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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001036-MR

UNIVERSITY OF LOUISVILLE AND
SHIRLEY C. WILLIHNGANZ — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00123

KAREN C. BRITT — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: MAZE AND NICKELL, JUDGES; HENRY,[1] SPECIAL JUDGE.

HENRY, SPECIAL JUDGE: The sole issue in this interlocutory appeal is whether the Franklin Circuit Court erred in denying the University of Louisville's motion

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution. Special Judge Henry authored this opinion prior to the expiration of his appointment on April 24, 2019. Release of the opinion was delayed by administrative handling.

for summary judgment predicated upon its alleged entitlement to the protection of sovereign immunity on appellee's breach of contract claim. Because we are convinced that the contract at issue in this appeal is an implied contract which does not fall within the waiver of sovereign immunity set out in the Kentucky Model Procurement Act, Kentucky Revised Statute ("KRS") 45A.245, we reverse the decision of the circuit court.

The facts are not in dispute. Appellee Britt was initially employed by the university in 2003 as a visiting assistant professor in Art History, a division of the Fine Arts Department in the College of Arts and Sciences. This initial appointment was a non-tenure track appointment for a single academic year. Thereafter, in October 2003, the dean of the College of Arts and Sciences wrote appellee stating his intention to recommend her appointment to a tenure-track position for a one-year term commencing in the summer of 2004. The letter stated that this initial tenure-track appointment was probationary, that she was subject to annual reviews for a period of five years, and outlined the appointment's "Teaching, Research, and Service Commitments," as well as referencing the "*Redbook*" which sets out conditions governing employment at the university and the college's *Personnel Policy and Procedures*. The letter also notified appellee that she could accept the terms of the recommendation by signing and dating her

acceptance in the space provided and returning the signed acceptance to the university.

Of particular pertinence to this appeal, the letter set out the following regarding tenure:

> You will be subject to a pretenure review during the academic year 2006-07. Your review for tenure will be no later than the academic year 2009-10, with tenure to be effective July 1, 2011. If your review during the year 2009-10 results in a decision not to grant tenure, your contract for 2010-11 would be terminal. Termination of your appointment prior to that time would be subject to the provisions of the *Redbook*.

Following her conversion to tenure-track, appellee received annual letters notifying her of the continuation of her appointment. However, after being reviewed for tenure in 2009, the dean of the College of Arts and Sciences recommended that appellee be denied tenure due to insufficient research and creative activity. The provost concurred in the dean's recommendation and denied appellee tenure. Appellee then filed a grievance which resulted in a hearing by the University Grievance Committee. The committee determined that appellee's workload from teaching and student advising/mentoring was excessive and deviated from the department's usual practice and custom. Although the grievance committee requested that the dean and provost reconsider the denial of tenure, neither decided to change their recommendations. The committee then asked the university

president to intercede but, after a review of the matter, the president's designee declined to override the initial decisions of the dean and provost concerning tenure.

Following the denial of tenure, appellee took a leave of absence in the fall semester of the 2010-2011 academic year and returned to teach in the 2011 spring semester. At the conclusion of that semester, appellee's employment with the university was terminated. She filed a complaint in Franklin Circuit Court on January 31, 2012, alleging that her denial of tenure resulted from gender discrimination; arbitrary and capricious action on the part of the university; and a violation of her rights under the equal protection clause. She also asserted a claim for breach of contract. In support of her breach of contract claim, appellee asserted that the initial recommendation letter and subsequent appointment letters constituted express written contracts with the university.

In response, the university argued that there was no written contract sufficient to waive its sovereign immunity protection under the Model Procurement Code. The university also maintained that, even if the dean's recommendation letter and the provost's annual appointment letters could be construed to constitute written contracts sufficient to come within the waiver set out in the code, it would nevertheless be afforded the protections of sovereign immunity because appellee failed to file suit within the one-year period set out in KRS 45A.260.

After conducting two hearings on the issue of whether an express written contract existed sufficient to waive the university's sovereign immunity shield, the circuit court entered an order denying the university's motion for summary judgment. The circuit court determined that the dean's initial tenure-track recommendation letter contained all the essential elements of a contract: 1) it appointed appellee to a one-year term; specifying her salary; 2) it required that she abide by an annual work plan describing the distribution of her efforts in teaching, research, creative activities, and service; and 3) contained a section allowing appellee to accept the terms of the recommendation. The circuit court also found that the parties intended the terms of the *Redbook* to be incorporated into appellee's employment agreement.

On the basis of these factors, as well as the fact that appellee continued to be reappointed to her position every year, the circuit court concluded that appellee was "party to a valid and lawfully authorized written contract for employment with the University of Louisville" sufficient to fall under the waiver of sovereign immunity contained in the Model Procurement Code. The circuit court also determined that because appellee had been performing under the terms of her most recent appointment letter and was challenging her denial of tenure within one year of filing suit, her complaint was timely filed under the limitations

period set out in the code. This appeal followed the denial of the university's motion for summary judgment.

