

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARY C LEE,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN – DEARBORN  
and ROBERT L SIMPSON,

Defendants-Appellees.

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UNPUBLISHED

May 12, 2009

No. 284541

Court of Claims

LC No. 2006-000046-MI

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

This action arises out of expulsion proceedings and determinations made by defendant, University of Michigan – Dearborn (UMD), against Mary C. Lee, plaintiff and former UMD student. After UMD decided to hold plaintiff's expulsion in abeyance, plaintiff commenced this action in the Court of Claims, alleging a 42 USC § 1983 claim individually against defendant Provost Robert L. Simpson, breach of contract, and seeking a limited review of the proceedings under Michigan's Administrative Procedure Act (APA). The matter was removed to federal district court, which dismissed plaintiff's APA and § 1983 claim, and remanded the breach of contract claim to the Court of Claims.<sup>1</sup> That court granted summary disposition for defendants. Plaintiff now appeals that order as of right. We affirm.

**I. Basic Facts and Procedural History**

The underlying facts of this case involve the events that led to plaintiff's eventual expulsion from UMD. In October 2005, one of UMD's professors, Liana McMillan, made allegations against plaintiff, asserting in a formal complaint to UMD that plaintiff had harassed and stalked her, interfered with her ability to teach activities on campus, and had failed to comply with the directives of campus security in violation of UMD's Statement of Student Rights and Code of Student Conduct (Code). Proceedings were initiated under UMD's Judicial

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<sup>1</sup> While the action was pending in federal court plaintiff was expelled from UMD. Plaintiff did not amend her complaint to incorporate her actual expulsion.

Code and plaintiff was notified of a hearing to be held by UMD's Non-Academic Conduct Board (Hearing Board). The hearing was held on December 2, 2005, after which the Hearing Board determined that plaintiff had violated the Code. During the hearing, no evidentiary standard was announced and plaintiff was not permitted to cross-examine McMillan due to a timing conflict. The Code, however, specifically provided these procedural criteria, as provided:

To find a respondent guilty, the Hearing Board must be convinced of the guilt of the respondent by a preponderance of the evidence.

\* \* \*

Respondents shall be accorded an opportunity to question information presented against them at the hearing.

Subsequently, the Hearing Board ordered that plaintiff be expelled.

Plaintiff appealed this decision to defendant's Appeal Board, alleging that the decision was arbitrary and capricious, that the sanction was excessive, and that procedural errors resulted in an unfair hearing. Specifically, plaintiff alleged that the Hearing Board failed to comply with the Code because she was not permitted to cross-examine McMillan, no standard of proof was established when the Hearing Board was convened, and the Hearing Board members did not approach the hearing with "open mind[s]" because they were provided materials prior to the hearing. Subsequently, the Appeal Board determined that the Hearing Board's sanction was excessive and ordered that plaintiff's expulsion be held in abeyance contingent upon plaintiff refraining from making any contact with McMillan and seeking counseling. Despite the Appeal Board's decision, plaintiff nonetheless sought a re-hearing of the original decision, alleging that she was denied a fair hearing and that the Hearing Board's decision was arbitrary and capricious. Defendant Simpson denied the request consistent with UMD procedures.

Plaintiff then filed a complaint, asserting amongst other claims, breach of contract, which is the only count of plaintiff's complaint before this Court on appeal. Plaintiff's claim alleged that the Code constitutes a contract between UMD and plaintiff and that UMD's determinations breached the Code because those decisions did not comport with procedural or substantive due process. Defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), which the trial court granted. This appeal followed.

## II. Standards of Review

We review de novo a trial court's determination on a summary disposition motion. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008). Because the trial court relied on evidence outside the pleadings, we will consider the trial court's decision as based upon MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). In doing so, we must view all the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Huntington Woods, supra* at 614. Summary disposition was appropriate if no material factual dispute exists regarding a genuine factual issue and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

### III. Breach of Contract

On appeal, plaintiff abandons any claim that UMD breached an express contract. Rather, plaintiff posits several theories, albeit somewhat incoherently, under which she urges this Court to find the existence of an implied contract: First, the Code itself constitutes an implied contract; second, the Code creates an implied contract premised upon a theory of promissory estoppel; and, third an implied contract arises from her supposed right to continued enrollment at UMD free from arbitrary dismissal. In plaintiff's view, UMD's determinations were arbitrary and her due process rights thereby violated because UMD did not strictly comply with the Code's requirements. We consider each of these arguments in turn.

