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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000191-MR

KENOYE EKE, Ph.D. APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00471

KENTUCKY STATE UNIVERSITY APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

HENRY, JUDGE: Kenoye Eke, Ph.D. (Dr. Eke) appeals from a summary judgment of the Franklin Circuit Court upholding his dismissal as an employee of Kentucky State University (KSU). We affirm.

Dr. Eke was first hired by KSU in May of 1999 to serve as Associate Vice President for Academic Affairs and Acting Dean of the College of Professional Studies. The term of this first employment contract was one year, beginning July 1, 1999 and ending June 30, 2000. Dr. Eke accepted this appointment on June

10, 1999. In this first contract Dr. Eke was also appointed Professor with tenure in Political Science. During the course of his employment at KSU Dr. Eke's job title and duties changed somewhat and his salary was increased. On April 25, 2001 the parties signed an Employment Agreement (Agreement) appointing Dr. Eke Vice President for Academic Affairs at KSU for a fifteen-month term beginning April 1, 2001 and ending June 30, 2002. The terms and conditions of Dr. Eke's status as a tenured Professor were specifically excluded from the scope of the Agreement; therefore, even if his employment as Vice President for Academic Affairs was ended he retained a separate contractual right to continued employment as a tenured Professor.

On or about June 21, 2002 KSU fired Dr. George Reid, who had been KSU's President when the Agreement was signed, and hired Dr. Paul E. Bibbens, Jr. as Interim President. On June 28, 2002 President Bibbens called Dr. Eke into his office and told him that as of June 30, 2002 he would no longer be Vice President for Academic Affairs. During the next two months the parties discussed payment of a severance package to Dr. Eke but no final agreement was reached. In late August 2002 KSU learned, apparently from an article published in the Frankfort newspaper, that Dr. Eke had accepted a position as Provost at Cheyney State University in Pennsylvania, and the negotiations

ceased. This action was filed in Franklin Circuit Court on April 22, 2003. KSU filed a motion for summary judgment on May 8, 2003. The motion was granted on December 29, 2003, and this appeal followed.

Dr. Eke states five grounds for reversal of the Franklin Circuit Court's summary judgment: First, that the court erroneously determined that Dr. Eke's employment was not "terminated" as that term is defined in the Agreement; second, that summary judgment was granted before he had an opportunity to complete discovery; third, that the court erroneously dismissed Counts I and II of the complaint based on the doctrine of sovereign immunity; fourth, that the court erroneously rejected Dr. Eke's claims of promissory estoppel, detrimental reliance and fraud; and finally that the court improperly dismissed his request for declaratory relief.

TERMINATION VERSUS EXPIRATION

Dr. Eke's complaint alleges that on June 28, 2002 he was told by President Bibbens that his employment "would terminate" effective June 30, 2002. KSU contends that there was no "termination" but that the Agreement expired of its own terms effective June 30, 2002. This is important because of Paragraph 9(b) of the Agreement which states as follows:

(b) Without Cause. The University may terminate Employee's employment as Vice President for Academic Affairs hereunder at any time without cause, provided, however, that Employee shall be entitled to severance pay in the amount of $60,000, (26) weeks of Base Salary, in addition to accrued but unpaid Base Salary and accrued vacation, less deductions required by law, but if, and only if, Employee executes a valid and comprehensive release of any and all claims that the Employee may have against the University in a form provided by the University and Employee executes such form within seven (7) days of tender. In addition, Employee shall have the right to return to faculty status at ten-twelfths (sic) of base salary.

Dr. Eke argues that an issue of fact exists regarding whether he was terminated or the Agreement merely expired because his verified complaint alleges that he was terminated and KSU's responsive pleadings fail to contravene that allegation. If his employment was terminated without cause, he is entitled to severance, but if the contract simply expired of its own terms there is no contractual basis for severance pay.

Exhibit No. 3 to Dr. Eke's complaint is a copy of a letter from President Bibbens to Dr. Eke which states in pertinent part:

> This letter will confirm the expiration of your contract as Vice-President for Academic Affairs at Kentucky State University on June 30, 2002. In accordance with the terms of this contract, you retain all rights as a tenured professor of Political Science at KSU . . . .

We are to review the record in the light most favorable to the non-moving party. Dossett v. New York Mining & Mfg. Co., 451 S.W.2d 843 (Ky. 1970). Having done so we are

unable to conclude that Dr. Eke’s characterization of the ending of his administrative employment as “termination” creates an issue of material fact. KSU doesn’t deny that Bibbens may have used some tense of the verb “terminate” when advising Dr. Eke of the cessation of his administrative employment, but contends that the dispute is merely semantic. We agree. The facts are clear that Dr. Eke’s contract expired on June 30 and that Bibbens told him that his administrative employment would end June 30. “. . . [S]ummary judgment does not require that there be no issue of fact but that there be no genuine issue of fact. If the defenses have no substance, if controlling facts are not in dispute, or factual disputes are insignificant, summary judgment is appropriate.” (Citation omitted) Blue Cross & Blue Shield of Kentucky, Inc. v. Baxter, 713 S.W. 2d 478, 479 (Ky. App. 1986).

