DA 20-0055

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 299N

RYAN JONES,

Plaintiff and Appellant,

v.

MONTANA STATE UNIVERSITY, a Unit of the Montana University System & Subdivision of the State of Montana,

Defendant and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV 17-804C
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Brian Gallik, Gallik, Bremer & Molloy, P.C., Bozeman, Montana

For Appellee:

Adam Tunning, Bryce Burke, Moulton Bellingham PC, Billings, Montana

Submitted on Briefs: October 7, 2020

Decided: November 24, 2020

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellant Ryan Jones appeals from the order of the Eighteenth Judicial District Court, Gallatin County, granting summary judgment in favor of Montana State University (MSU). We affirm.

¶3 From March 2013 to August 2014, MSU appointed Jones as an assistant research professor pursuant to a series of term contracts.

¶4 In the spring of 2014, MSU offered Jones a new position as assistant professor and extended a contract for the 2014-2015 academic term. The position was "tenurable," with award of tenure depending on four more years of research output and successful retention reviews.

¶5 Jones was reappointed as assistant professor under a second contract for a term beginning August 16, 2015 and ending May 16, 2016. After the expiration of this term, Jones received notice that his contract would not be renewed for the 2016-2017 academic year.

¶6 Jones' employment contracts incorporated by reference MSU's Interim Faculty Personnel Policies. Interim Faculty Personnel Policy 200.13 provides:

A. A tenurable appointee with probationary status (hereinafter referred to as a probationary appointee) has the right to serve the specified term of the appointment and may not be discharged without cause during that term.

B. Reappointment of probationary appointees shall be at the discretion of the Employer . . . .

C. Failure to provide a probationary appointee with the required notice period shall not result in automatic reappointment or create any right for an additional term. The Employer shall have the option of providing employment or severance pay in lieu of any portion or all of the notice to which the employee is entitled . . . .

¶7 On May 25, 2016, Jones received notice that he was being terminated within his probationary period pursuant to Policy 200.13(B). At the time he received notice, Jones remained on probationary appointment with MSU and was teaching one class for the summer 2016 term under a separate contract. MSU continued to pay Jones' monthly salary for the following five and a half months pursuant to the notice provisions in Policy 200.13(C).

¶8 Jones filed claims against MSU alleging breach of contract, deprivation of property and liberty without due process, and defamation. The District Court granted summary judgment in favor of MSU on all claims.

¶9 We review a district court's grant of summary judgment de novo. *Bardsley v. Pluger*, 2015 MT 301, ¶ 11, 381 Mont. 284, 358 P.3d 907. "The party moving for summary judgment bears the initial burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law." *Miller v. Begley*, 2011 MT 230, ¶ 10, 362 Mont. 115, 262 P.3d 1085. Once the moving party has met its burden, the burden shifts to the opposing party to present facts of a

substantial nature showing that genuine issues of material fact remain for trial. *Cape v. Crossroads Corr. Ctr.*, 2004 MT 265, ¶ 12, 323 Mont. 140, 99 P.3d 171. The opposing party "must present more than conclusory allegations, speculation, or denial." *Cape*, ¶ 12.

¶10 Although Jones concedes he was hired on specific term contracts, he argues that material issues of fact preclude summary judgment on his breach of contract claim. Jones contends his contract was not renewed because of alleged research misconduct which MSU failed to adequately investigate prior to terminating his employment. Jones also argues MSU breached their summer 2016 contract by terminating his employment during the term without cause.

¶11 This Court has consistently "upheld the discretionary rights of employers to non-renew specific term contracts without a showing of good cause." *Farris v. Hutchinson,* 254 Mont. 334, 341, 838 P.2d 374, 378 (1992); *see also Leland v. Heywood,* 197 Mont. 491, 643 P.2d 578 (1982); *Talley v. Flathead Valley Cmty. Coll.*, 259 Mont. 479, 487, 857 P.2d 701, 705 (1993); *Schaal v. Flathead Valley Cmty. Coll.*, 272 Mont. 443, 445-47, 901 P.2d 541, 542-43 (1995). "No obligation can be implied which would result in the obliteration of a right expressly given under a written contract." *Farris*, 254 Mont. at 339, 838 P.2d at 377.

¶12 No issues of fact preclude summary judgment on Jones' claim for breach of contract. The contract expressly provides that "[r]eappointment of probationary appointees shall be at the discretion of the Employer." Jones was a probationary appointee, and MSU retained discretion to not renew his contract for another academic term. MSU was not

required to undergo additional investigation into Jones' research conduct prior to exercising its discretion. Requiring such an investigation would defeat the purpose of the discretionary provision.

