does not preclude plaintiff from introducing any otherwise admissible evidence regarding complaints he made. If, however, plaintiff elects to introduce evidence that he complained that the clinical program was conducted

1 in violation of labor laws, defendants will be entitled to a limiting instruction that such evidence is
2 not being admitted for the truth of the claims but rather for the purpose of demonstrating a
3 potential reason for defendants' subsequent conduct.

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5 Docket No. 890

6 Plaintiff's motion to "correct" the name of a witness is granted.

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8 Docket No. 891

9 Plaintiff's motion to add the so-called "Johnson Study" to his exhibit list is granted.

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11 Docket No. 839

12 Defendants' request for a ruling in advance of trial as to what alleged complaints made by
13 plaintiff would qualify for First Amendment protection, and which would not, is denied.

14 Defendants acknowledge that at least some of plaintiff's complaints, such as those relating to
15 purported patient safety concerns, do not fall within the category of "curricular speech" held in
16 *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) to be outside the ambit of the First Amendment.

17 Additionally, even to the extent some of plaintiff's complaints might be characterized as criticisms
18 of the curriculum, it is not clear that such statements would be unprotected. While students may
19 ultimately have no right under the First Amendment to change the curriculum or academic
20 requirements, it does not automatically follow that they lack the right to criticize those things, or
21 cannot advance claims for any retaliation resulting from the voicing of such criticism.

22 Where there is a legitimate pedagogical purpose, *Brown* plainly permits teachers to require
23 student speech to conform to certain requirements in the context of completing assignments. 308
24 F.3d at 953 ("[A] teacher may require a student to write a paper from a particular viewpoint, even
25 if it is a view-point with which the student disagrees, so long as the requirement serves a
26 legitimate pedagogical purpose. For example, a college history teacher may demand a paper
27 defending Prohibition, and a law-school professor may assign students to write "opinions"
28 showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment

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question.”). Thus, if a student refuses to write the paper defending Prohibition, he or she may be given a failing grade. If the student merely complains vociferously that the assignment is poorly conceived and does not further the educational aims of the course, but nevertheless completes the assignment to an acceptable standard, nothing in *Brown* plainly suggests that the criticism would fall outside the protection of the First Amendment.

Thus, at this juncture it is not feasible to determine which, if any, of plaintiff’s alleged speech might not be protected. Not later than the close of the third day of trial, the parties may, if they wish, submit proposed jury instructions setting out the standards for what speech may support a First Amendment claim. Defendants’ request for a finding that the individual defendants are entitled to qualified immunity is also denied, without prejudice.

IT IS SO ORDERED.

Dated: December 1, 2014



RICHARD SEEBORG
United States District Judge