As a preliminary matter, we note that the Supreme Court of Kentucky recently reiterated the standard by which we review rulings concerning sovereign immunity claims:

> The issue of whether a defendant is entitled to the defense of sovereign or governmental immunity is a question of law. *See Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (citing *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824, 825 (Ky. 2004)). Questions of law are reviewed de novo. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp*., 238 S.W.3d 644, 647 (Ky. 2007). We also note that "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009).

University of Louisville v. Rothstein, 532 S.W.3d 644, 647 (Ky. 2017). With those principles in mind, we turn to an examination of the university's claim that sovereign immunity shields it from appellee's breach of contract action.

We start with *Rothstein*'s unequivocal conclusion that the plain language of KRS 45A.245 waives immunity for contract claims and that employment contracts must be treated no differently than other written contracts:

> Based on the plain language of the statute and our prior interpretation of KRS 44.270, we now hold that KRS 45A.245(1) waives the defense of governmental immunity in **all claims based upon lawfully authorized written contracts**.

Id. at 650 (emphasis added) (footnote omitted). Appellee insists, and the circuit court agreed, that the provisions of the *Redbook* were sufficiently incorporated by reference into her written contract to satisfy the code's requirement of a lawfully authorized written contract. Unlike the circuit court, we decline to extend the requirement of a "lawfully authorized written contract" in our Model Procurement Code to include an implied contract which the *Redbook* may have created between appellee and the university.

In *Dixon v. Daymar Colleges Group., LLC*, 483 S.W.3d 332, 344 (Ky. 2015), the Supreme Court of Kentucky clarified the requirements for the valid incorporation of terms into a written contract:

> Incorporation by reference is an historic common-law doctrine. For a contract validly to incorporate other terms, "it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms." **In addition, there must be "clear language [ ] express[ing] the incorporation of other terms and conditions[.]"**

Id. at 344 (citing *Bartelt Aviation, Inc. v. Dry Lake Coal Co*., 682 S.W.2d 796, 797 (Ky. App. 1985) (footnotes omitted) (emphasis added).

Concerning the *Redbook*, the initial letter concerning the recommendation that Britt be offered a tenure-track position states as follows:

> The conditions governing employment at the University of Louisville are contained in the University's governance document, the *Redbook*. Specific terms

> applicable to your appointment in the College of Arts and Sciences are contained in the College's Constitution and By-Laws, in the College's *Personnel Policy and Procedures* and in the Constitution and By-Laws of the Department.

Subsequent letters stated that "[t]he terms and conditions of employment at the University of Louisville herein specified include all rules and regulations promulgated on the authority of the University of Louisville Board of Trustees and the governance document known as *The Redbook*." As was the case in *Dixon*, we are convinced the language concerning the *Redbook* in the letters to Britt "is simply not clear enough" to indicate that the *Redbook* was incorporated by reference into the written agreement. *Dixon*, 483 S.W.3d at 346. Britt had a right to rely on the *Redbook* for general employment terms, but its conditions are separate from the offer of employment. In our view, reference to the *Redbook* in the October 2003 recommendation letter creates only an implied contract which cannot satisfy the code's written contract requirement.

This conclusion regarding the incorporation of an implied contract was reached by two separate panels of this Court in not-to-be published[2] opinions:

[2] Kentucky Rules of Civil Procedure 76.28(4)(c) states, "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state . . ." and "unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." *Estate of Wittich By & Through Wittich v. Flick*, 519 S.W.3d 774, 779 (Ky. 2017). We reference *Newton* and *Weickgenannt* under the authority of the civil rule and Supreme Court precedent.

Newton v. University of Louisville, No. 2009-CA-002197-MR, 2010 WL 4366360 (Ky. App. Nov. 5, 2010), and *Weickgenannt v. Board of Regents of Northern Kentucky University*, No. 2011-CA-001975-MR, 2012 WL 6651887 (Ky.App. Dec. 21, 2012). Citing *Hammond v. Heritage Communications, Inc*., 756 S.W.2d 152, 154 (Ky. App.1988), the Court in *Newton* stated that an implied contract "is one neither oral nor written-but rather, implied in fact, based on the parties' actions." *Id*. at *4. Because Newton's continuing to work was the additional act or conduct from which the existence of an implied contract could be inferred, this Court concluded that the existence of the contract depended upon factors beyond the written terms of the *Redbook* and personnel policies.

Further, the Court in *Weickgenannt* referenced *Newton* in concluding that annual employment agreements between the parties were insufficient to overcome the university's claim of sovereign immunity. On strikingly similar facts, the Court determined that although Weickgenannt may have been a party to annual employment agreements with NKU, she was not a party to a lawfully authorized written contract entitling her to tenure, the contract she sought to enforce.