¶13 Furthermore, Jones has no viable claim that MSU breached the summer 2016 contract. Jones does not provide substantial evidence of damages resulting from his inability to continue teaching during the summer term. Jones cannot sustain a claim without showing that "damages likely resulted from the breach of contract." *Tin Cup Cty. Water v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 38, 347 Mont. 468, 200 P.3d 60. Jones attempts to raise an issue of fact regarding damages by pointing to his affidavit, where he stated that he was not fully paid under the summer contract. MSU submitted records showing Jones was paid the same monthly salary before and after his separation from the university, including payment throughout the summer 2016 term. Jones' statements to the contrary are merely conclusory and insufficient to raise issues of fact. The District Court properly granted summary judgment on the breach of contract claim.

¶14 Next, Jones argues his termination from MSU in the summer of 2016 amounted to a deprivation of property without due process.[1] In particular, he asserts Policy 200.13(A) established a protected property interest in continued employment through the summer appointment because he had "the right to serve the specified term of the appointment and may not be discharged without cause during that term."

[1] Jones limits appeal on this issue to the summer 2016 appointment, relying on the breach of contract claim for the balance of his employment.

¶15 Before an employee is entitled to due process for the loss of employment, he must first demonstrate existence of a protected property interest. *Mysse v. Martens*, 279 Mont. 253, 260, 926 P.2d 765, 769 (1996). "In order to have a property interest in an employment position, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Ray v. Mont. Tech of the Univ. of Mont*., 2007 MT 21, ¶ 54, 335 Mont. 367, 152 P.3d 122 (citing *Akhtar v. Van De Wetering*, 197 Mont. 205, 211, 642 P.2d 149, 153 (1982)). In general, non-tenured university and college employees hired on specific term contracts do not have legitimate expectations of continued employment. *Ray*, ¶ 54; *Talley*, 259 Mont. at 489, 857 P.2d at 707.

¶16 Jones did not have a legitimate claim of entitlement to continued employment for the remainder of the summer 2016 term. Essentially, Jones attempts to cast a contract claim as a constitutional claim because the basis for his alleged property interest stems from a contractual provision. Even assuming Jones had a contractual right to serve the remainder of the term, "[a] mere breach of contractual right is not a deprivation of property without due process of law." *Jimenez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981) (citing *Bishop v. Wood*, 426 U.S. 341, 349-50, 96 S. Ct. 2074, 2079-80 (1976)). Furthermore, Jones was paid severance in accordance with the terms of his contract. He cannot sustain a claim that he was deprived of any property relating to his loss of employment.

¶17 Jones also contends he was deprived of liberty without due process because MSU administrators accused him of research misconduct, which harmed his reputation.

¶18 "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Bd. of Regents v. Roth*, 408 U.S. 564, 575, 92 S. Ct. 2701, 2708 (1972). In the context of public employment, a liberty interest is implicated if the government levels a charge against an employee, impairing his reputation such that the employee is effectively foreclosed from pursuing other employment opportunities. *Tibbetts v. Kulongoski*, 567 F.3d 529, 536 (9th Cir. 2009). The employee must establish all elements of a three part test: (1) the accuracy of the charge is contested; (2) there was some public disclosure of the charge; and (3) the charge was made in connection with the termination of employment. *Guzman v. Shewry*, 552 F.3d 941, 955 (9th Cir. 2009) (internal citations and quotations omitted).

¶19 Jones does not allege that MSU publicly disclosed any information relating to his alleged research misconduct or his separation from the university. Instead, he asserts that MSU's internal communications were "sufficiently stigmatizing" to support a claim merely because his supervisors recommended termination after receiving a report regarding the alleged misconduct. He provides no authority for the contention that internal correspondence amounts to a public disclosure for purposes of a liberty interest claim. The District Court properly granted summary judgment on Jones' due process claims.

¶20 Finally, Jones argues issues of fact preclude summary judgment on his defamation claim. He asserts university administrators circulated false information regarding his research conduct, which constitutes malice and therefore defeats MSU's claim of privilege.

¶21 A defamation claim requires existence of a "false and unprivileged publication." *Chapman v. Maxwell*, 2014 MT 35, ¶ 14, 374 Mont. 12, 322 P.3d 1029. A publication is privileged—and therefore not a basis for a defamation claim—if it is made "in the proper discharge of an official duty." Section 27-1-804(1), MCA; *Small v. McRae*, 200 Mont. 497, 651 P.2d 982 (1982). "The proper discharge of an official duty" includes public officers' internal communications relating to the hiring and firing of an employee. *Storch v. Bd. of Directors of E. Montana Region Five Mental Health Ctr.*, 169 Mont. 176, 181-82, 545 P.2d 644, 647-48 (1976). Malice is not relevant to the analysis of whether communications are privileged under § 27-1-804(1), MCA. *Storch*, 169 Mont. at 181, 545 P.2d at 647.

¶22 The District Court correctly concluded that MSU's internal correspondence relating to Jones' conduct is privileged under § 27-1-804(1), MCA. Such communications were made in the course of evaluating his performance as a university researcher. As such, the communications were made in the proper discharge of their official duties. Jones' allegations that the communications constitute malice do not undermine the privilege or create an issue of fact. Therefore, there is no basis for a defamation claim. Summary judgment was proper on this issue.

¶23 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents

no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. Affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR