[Cite as *Lewis v. Cleveland State Univ.*, 2009-Ohio-2827.]

Court of Claims of Ohio
The Ohio Judicial Center
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JOSEPH LEWIS

Plaintiff

v.

CLEVELAND STATE UNIVERSITY

Defendant
Case No. 2006-07457

Judge Joseph T. Clark
Magistrate Lewis F. Pettigrew

MAGISTRATE DECISION

{¶ 1} Plaintiff brought this action alleging breach of contract, racial discrimination and violations of R.C. 2307.70(A) and 2927.12. The issues of liability and damages were bifurcated and the case proceeded to trial before a magistrate on the issues of liability and civil immunity.

{¶ 2} In 2002 and 2003, plaintiff, an African American male, was enrolled as a student in defendant's College of Graduate Studies. He was a Ph.D. candidate in the Maxine Goodman Levin College of Urban Affairs.

{¶ 3} In the fall semester of 2002, plaintiff registered for Quantum Research Methods, an advanced mathematics class taught by Sanda Kaufman Ph.D. and identified in plaintiff's certified transcript as UST 803. UST 803 was a required course in the Ph.D. program. Shortly after the mid-term exam, Dr. Kaufman informed the students that many of the class members were underperforming and that some were in danger of failing the course. At that point, plaintiff decided to register a "formal complaint" about Dr. Kaufman.

{¶ 4} To that end, plaintiff drafted and addressed a letter to William Bowen Ph.D., defendant's graduate program director, wherein plaintiff detailed Dr. Kaufman's "unprofessional and unethical practices * * * in her role as Professor of UST 803, Fall 2002 semester." (Defendant's Exhibit B.) The letter is dated June 22, 2002, and is signed by plaintiff and a number of other "UST 803/ Fall 2002 Ph.D. Student Body Members."[1] In a nutshell, the letter cited numerous examples of Dr. Kaufman's allegedly poor teaching practices and her insensitivity to her students' needs. Plaintiff requested that each of the students who signed the complaint be given a grade of "satisfactory" for UST 803.

{¶ 5} After Dr. Bowen met with plaintiff and several of the other affected students on December 6, 2002, he issued a memorandum response to the formal complaint wherein he recommended the following:

{¶ 6} "a) that the College of Urban Affairs should offer and highly recommend an informal session of UST 501 from January 3 — January 13, provided so as to fortify the algebraic reasoning skills that are necessary for success in UST 803.

{¶ 7} "b) that the College should offer that the relevant students should have the option of removing the grade of 'I' for the UST 803 course taken in the fall semester by taking the course in the spring, and receiving the grade earned in the spring."

{¶ 8} Pursuant to Dr. Bowen's recommendation, an informal session of UST 501 was offered, free of charge, to plaintiff and the other students who had signed the formal complaint. Plaintiff was given a grade of "incomplete" for UST 803 and, in January 2003, he attended the informal session of UST 501, taught by Dr. Bowen.

{¶ 9} Plaintiff subsequently registered for UST 803 in the spring semester, with Dr. Bowen as his instructor. While taking the class, plaintiff became unhappy with Dr. Bowen's teaching methods and his treatment of students. Plaintiff once again struggled

[1]The identities of the other students who signed the formal complaint have been redacted from Exhibit B, and all other materials submitted by defendant, in order to preserve student privacy.

in UST 803 and ultimately received a grade of "C." He subsequently filed a grade dispute with defendant's Graduate College Grade Dispute Committee (Graduate Committee). Therein, plaintiff requested that defendant disregard the grade of "C" that he was given by Dr. Bowen and that he be permitted to replace the "incomplete" he was given by Dr. Kaufman with a grade he would later earn upon retaking UST 803 with a competent professor.

{¶ 10} In an April 28, 2003 memorandum to the Graduate College Petitions committee Dr. Bowen responded to plaintiff's request by stating in part:

{¶ 11} "2. The only way I would ever support a petition for an extension of an incomplete would be with a detailed agreement regarding exactly what the student would have to do to satisfactorily complete the course. In this case, Mr. Lewis has had two semesters to demonstrate his knowledge of regression analysis, with two separate professors, and he has rejected the advice and judgments of both.

{¶ 12} "3. Mr. Lewis's performance in UST 803 this semester has been marginal, at best."

{¶ 13} In the spring semester, plaintiff registered for a course entitled "Public Administration Seminar" (UST 830) which was to be taught by Dr. Alexander. However, plaintiff did not perform well in UST 830 and received a grade of "C." Plaintiff subsequently filed a grade dispute wherein he requested that the dispute over his grade(s) in UST 803 be combined for hearing with his latest grade dispute regarding UST 830. Plaintiff's UST 830 grade dispute was contained in a June 3, 2004 letter addressed to Dean Mark A. Tumeo, defendant's vice provost for research and dean of graduate studies.

