

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kunal Saha,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1139
The Ohio State University,	:	(C.C. No. 2007-02050)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 4, 2011

Dagger, Johnston, Miller, Ogilvie & Hampson, and D. Joe Griffith, for appellant.

Michael DeWine, Attorney General, Randall W. Knutti and Amy S. Brown, for appellee.

APPEAL from the Ohio Court of Claims

TYACK, J.

{¶1} Dr. Kunal Saha is appealing from an adverse verdict in the Ohio Court of Claims. For the reasons that follow, we affirm the judgment of the Court of Claims.

{¶2} On appeal, Dr. Saha assigns eight errors for our consideration:

I. The Trial Court erred as a matter of law in finding that Ohio State did not breach its contract with Dr. Saha by failing to apply basic principles of contract law to the undisputed facts of the record regarding tenure review/re-review.

II. The Trial Court erred as a matter of law in finding that Ohio State did not breach its contract with Dr. Saha by ignoring the irrefutable evidence present in Ohio State's Rules that allow tenure candidates to appeal to the Committee on Academic Freedom and Responsibility (CAFR) against negative tenure decisions or any other impropriety in the process of the tenure review/re-review.

III. The Trial Court erred as a matter of law in dismissing Ohio State's multiple breaches of contract against Dr. Saha primarily on the ground of academic deference by inappropriately relying upon Bleicher v. University of Cincinnati (Tenth District 1992), 78 Ohio App.3d 302.

IV. The Trial Court's judgment concerning Dr. Saha's claims of breach of contract were against the manifest weight of the evidence and not supported by competent, credible evidence going to the essential elements of the case.

V. The Trial Court erred as a matter of law in finding that Dr. Saha failed to present a prima facie case of discrimination based upon the assumption that other tenure candidates from the Department of Pediatrics were differently situated than Dr. Saha which is in contrast to the undisputed facts of the record.

VI. The Trial Court erred as a matter of law in its application of the third prong of the McDonald Douglas test, that Dr. Saha was not qualified for the position of tenure at Ohio State when the Trial Court failed to consider the plethora of uncontroverted evidence admitted during the trial, including the following: (1) among the five tenure candidates from Ohio State's Department of Pediatrics, Dr. Saha was the most successful candidate in all three objective criteria for judging research which include grant funding, quality and quantity of scientific publications by the candidates; (2) that Dr. Saha published the highest number of papers as first/senior author which is considered as original research from a candidate's laboratory and receives the maximum credit; (3) that although Dr. Saha was denied tenure

primarily on the ground of insufficient publications and grant funding, the evidence revealed that he actually had the highest number of publications and grant funding.

VII. The Trial Court's judgment as to Dr. Saha's claim relating to the civil immunity of Drs. Johnson, Hansen, Fisher, Bakletz, Walker, Morrow and Bernard are against the manifest weight of the evidence and are not supported by any competent, credible evidence going to the essential elements of the case.

VIII. The Trial Court's decision as to Dr. Saha's claims of defamation are against the manifest weight of the evidence and are not supported by any competent, credible evidence going to the essential elements of the case.

Factual Background

{¶3} Plaintiff-appellant, Dr. Kunal Saha ("Dr. Saha"), began his employment with defendant-appellee, The Ohio State University ("OSU"), in June 1998. Dr. Saha was employed as an Assistant Professor in the Department of Pediatrics, College of Medicine.

{¶4} Dr. Saha's position was that of a primary researcher. He was placed in charge of a lab and given a support staff and post-doctoral students for his work in AIDS research. Dr. Saha was simultaneously employed by both OSU and the Columbus Children's Hospital as a member of the Children's Research Institute ("CRI").

{¶5} The appointment was considered probationary, however, renewal of the appointment was conditioned upon results of each annual review. Dr. Saha received generally favorable reviews through the 2000-2001 academic year.

{¶6} In December 2001, Dr. Saha travelled to India to lecture at an AIDS conference. He was scheduled to return in a few weeks. Dr. Saha testified that, while in India, his lawyers petitioned the Federal Supreme Court of India to allow Dr. Saha's criminal negligence case against his deceased wife's doctors to proceed to trial. This was allowed by the court on the condition that Dr. Saha attend the trial.

{¶7} Dr. Saha remained in India through January and February 2002. In early March, Dr. Saha requested a leave of absence which was approved by the OSU Board of Trustees at their April 5, 2002 meeting.