Quite recently, however, a panel of this Court issued yet another not-to-be published opinion in *University of Louisville v. Bohm*, No. 2017-CA-000935-MR, 2019 WL 1422912 (Ky. App. Mar. 29, 2019), holding, on the basis of

language which is virtually identical language to that set out in Britt's employment letters, that "all the rules and regulations (including the tenure policy) contained in *The Redbook* are incorporated into Bohm's employment contract with U of L." *Id*. at *6. Thus, the *Bohm* opinion concluded that "*The Redbook* and Bohm's written employment contract should be considered as one binding agreement between the parties" and "[c]onsequently, U of L is not entitled to governmental immunity for the alleged breach of contract claim." *Id*. Because we find ourselves aligned with the analysis and reasoning set out in *Newton* and *Weickgenannt*, we decline to follow the holding in *Bohm*. Recognizing the confusion created for the bench and bar by these conflicting non-published opinions, we respectfully suggest these issues can only find definitive resolution by opinion of the Supreme Court of Kentucky.

In our view, even assuming for the sake of argument that appellee's recommendation and re-appointment letters could be construed to be a written contract within the context of KRS 45A.245, we nevertheless conclude as a matter of law that those contracts do not waive the university's sovereign immunity defense because they do not constitute a contract conferring *entitlement to tenure*, the only contract at issue in this litigation.

Here, the contracts which the circuit court determined to be "legally authorized written contracts," merely provided for appellee's annual employment;

they did not guarantee tenure appointment. An examination of the plain language of the October 2003 recommendation letter confirms that, at best, appellee had secured an implied contract providing that she could *be considered* for tenure in the future. Furthermore, it is immaterial whether the recommendation letter incorporated by reference the university employment handbook or manual. Reference to the *Redbook* merely established the policies and procedures by which appellee's implied contract to be considered for tenure in the future would be exercised. Success on appellee's tenure review required enforcement of an *implied contract* which was dependent upon factors beyond the written terms of the *Redbook* and personnel policies. The import of the distinction between implied and written contracts in this regard was clearly explained by the former Court of Appeals in *Victor's Executor v. Monson*, 283 S.W.2d 175 (Ky. 1955):

> A contract implied in fact . . . differs from an "express contract" only in the mode of proof required; **and it is implied only in that it is to be inferred from the circumstances, the conduct, and the acts or relations of the parties, rather than from their spoken words**. In short, from the evidence disclosed the court may conclude the parties entered into an agreement, **although there is no proof of an express offer and a definite acceptance.**

Id. at 176-77 (emphases added). Under this view of implied contracts, we are persuaded that an implied contract cannot constitute "a lawfully authorized written contract" under KRS 45A.245 because there is no proof of an express offer and a

definite acceptance. In order to waive the defense of sovereign immunity, the code requires, at a minimum, proof of a contract's most basic terms.

We are also convinced that appellee's contract claim fails under the reasoning set out in *Lipson v. University of Louisville*, 556 S.W.3d 18 (Ky. App. 2018), in which this Court rejected a similar contract claim, although one couched in terms of due process deprivation. Lipson, an anesthesiologist, sued the university based upon a written contract which he alleged entitled him, among other things, to an increased salary for work as medical director of the Outpatient Surgery Center. The university claimed entitlement to sovereign immunity and moved for summary judgment on Lipson's claims of breach of contract, unjust enrichment, violation of procedural due process, and violation of Kentucky's wage and hour statutes. Pertinent to the matter before us, the university argued that the undisputed facts established it never entered into a written contract agreeing to pay Lipson additional amounts for his work in the OSC Director position. In upholding the denial of Lipson's claim, this Court stated:

> First, we recognize "[t]he fundamental right of due process cannot be trumped by [governmental] immunity." *See Miller v. Admin. Office of the Courts*, 361 S.W.3d 867, 876 (Ky. 2011). . . . As explained by the United States Supreme Court, due process is required where a person has a requisite property interest that is "more than an abstract need or desire[,] . . . more than a unilateral expectation . . . [but one where] instead, [the person] ha[s] a legitimate claim of entitlement[.]" *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92

> S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). However, "a mere subjective expectancy" of entitlement is not protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972) (internal quotation marks omitted).
>
> **Without an *executed* contract detailing the increase in pay, Lipson's expectation of this entitlement was merely subjective.**

Id. at 31 (emphasis added).

As was the case in *Lipson* and *Rothstein*, the fact that appellee had nothing more than "a unilateral expectation of" being granted tenure is fatal to her breach of contract claim. The written contract upon which appellee predicates her claim grants nothing more than the opportunity to be *considered* for tenure. Rather, it clearly explains that if tenure is not granted, appellee's contract for the 2010-2011 academic year would be terminal. To be clear, despite her attempts to couch her argument in terms of wrongful termination and being denied the termination procedure set out in the *Redbook*, appellee's true complaints focus not upon her employment contract and renewals, but upon the denial of tenure in which she had nothing more than a "mere subjective expectancy." Lacking an express written contract guaranteeing tenure, appellee's breach of contract claim falls short of satisfying the model procurement code's requirement of "a lawfully authorized written contract" in order to overcome the university's sovereign immunity shield.

Having concluded that the university's entitlement to the defense of sovereign immunity was not waived by operation of KRS 45A.245, we need not address the argument that appellee's complaint was barred by the one-year limitations provision set out in KRS 45A.260.

Accordingly, we reverse the judgment of the Franklin Circuit Court denying the university's motion for summary judgment based upon the defense of sovereign immunity.

ALL CONCUR.

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