#### A. The Code as an Implied Contract

First, as a matter of law, the Code itself, standing alone, does not create an implied contract. Plaintiff's argument that the Code per se creates an implied contract, in fact or in law—which one, plaintiff does not specify—in effect asks this Court to recognize the Code as an express contract under the guise of an implied contract. This we cannot do. Courts have declined to strictly apply contract law in the context of student-university relationships and claims that a contract exists between the university and the student have repeatedly failed. See *Cuddihy v Wayne State Univ Bd of Governors*, 163 Mich App 153, 156-158; 413 NW2d 692 (1987); *Amaya v Mott Community College*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 1997 (Docket No. 186755); see also *Doherty v Southern College of Optometry*, 862 F 2d 570, 577 (CA 6, 1988). Further, this Court has implicitly rejected the contention that student handbooks, codes, or other informational materials create contracts, expressly or otherwise, between universities and their students. See *Cuddihy, supra* at 157-158; see also *Ewing v Bd of Regents of the Univ of Michigan*, 559 F Supp 791, 800 (1983) (finding informational materials did not expressly or through course of conduct contractually bind university), rev'd 742 F2d 913 (CA 6, 1984), rev'd 474 US 214; 106 S Ct 507; 88 L Ed 2d 523, ns 9 and 10 (1985) (citing district court's opinion with approval). In any event, nothing with regard to UMD's course of conduct suggests that it intended to bind itself to strict compliance with the Code's requirements. Nor has plaintiff even alleged as such. Accordingly, we conclude that the trial court properly granted summary disposition with regard to this issue.

#### B. Implied Contract Premised on Promissory Estoppel

Plaintiff's second contention that the Code creates an implied contract that should be enforced based on a theory of promissory estoppel is also unavailing. At the outset, we note that plaintiff raises her promissory estoppel theory for the first time on appeal. Because it is not properly preserved, we decline to review it. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 523; 679 NW2d 106 (2004). In any case, even if we did consider plaintiff's promissory estoppel claim, it fails for several reasons. First, the claim was not properly plead and thus summary disposition under MCR 2.116(C)(8) would have been appropriate had the issue been before the trial court. Further, even if we were to overlook the insufficiency of the pleadings, plaintiff's claim would still fail as this Court has previously rejected promissory estoppel claims in the context of student-university relationships. *Cuddihy, supra* at 156-158. Moreover, promissory estoppel and implied contract are separate and distinguishable claims. An implied contract does not necessarily arise out of the facts that lead to a promissory estoppel claim and plaintiff does not explain how this may be the case in the instant matter, nor does she

cite any authority in support of her theory. A party may not simply announce its position and leave it to this Court to discover and rationalize the basis for the claim, nor will this Court search for authority in support of the party's argument. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). For all of these reasons, we cannot grant plaintiff the relief she seeks on this basis.

### C. Implied Contract Based on Due Process

Turning to plaintiff's final argument, we find it prudent to follow the lead of the United States Supreme Court and assume, without deciding, that a student enrolled at a university has an implied contractual right to continued enrollment in the program that is a protected property interest. *Regents of the Univ of Michigan v Ewing*, 474 US 214, 222-225; 106 S Ct 507; 88 L Ed2d 523 (1983). This implied contractual right gives the student a right to continued enrollment free from arbitrary dismissal. *Id.* In our view, the analysis to be applied is functionally the same as a claim for procedural due process. It requires us to determine whether UMD acted arbitrarily in first expelling plaintiff and then holding her expulsion in abeyance upon appeal.<sup>2</sup> *Id.* at 223. In other words, we must determine what process is due. At the very minimum, what is required where a student faces a disciplinary process that threatens his or her property interest is some type of notice and some opportunity to be heard. *Goss v Lopez*, 419 US 565, 579; 95 S Ct 729; 42 L Ed 2d 725 (1975); *Birdsey v Grand Blanc Community Schools*, 130 Mich App 718, 725; 344 NW2d 342 (1983). The due process required will vary depending on the circumstances of each case. *Flaim v Medical College of Ohio*, 418 F3d 629, 634 (6 CA, 2005). Generally, in the context of disciplinary actions between a student and his or her educational institution, courts have applied a balancing test of the following factors: "(1) the nature of the private interest affected—that is, the seriousness of the charge and potential sanctions, (2) the danger of error and the benefit of additional or alternate procedures, and (3) the public or governmental burden were additional procedures mandated." *Id.* at 635; see also *Mathews v Eldridge*, 424 U.S. 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). In balancing these factors, courts have kept in mind that although universities are not courts of law, the goal is that students facing serious sanctions should be afforded a fundamentally fair hearing. *Flaim, supra* at 635 n 1.