{¶8} Dr. Saha returned to Columbus at the end of April 2002. On May 1, 2002, Dr. Saha was informed that his CRI internal support package for his laboratory research would end June 30, 2002.

{¶9} As part of Dr. Saha's fourth-year review for the 2001-2002 academic year, he was required to submit his dossier by March 1, 2002. Dr. Saha missed this deadline and the dossier was not submitted for many months.

{¶10} Dr. Saha's fourth-year review was conducted in August 2002. Dr. Saha was informed that there were many concerns including: (1) him being absent for a substantial portion of the academic year; (2) his research production; (3) his dossier being submitted late; (4) poor communication with his lab from India; and (5) his not being available to mentor graduate and post-doctoral students. Dr. Saha was not recommended for re-appointment on the faculty tenure track.

{¶11} Dr. Saha responded that the decision was discriminatory and based on ulterior motives, that his student's education did not suffer, and that he was evaluated unfairly. After an investigation, it was concluded that the department supplied insufficient documentation that Dr. Saha did not mentor his students and therefore Dr. Saha was allowed to continue on the tenure track.

{¶12} Dr. Saha testified that the loss of internal support reduced his lab staff from five or six to two or three with which he was unable to continue with his research at the same level as before.

{¶13} Dr. Saha was absent from his laboratory in August and September 2003, speaking at another AIDS conference in India. During this time, a student on a three-month rotation in Dr. Saha's lab requested a transfer citing that she had very little communication with Dr. Saha and no one in his lab knew when he would return.

{¶14} Dr. Saha's fifth-year review was completed in September 2003. It was noted that there were no peer-reviewed articles in 2002, and that there needed to be improvement in productivity.

{¶15} OSU utilizes a multi-level review process in making promotion and tenure decisions. The levels of review correspond to the organization of the academic institution, and consist of the department level, the college level, and the university level with the provost making the final decision.

{¶16} In October 2003, Dr. Saha's sixth-year review process began to determine if he would be promoted to Associate Professor and granted tenure. Dr. Saha submitted his dossier, and letters of evaluation were collected. On

October 23, eight members of the Committee of Eligible Voting Faculty ("CEVF") in the Department of Pediatrics voted against recommending tenure. The CEVF was concerned about prolonged absences from Columbus; Dr. Saha's limited publication record and grant support since relocating to OSU; and the quality and quantity of his teaching. This recommendation was passed along to the department chair who concurred and forwarded the negative recommendations to the college level, with the additional concerns about the level of external grant funding, and hints from the external reviewer statements that Dr. Saha's theories on AIDS may not be correct and had yet to achieve wide-spread acceptance.

{¶17} When informed, Dr. Saha supplemented his dossier with impact factors used to quantify the prestige of publishing in certain journals, and added additional external evaluation letters.

{¶18} The College of Medicine's Promotion and Tenure Committee, after their review of the dossier, also agreed not to recommend Dr. Saha for tenure. This was passed to the Dean of the College of Medicine who concurred and forwarded the negative recommendations to the university level.

{¶19} Dr. Saha responded that the denial was based upon a biased and discriminatory attitude by the department, unfair evaluation process, and the termination of internal funding in 2002.

{¶20} The University Promotion and Tenure Committee voted against offering tenure and the provost followed their recommendation. Dr. Saha was notified in April 2004 that he would be terminated June 30, 2005. He appealed to OSU's Committee on Academic Freedom and Responsibility ("CAFR"). After

investigating, CAFR was concerned over the low number of eligible voting faculty (eight), who actually participated in the departmental-level vote. Thus, the appeal was sent to the Faculty Senate Hearing Committee for review. The committee formed a hearing panel that did not find evidence of procedural violations and felt that the Department of Pediatrics had conducted its evaluation in a reasonable fashion. However, the panel was also concerned and said the departmental vote was inherently unfair due to the limited number participating. These findings were reported to the department on June 15, 2005.

{¶21} The provost, also concerned about the low turnout for the departmental vote, sent the application back to the department specifically for a re-vote.

{¶22} The department assembled a quorum of eligible voting faculty and a re-vote occurred on June 20, 2005, with one faculty voting for and twenty-six faculty voting against the recommendation. Dr. Saha then again received a negative recommendation from the College's Promotions and Tenure Committee and the University's Promotion and Tenure Committee, and was again denied tenure by the provost. Dr. Saha was informed on September 25, 2005, that he would not be recommended for tenure.