OPPORTUNITY TO COMPLETE DISCOVERY

Dr. Eke contends that summary judgment was entered before he had a chance to begin discovery. Several cases hold that summary judgment should not be entered so as to terminate the proceedings before the parties have had ample time to complete discovery. See for example Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., 579 S.W.2d 628 (Ky. App. 1979). The complaint was filed April 22, 2003. KSU filed its

answer on May 6, 2003, and filed its motion for summary judgment on May 8, 2003. Summary judgment was entered almost eight months later on December 29, 2003. It does not appear from the record that any notices to take depositions were filed, that any depositions were taken or that the trial court entered any orders staying discovery during this time. Eight months is ample time to at least commence the discovery process. As stated in Hartford, supra at 630:

> It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so. Here, Hartford had a period of some six months between the filing of the complaint and the date of summary judgment in which to engage in discovery, or to inform the court, pursuant to CR 56.06, why judgment should not be entered or why a ruling on the motion for summary judgment should be continued.

There is nothing in the record to indicate that Dr. Eke's opportunity to complete discovery was foreclosed by the timing of the entry of the judgment, and we conclude that this argument is without merit.

SOVEREIGN IMMUNITY

During July and August 2002 Dr. Eke had discussions with various representatives of KSU toward severing all ties with KSU, including his position as a tenured professor. A document titled "Settlement Agreement and Release" was drafted

by KSU's private counsel and forwarded to Dr. Eke. By its terms this document was not to be "…binding or enforceable against KSU until approved by the Board of Regents of Kentucky State University at a regular or specially called meeting." It is undisputed that the document, referred to by Dr. Eke and the circuit court as the "verbal severance agreement", was never executed by KSU or approved by the Board of Regents. As noted by the circuit court, Counts I through IV of the complaint are based on this "verbal severance agreement". Count I sought specific performance of the agreement, Count II sought damages for its breach, Count III raised the theories of detrimental reliance and promissory estoppel in support of the agreement and Count IV alleged fraud and misrepresentation by KSU pertaining to the agreement. As to Counts III and IV it is Dr. Eke's contention that KSU induced him to resign his tenured position by negotiating a severance agreement that it never intended to execute or implement.

The parties do not dispute that Kentucky State University is an agency of the Commonwealth of Kentucky. Discussing KRS[1] 45A.245(1), the Kentucky Supreme Court recently stated in <u>Commonwealth v. Whitworth</u>, 74 S.W.3d 695, 700 (Ky. 2002):

[1] Kentucky Revised Statutes

> Suit cannot be instituted against the Commonwealth on a claim unless sovereign immunity has been specifically waived, as it has been on a lawfully authorized written contract.

Whitworth specifically dealt with an attempt to enforce oral contracts against the Commonwealth of Kentucky and held that contracts with the state must be in writing to be enforceable. It is undisputed that the "verbal severance agreement" was never executed by KSU, and therefore the circuit court properly found it unenforceable against the Commonwealth.

The circuit court found that absent a specific express waiver, the doctrine of sovereign immunity bars any relief on any of the remaining theories cited by Dr. Eke. While Dr. Eke makes no claim of an express waiver he urges us to find that "special circumstances" exist in this case which require us to enforce the "verbal severance agreement". Dr. Eke cites Laughead v. Commonwealth, Department of Transportation, 657 S.W.2d 228 (Ky. 1983) for the proposition that sufficiently egregious intentional misconduct by the Commonwealth may constitute "special circumstances" in which the courts are justified in fashioning an equitable remedy despite sovereign immunity. Laughead does not mention "special circumstances" in regard to the application of equitable remedies against the Commonwealth. Although the doctrine of equitable estoppel was employed by the court in that case, it was in aid of Laughead's

suit for an injunction to enforce a statute which waived sovereign immunity and provided for a specific remedy. In J. Branham Erecting & Steel Service Co. v. Ky. Unemployment Insurance Commission, 880 S.W.2d 896 (Ky. App. 1994) this court, declining to apply the doctrine against the Commonwealth, could find no case enumerating what specific "special circumstances" would have to exist to justify applying the doctrine but indicated that it would only be applied when a "gross inequity" would result. Here it appears that Dr. Eke accepted a position with Cheyney University in Pennsylvania on or about August 5, 2002, then continued to try to negotiate a severance package with KSU. When KSU learned that Dr. Eke had accepted other employment it had no further incentive to negotiate to "buy out" his contractual tenured position. KSU never terminated Dr. Eke as a Professor of Political Science, with or without cause. He abandoned that position when he accepted employment in Pennsylvania. While we agree that the Commonwealth should not be permitted to profit by its own wrong, there is no support in this record for a finding of "special circumstances". That being the case sovereign immunity applies and Whitworth, supra, is controlling.

DECLARATORY RELIEF

The circuit court dismissed Dr. Eke's claim for declaratory relief because it held that the claim was "based upon the claims asserted in Counts I through V of the complaint." This, Dr. Eke claims, is only partially correct in that he also sought a determination that he was terminated without cause under Paragraph 9(c) of the Agreement. We find this contention to be without merit because the circuit court's finding that the Agreement expired of its own terms is necessarily a finding that Dr. Eke's employment was not terminated without cause. The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

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