After our review of the record, it is plain that UMD sufficiently met due process requirements. Plaintiff was provided notice of the hearing via email and through a letter. At that time, she was also provided with a written statement of the allegations against her. At the hearing, she was permitted to provide witnesses, present her version of the events, as well as record the hearing. After the Hearing Board's determination, she was afforded an opportunity to appeal, which she did. During these proceedings, plaintiff was permitted to continue her educational program uninterrupted. Under these circumstances, we conclude that UMD's expulsion determinations were not arbitrary, but rather were grounded in sound professional judgment and consistent with due process.

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<sup>2</sup> Notably, because plaintiff did not amend her complaint to include her actual expulsion, our review of UMD's actions only involves the two previous expulsion-related determinations.

The pith of plaintiff's due process argument, however, is that UMD did not strictly abide by the Code's requirements and thus her due process rights were violated. Specifically, plaintiff contends she was not permitted to cross-examine McMillan and that the burden of proof was not provided to the Hearing Board before proceedings commenced, in violation of the Code.<sup>3</sup> It is true that the Code required the application of an evidentiary standard and permitted plaintiff the opportunity to question the evidence presented against her. However, it is important to recognize that the implied contractual right plaintiff seeks to protect arises, not from the provisions of the Code, but from the due process requirements of the Constitution. And, as should be clear from the above discussion, due process requires much less than that which the Code would provide. Unfortunately for plaintiff, the Code, as well as other informational materials of a University, does not rise to the level of an enforceable statute or rule of law, and does not even constitute a contract, as already discussed.

In any event, assuming that all the technical errors that plaintiff complains of occurred, it does not follow that UMD's failure to strictly comply with the Code constitutes a violation of due process. With respect to the burden of proof, all that is required under the Michigan Constitution is that UMD's decision be supported by competent, material, and substantial evidence. Const 1963, art 6, § 28; see also *McBride v Pontiac School District*, 218 Mich App 113, 122-123; 553 NW2d 646 (1995). Thus, under Michigan law, due process does not require that UMD enunciate an evidentiary standard to be applied in the context of disciplinary proceedings. Further, cross-examination is generally not a necessary due process requirement in the school-disciplinary proceedings, *Jaksa v Regents of Univ of Michigan*, 597 F Supp 1245, 1252-1253 (ED Mich, 1984), and plaintiff has not explained why it should have been constitutionally required in her case, especially in light of the additional burden it would have imposed on UMD. In short, although plaintiff was facing a serious sanction for her actions, nothing about these additional procedural requirements would have made UMD's determinations any more accurate or any more fair such that this Court should rule that these procedures are constitutionally required in cases like plaintiff's. *Flaim*, 418 F3d at 635. The trial court did not err by granting summary disposition for defendants.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Jane M. Beckering

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<sup>3</sup> Notably, plaintiff failed to provide any affidavits or other documentary evidence showing that UMD breached the Code and merely relied upon her own assertions. "[A] party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided . . . , set forth specific facts showing that there is a genuine issue for trial." *Bell v Fox*, 206 Mich App 522, 524; 522 NW2d 869 (1994) (quotation marks and citation omitted). Failure to provide a genuine issue for trial provides a proper basis upon which to grant summary disposition, as the trial court did here.