{¶ 14} Plaintiff and Dean Tumeo exchanged correspondence and telephone calls over the next two months in an effort to resolve certain disagreements preventing plaintiff's grade disputes from moving through the system. The specific obstacles were plaintiff's continued objection to Dr. Bowen's participation in the process and a stalemate regarding the production of supporting documentation.

{¶ 15} On September 20, 2004, plaintiff was notified of an Academic Standards Committee determination that his failure to achieve a grade of "B" or better in UST 803 prevented him from taking part in the comprehensive examinations required of all Ph.D. candidates. Plaintiff was advised as follows: "take [UST 803] the next time it is offered. When you earn a B in the course you will be allowed to continue your program of study and take comprehensive exams."

{¶ 16} On September 30, 2004, plaintiff sent a letter to Dean Tumeo wherein plaintiff provided the information regarding his grade dispute that Dean Tumeo had previously requested. Thereafter, Drs. Kaufman, Bowen, and Alexander submitted written responses to Dr. Bill Bailey, associate dean of the college of graduate studies; those responses were, in turn, forwarded to plaintiff.

{¶ 17} Although some of the relevant records have not been admitted into evidence, plaintiff's grade dispute regarding UST 830 was considered by the Graduate College Grade Dispute Committee on December 15, 2004. The committee did not support plaintiff's request for a higher grade. Plaintiff also received no support for his UST 803 grade dispute at the departmental level.

{¶ 18} Ultimately, plaintiff's UST 803 and UST 830 grade disputes made it to the Admissions and Standards Committee, the final step in the grade dispute process. The matters were considered on February 16, 2005, and on March 9, 2005, the Chairman issued a decision on behalf of the committee members which states in relevant part:

{¶ 19} "In summary, it is the finding of the University Admissions and Standards Committee that due process as defined in the Academic Regulations set forth in the *Cleveland State University Graduate Catalogue for 2002-2004* has been accorded Mr. Lewis in this grade dispute. The steps defined have been followed, except where Mr. Lewis himself has requested that they be ignored."

{¶ 20} Plaintiff did not achieve a grade of "B" in UST 803, he did not take comprehensive exams, and he did not receive a Ph.D. from defendant. Defendant

maintains that plaintiff is still welcome to take UST 803 and that he has been notified that he may continue his pursuit of a Ph.D. if he achieves a grade of "B" or better in the class.

{¶ 21} On November 27, 2006, plaintiff filed his complaint wherein he alleges that he was not permitted to complete his doctoral studies at defendant's institution as a result of academic misconduct that amounted to a breach of contract. Plaintiff also contends that several of defendant's employees committed criminal acts against him including ethnic intimidation, theft, menacing, and tampering with records. Finally, plaintiff maintains that he was employed by defendant as a policy and planning assistant with the Federation for Community Planning and that defendant discriminated against him on the basis of his race in violation of R.C. Chapter 4112.

{¶ 22} Defendant argues that any claims of race discrimination must fail inasmuch as plaintiff was not an employee of the university. In denying defendant's motion for summary judgment, the court found that a genuine issue of fact existed with respect to plaintiff's employment status.

{¶ 23} Frances Hunter, now retired, was defendant's graduate assistant intern coordinator when plaintiff was a student. She testified that plaintiff had an internship with the Federation of Community Planning (FCP); that he was paid a $1,000 stipend by FCP in return for his work; and that he received a $1,000 tuition grant from defendant for participating in the program. According to Hunter, FCP contacts defendant when it wishes to hire student interns. Hunter did not consider plaintiff to be an employee of defendant.

{¶ 24} Defendant's Exhibit bb is the only document admitted into evidence that speaks to plaintiff's internship. Based upon the language of Defendant's Exhibit bb, it is clear that defendant has a great deal of control over plaintiff's entitlement to a tuition grant. However, Defendant's Exhibit bb also states that where the tuition grant is tied to an internship, the hours of service to defendant "should be noted as '0.'" Additionally,

the extent of defendant's right to control means and methods of plaintiff's work at FCP is not set out in the single page of Defendant's Exhibit bb.[2]

{¶ 25} Inasmuch as plaintiff has the burden of establishing an employment relationship with defendant for purposes of his claim of discrimination, plaintiff has failed to produce sufficient evidence to meet his burden. Accordingly, plaintiff's discrimination claim brought pursuant to R.C. Chapter 4112 is without merit.

{¶ 26} Plaintiff next contends that he was denied his contractual right to challenge his grades and that he was subsequently prohibited from pursuing his Ph.D. in violation of the parties' agreement.