{¶23} Dr. Saha subsequently filed his case against OSU in the Ohio Court of Claims.

Assignments of Error I, II, III and IV -- Breach of Contract

{¶24} The first and second assignments of error assert that the Court of Claims erred as a matter of law in finding that OSU did not breach its contract.

Specifically, that OSU should have conducted a re-review that was to be new, fair and impartial which would have entitled Dr. Saha to another appeal to the CAFR and a new termination date one year from when the new review concluded he was not recommended for tenure.

{¶25} It is undisputed that Dr. Saha had a contract with OSU and that the rules and regulations concerning academic procedures were incorporated into that contract.

{¶26} In the context of granting tenure, to prove a breach of contract, Dr. Saha is required to prove both that OSU violated one or more terms of his contract and that he was substantially prejudiced as a result. *Gogate v. Ohio State Univ.* (1987), 42 Ohio App.3d 220, 222.

{¶27} To be substantially prejudiced means that Dr. Saha must prove causation. In other words, but for OSU's breach, Dr. Saha would have been awarded tenure. *Logsdon v. Ohio Northern Univ.* (1990), 68 Ohio App.3d 190, 195.

{¶28} As a reviewing court, we must give a presumption of correctness to the finding of the trial court since that court is "best able to view the witnesses and observe their demeanor, gestures and voice inflections and use those observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶29} The central question concerning the breach of contract claims is whether Dr. Saha was entitled to a new, fair and impartial evaluation after the Faculty Senate hearing panel's findings.

{¶30} The OSU rule that governs is 3335-5-05(C)(6), concerning the findings of the Faculty Senate hearing panel. At the conclusion of a hearing, the hearing panel shall: (a) dismiss the complaint if it determines that there has been no improper evaluation; or (b) when it has found that an improper evaluation has been made, submit its findings to the dean of the college in which the complainant is a member and to the executive vice president and provost. The executive vice president and provost, in consultation with the hearing panel and the chair of the Faculty Senate Hearing Committee, shall take such steps as may be deemed necessary to assure a new, fair and impartial evaluation.

{¶31} The hearing panel did not find that the Department of Pediatrics conducted an improper evaluation:

The hearing panel finds no specific procedural violations in the voting of eligible faculty in the Department of Pediatrics * * *.

* * *

In summary, the hearing panel does not find evidence of procedural violations and feels that the Department of Pediatrics has conducted its evaluation in a reasonable fashion * * *.

(Hearing Panel Report, at exhibit No. 44.) (Emphasis sic.)

{¶32} There being no finding of an improper evaluation, Dr. Saha has no right to a new evaluation, nor does he have a right to a second appeal to the CAFR or a new later termination date when he again was not recommended for tenure in the fall of 2005.

{¶33} Dr. Saha argues that the provost's instructions to re-review, entitle him to a new evaluation. The provost instructed the re-review, due to the hearing

panel's concerns about such a small percentage of voting faculty participating in the departmental vote. This re-vote and subsequent second evaluation at the college and university levels were a result of the provost's concerns and not triggered by some university rule and thus not a provision of the contract. It is the provost who determined the scope of the re-review. There has been no violation of Dr. Saha's contract and therefore no bases that he was entitled to a second appeal to CAFR or a later termination date.

{¶34} The first and second assignments of error are overruled.

{¶35} The third assignment of error asserts that the Ohio Court of Claims gave too much academic deference to OSU, inappropriately relying upon *Bleicher v. Univ. of Cincinnati College of Med.* (1992), 78 Ohio App.3d 302.

{¶36} As a general rule, courts defer to the academic decisions of colleges and universities unless there has been "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 308.

{¶37} Further, in *Gogate* at 226, this court cautioned trial courts to be diligent not to intrude into faculty employment determinations and not to substitute their judgment with respect to qualifications of faculty members for promotions or tenure. We further noted that determinations on such matters as teaching ability, research, and service simply cannot be evaluated solely on the basis of objective factors. *Id.*

{¶38} Dr. Saha argues that the Court of Claims gave deference to OSU in interpretation of the contract between OSU and Dr. Saha. A careful reading of

the decision shows that this is not true. The Court of Claims used its own judgment when interpreting the contract. The court properly gave deference to OSU when faculty members used their subjective judgment when they evaluated Dr. Saha's ability, future potential, and commitment to the areas of research, teaching, and service.

{¶39} The third assignment of error is overruled.

{¶40} The fourth assignment of error asserts that the Court of Claims' decision concerning Dr. Saha's breach of contract claims are against the manifest weight of the evidence.

{¶41} Judgments supported by some competent, credible evidence going to all elements of the case will not be reversed by a reviewing court as being against the manifest weight of evidence. *C. E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, 280.

{¶42} We have already found that Dr. Saha does not have a right to another appeal to the CAFR or a new later termination date because he did not have a right to a new evaluation.

{¶43} Dr. Saha claims that at least two-thirds of eligible faculty of the Department of Pediatrics were required to vote on a recommendation for tenure based on the Office of Academic Affairs Policies and Procedures Handbook. This rule, which was not in effect in 2003 or 2004 actually states "[t]his suggested definition requires a minimum of two-thirds of the eligible faculty to vote on a case in order for the voting procedure to be **valid**." (Plaintiff's exhibit No. 8.)

(Emphasis sic.) We find credible evidence that there was no rule and neither the provost nor the hearing panel required that two-thirds of the faculty vote.

{¶44} Dr. Saha also claims that one person who presented a letter of evaluation was biased. The faculty hearing panel concluded that the Department of Pediatrics made a good-faith effort to solicit evaluation letters according to university and departmental guidelines and had conducted evaluations in a reasonable fashion despite difficulties imposed by late arriving letters of evaluation. We find this to be credible evidence that the evaluation letters did not violate any university rules.

{¶45} The fourth assignment of error is overruled.

Assignments of Error V and VI -- Discrimination

{¶46} The fifth and sixth assignments of error assert that the Court of Claims erred as a matter of law in finding that Dr. Saha failed to present a prima facie case of indirect racial discrimination, specifically finding that Dr. Saha was not similarly-situated as the other Department of Pediatrics' tenure candidates, and that Dr. Saha was not qualified for the position of tenure at OSU.

{¶47} A prima facie case of indirect racial discrimination may be brought by establishing by a preponderance of the evidence that the plaintiff: (1) was a member of a protected class; (2) was subjected to an adverse employment action; (3) was qualified for the position; and (4) that comparable, non-protected persons were treated more favorably. *Clark v. City of Dublin*, 10th Dist. No. 01AP-458, 2002-Ohio-1440, following *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817.

{¶48} The third prong of the *McDonnell Douglas* test requires that a plaintiff prove that he was qualified for the position.

{¶49} The prima facie burden of showing that a plaintiff is qualified can be met by presenting credible evidence that his or her qualifications are at least equivalent to the minimum objective criteria required for employment in the relevant field. Although the specific qualifications will vary depending on the job in question, the inquiry should focus on criteria such as plaintiff's education, experience in the relevant industry, and demonstrated possession of the required general skills. *Wexler v. White's Fine Furniture, Inc.* (C.A.6, 2003), 317 F.3d 564, 575-76.

{¶50} The Court of Claims found that Dr. Saha failed to present sufficient evidence that he was qualified for the position of tenure, failing the third prong to prove indirect racial discrimination. The court found sufficient evidence that Dr. Saha's research productivity and grant funding did not meet the expectations of the department, the college, or the university. However, this is not the same standard as possessing at least the minimum objective criteria required for employment in the relevant field.

{¶51} Analyzing the record, this court finds that Dr. Saha did present sufficient evidence that he possessed the minimum objective criteria for employment within the field of AIDS research.

{¶52} The fifth assignment of error is sustained.

{¶53} As to the fourth prong of the *McDonnell Douglas* test, a plaintiff is required to prove that all of the relevant aspects of his employment situation were

nearly identical to those of other tenure candidates. *Pierce v. Commonwealth Life Ins. Co.* (C.A.6, 1994), 40 F.3d 796, 802.

{¶54} Some common relevant aspects are whether the individuals, with whom the plaintiff seeks to compare his treatment, dealt with the same supervisor, had been subjected to the same standards, and had engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 583.

{¶55} Dr. Saha argues that his position with AIDS research is unique and thus incomparable to other positions making the establishment of a prima facie case more difficult. This is not true. Such a narrow construction of *Mitchell* has never been endorsed. The test only requires "that the plaintiff demonstrate that he or she is similarly-situated to the non-protected employee in all *relevant* respects." *Ercegovich v. Goodyear Tire & Rubber Co.* (C.A.6, 1998), 154 F.3d 344, 353. (Emphasis sic.)