{¶ 27} To recover upon a breach of contract claim, a plaintiff must prove "'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.'" *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 2002-Ohio-443, quoting *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 483. There is no dispute in this case that a contractual relationship existed between plaintiff and defendant. Indeed, "when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature." *Bleicher v. Univ. of Cincinnati College of Med.* (1992), 78 Ohio App.3d 302, 308, quoting *Behrend v. State* (1977), 55 Ohio App.2d 135, 139. The terms of the contractual relationship are found in the university catalogue and handbook supplied to students. *Embrey v. Central State Univ.* (Oct. 8, 1991), Franklin App. No. 90AP-1302, citing *Smith v. Ohio State Univ.* (1990), 53 Ohio Misc.2d 11, 13.

{¶ 28} Defendant first argues that plaintiff failed to timely file this contract action. However, in denying summary judgment the court rejected defendant's argument stating: "In support of its motion defendant submitted the affidavit of Mark A. Tumeo,

[2]Defendant's Exhibit bb represents just the first page of a two-page document. Although plaintiff's job description at FCP is referenced as an attachment thereto, it is not part of the exhibit.

vice provost for research and dean of graduate studies in the College of Graduate Studies. Dean Tumeo confirmed that plaintiff participated in the university's grade dispute process through at least February 16, 2005." (Entry dated December 13, 2007.) The evidence admitted at trial corroborates Dean Tumeo's deposition testimony and the court finds that plaintiff's cause accrued on February 16, 2005, at the earliest. Thus, plaintiff's action was timely filed.

{¶ 29} The primary dispute between the parties is that plaintiff believes he should have been eligible to take comprehensive examinations and to obtain his Ph.D. if he maintained a "B" average in all of his courses, whereas defendant insists that plaintiff needed to achieve a grade of "B" or better in each of his required core courses.

{¶ 30} Under the heading "Academic Standards for Graduation," defendant's Ph.D. program in Urban Studies and Public Affairs Student Handbook (handbook) requires: "Achievement of 3.0 cumulative grade point average for all courses taken as a graduate student."

{¶ 31} However, on page 4 under the heading "Ph.D. Coursework [sic]" the handbook very clearly states:

{¶ 32} "A minimum grade of 3.0 ('B') is required for all core courses; a grade below 3.0 requires repeating the course. In concentration and elective courses, no more than eight credits below B (3.0) may be applied to the degree." (Emphasis in original.)

{¶ 33} Defendant's 2002-2004 "Graduate Catalog for Urban Studies and Public Affairs" (catalogue) is also relevant to the dispute. Under the heading "Course Requirements," the catalogue states in part:

{¶ 34} "Following completion or waiver of prerequisites, each student is required to:

{¶ 35} "1. Complete a common core of five courses with a grade-point average of 3.0 or better. The core courses are:

{¶ 36} "* * *

{¶ 37} "UST 803 Quantitative Research Methods I."

{¶ 38} Giving plaintiff the benefit of the doubt, there are portions of both the catalogue and the handbook that are susceptible, when read in isolation, to the meaning ascribed to them by plaintiff. In the view of the court, however, defendant's reading of the relevant language is the only reasonable view. Indeed, the members of defendant's faculty and administration who testified on the matter agreed that the language "[c]omplete a common core of five courses with a grade-point average of 3.0 or better" means that students must achieve a 3.0 or better (grade of "B") in each of the "common core of five courses." And, in light of the language of the handbook which specifically requires a grade of "B" in all core courses, plaintiff's understanding of the requirements of the Ph.D. program is clearly mistaken.

{¶ 39} In short, plaintiff has failed to establish that defendant breached the parties' agreement on this basis.

{¶ 40} With respect to the claim based upon the grade dispute procedures, defendant maintains that plaintiff cannot prevail on such a claim inasmuch as defendant's grading procedures were neither arbitrary nor capricious. The court agrees.

{¶ 41} The grade dispute procedures are clearly spelled out in the catalogue and, based upon the testimony at trial, the court finds that defendant substantially complied with those procedures, except where plaintiff requested that the process be expedited. Although there is merit to plaintiff's contention that the procedures are somewhat one-sided in favor of the professor, plaintiff agreed to abide by those procedures when he enrolled in defendant's university. Thus, plaintiff failed to establish a breach of the parties' agreement on this basis.

{¶ 42} Plaintiff's claims based upon an oral agreement with defendant arise from plaintiff's testimony that Dean Rosentraub agreed to award plaintiff a passing grade if plaintiff agreed to withdraw the June 22, 2002 "formal complaint." However, even if Dean Rosentraub made such a promise, and even if such a promise were actionable in

damages, no evidence was presented to establish that Dean Rosentraub possessed the authority to bind defendant. Indeed, both the testimony of defendant's witnesses and the language of the catalogue support the conclusion that the final determination of a student's grade rests with the professor who taught the course. Dr. Rosentraub was not plaintiff's instructor for either of the courses for which plaintiff filed a grade dispute. Thus, plaintiff's claims based upon this alleged oral representation are without merit.