{¶56} The Court of Claims found that Dr. Saha failed to present sufficient evidence to prove that the other tenure candidates were similarly-situated in all relevant respects. Two of the candidates were clinicians rather than researchers whose job function was primarily different. The other two candidates each operated a core laboratory which supplied valuable research materials that were viewed within the department as vital to other ongoing research. Dr. Saha ran a research lab whose function focused on primary hypothesis-driven AIDS research.

{¶57} This court finds that Dr. Saha failed to prove by a preponderance of the evidence that he was similarly-situated in all relevant aspects to the other four tenure candidates to which he compares himself.

{¶58} Dr. Saha did not prove by a preponderance of the evidence that he was similarly-situated to the other tenure candidates. Lacking this prong of the *McDonnell Douglas* test, Dr. Saha has failed to establish a prima facie case of indirect racial discrimination.

{¶59} The sixth assignment of error is overruled.

Assignment of Error VII -- Civil Immunity

{¶60} The seventh assignment of error asserts that the Court of Claims' decision as to Dr. Saha's claim relating to the civil immunity of Drs. Johnson, Hansen, Fisher, Bakletz, Walker, Morrow, and Bernard is against the manifest weight of the evidence.

{¶61} R.C. 9.86 provides that:

No officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶62} The Court of Claims found that Drs. Johnson, Hansen, Fisher, Bakletz, Walker, Morrow, and Barnard acted within the scope of their employment, and that Dr. Saha failed to prove that they acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶63} This court finds competent and credible evidence exists to support the Court of Claims' decision that OSU's employees acted within the scope of their employment and did not act with malicious purpose, in bad faith, or acting in a wanton or reckless manner.

{¶64} The seventh assignment of error is overruled.

Assignment of Error VIII -- Defamation

{¶65} The eighth assignment of error asserts that the Court of Claims' decision as to Dr. Saha's claim of defamation is against the manifest weight of the evidence.

{¶66} For a defamation claim to succeed, five things must be proven: falsity, defamation, publication, injury, and fault. *State ex rel. Sellers v. Gerken*, 72 Ohio St.3d 115, 117, 1995-Ohio-247. Further, these communications are protected as qualified privilege as it is in OSU's interest to publish in a reasonable manner for the proper purpose of evaluating a candidate for promotion. *Hahn v. Kotten* (1975), 43 Ohio St.2d 237. To overcome this privilege, Dr. Saha must prove actual malice, by clear and convincing evidence, that OSU employees knowingly made false statements about him or with reckless disregard as to their truth or falsity. *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 116.

{¶67} Dr. Saha claims that he was defamed by comments made during his tenure review process, that his research did not meet the criteria for promotion and tenure at OSU, and that he had abandoned his job.

{¶68} The Court of Claims found that OSU had reasonable concern in the context of Dr. Saha's absence and lack of attention to his responsibilities at CRI. The court also found that Dr. Saha's absences and his unprecedented failure to submit his dossier on time created a pervasive perception among his peers that he was not committed to his research or his teaching. Thus, Dr. Saha was judged negatively by his peers based upon the perception that he could not have adequately supervised his laboratory during his prolonged absences, that his absences were unapproved at least prospectively, and that his productivity naturally suffered and ultimately fell below expectations.

{¶69} Specifically, the court found that Dr. Saha admitted in e-mails and in some of his rebuttal letters that his students and support staff did experience difficulties in maintaining consistent and effective communication. The court also found substantial evidence that communication while Dr. Saha was in India was spotty, inconsistent, and that his absence negatively affected his productivity. Dr. Saha even suggested that he could "make up" the lost productivity after he returned in 2002. Thus, the Court of Claims found that Dr. Saha failed to prove by a preponderance of the evidence that communications made by OSU were patently false or that OSU acted with reckless disregard as to their truth or falsity.

{¶70} Examining the record, we find that there is evidence of inconsistent communication while Dr. Saha was in India and that there was a concern about productivity. The Court of Claims' decision is supported by competent, credible evidence.

{¶71} Dr. Saha claims that the perceptions of faculty were in fact defamation because they were known to be false or made with reckless disregard for the truth or falsity. The record shows that these perceptions of OSU faculty could be reasonably reached.

{¶72} The eighth assignment of error is overruled.

{¶73} In summary, the first, second, third, fourth, sixth, seventh and eighth assignments of error are overruled. The fifth assignment of error is sustained, but has no effect on the underlying decision. Therefore, the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.