{¶ 43} As to plaintiff's claims regarding criminal conduct, R.C. 2707.70(A) provides that "[a]ny person who suffers injury or loss to person or property as a result of an act committed in violation of section 2909.05, 2927.11, or 2927.12 of the Revised Code has a civil action and may recover in that action full damages * * * for emotional distress, the reasonable costs of maintaining the civil action, and reasonable attorney's fees." *Vandiver v. Morgan Adhesive* Co. (1998), 126 Ohio App.3d 634, 640. The statute addressing ethnic intimidation is found at R.C. 2927.12 which states:

{¶ 44} "(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

{¶ 45} "(B) Whoever violates this section is guilty of ethnic intimidation." Id.

{¶ 46} According to plaintiff, in a meeting with Dr. Bowen, Dr. Bowen referred to plaintiff and the group of students who joined him in signing the formal complaint as "darkies" and "unqualified affirmative action students." Dr. Bowen denies making any such remarks. Thus, a resolution of this issue resolves to one of witness credibility.

{¶ 47} Given plaintiff's demonstrated willingness to draft detailed complaints whenever his instructors displeased or disappointed him, it is a virtual certainty that had Dr. Bowen uttered the racial slurs attributed to him by plaintiff, plaintiff would have specifically referenced those remarks in one of his many subsequent letters to defendant's administrators. The only evidence presented by plaintiff to substantiate his

claim that certain unspecified slurs were uttered is a copy of an undated, handwritten document that plaintiff allegedly delivered to defendant's office of affirmative action. The handwritten note states in part: "I have been the victim of threats and harrassment [sic] by Dr. Bowen of the urban college. He has used racial slurs, and dissmissed [sic] my work, because of a complaint I file [sic] against one of his colleagues."

{¶ 48} While plaintiff claims that he filed a complaint with defendant's office of affirmative action, Maria Codinach, defendant's affirmative action officer, testified that she has no recollection of such a complaint and that her office does not have a file on plaintiff. She did not recall ever before seeing the handwritten document containing plaintiff's complaint about Dr. Bowen.

{¶ 49} In light of plaintiff's failure to reference alleged racial slurs by Dr. Bowen in any of plaintiff's numerous correspondence to defendant's administration and in light of his failure to specify the slurs in the complaint he claims to have filed with defendant's office of affirmative action, there is little evidence to support plaintiff's claim of ethnic intimidation. The lack of corroborating evidence combined with Bowen's denials, convinces the court that Dr. Bowen did not make the racially motivated remarks attributed to him by plaintiff. Inasmuch as Dr. Bowen's alleged slurs and threats are the crux of the claims brought pursuant to R.C. 2307.70(A) and 2927.12, plaintiff has failed to meet his burden of proof.

{¶ 50} Having determined that plaintiff has failed to meet his burden of proof with respect to each of his claims, judgment in favor of defendant is hereby recommended.

{¶ 51} Turning to the issue of civil immunity, R.C. 2743.02(F) provides, in part:

{¶ 52} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court

of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action."

{¶ 53} R.C. 9.86 provides, in part:

{¶ 54} "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.*" (Emphasis added.)

{¶ 55} In *Thomson v. University of Cincinnati College of Medicine* (Oct. 17, 1996), Franklin App. No. 96 API-02260, the Tenth District Court of Appeals noted that:

{¶ 56} "Under R.C. 9.86, an employee who acts in the performance of his duties is immune from liability. However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. * * * Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. and Corr.* (1988), 48 Ohio App.3d 86. The act must be so divergent that its very character severs the relationship of employer and employee. *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246."

{¶ 57} Based upon the totality of the evidence presented, the court finds that defendant's employees Maria Codinach and Drs. Jennifer Alexander, William Bowen, Sanda Kaufman, Mark Rosentraub, Mark Tumeo acted within the scope of their employment with defendant at all times relevant hereto. The court further finds that Codinach and Drs. Alexander, Bowen, Kaufman, Rosentraub, Tumeo, did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, it is recommended that Codinach and Drs. Alexander, Bowen, Kaufman,

Rosentraub, Tumeo, be entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).[3]

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

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LEWIS F. PETTIGREW
Magistrate

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LP/cmd
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[3]During his trial testimony plaintiff stated that he wished to withdraw his request for an immunity determination regarding Drs. Rosentraub and Alexander.