[Cite as *Sich v. Franciscan Univ. of Steubenville*, 2019-Ohio-2706.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

DR. ALEXANDER R. SICH,

Plaintiff-Appellant,

v.

FRANCISCAN UNIVERSITY OF STEUBENVILLE,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 18 JE 0011

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 16-CV-00574

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. John F. Myers, 275 North Portage Path 3C, Akron, Ohio 44303 for Plaintiff-Appellant and

Atty. James M. Doerfler, and *Atty. Kim M. Watterson,* Reed Smith LLP, 225 Fifth Avenue, Pittsburgh, Pennsylvania 15222 for Defendant-Appellee.

Dated: June 19, 2019

Robb, J.

{¶1} Plaintiff-Appellant Dr. Alexander R. Sich appeals the decision of Jefferson County Common Pleas Court granting summary judgment for Defendant-Appellee Franciscan University of Steubenville. The issue in this case is whether there is a genuine issue of material fact as to whether Appellee violated the Employee Handbook when Appellant did not receive notice of all negative interactions listed in his file. For the reasons expressed below we find no merit with Appellant's assignment of error and affirm the trial court's decision.

Statement of the Facts and Case

{¶2} Prior to setting forth the facts and arguments it is noted all appellate briefs, summary judgment motions, and depositions are under seal. Only the complaint and answer are not under seal.

{¶3} In 2009, Appellee hired Appellant to teach physics as an Associate Professor on a tenure track; Appellant was also to start a pre-engineering program. In 2016, Appellant submitted his application for tenure.

{¶4} The tenure review committee reviewed his application, but recommended that he be denied tenure. The basis for the denial was the lack of collegiality or decorous behavior. The tenure board's recommendation was given to Appellee's Vice President of Academic Affairs (VPAA). The VPAA also recommended denial of tenure. The VPAA gave the tenure board's recommendation and its own recommendation to the Appellee's President.

{¶5} The ultimate decision of whether to grant or deny tenure rested with the President of Appellee. The President considered the committee's recommendation, the VPAA's recommendation, the tenure application and the applicant's academic file. The President, following his independent review concluded denial of tenure was proper.

{¶6} Appellant was notified in writing of the denial of tenure and was given a basis for the denial. Appellant then filed a complaint against Appellee asserting breach of contract, breach of implied contract, promissory estoppel, and negligent

misrepresentation. 11/28/16 Complaint; 6/23/17 Amended Complaint. Appellee answered. 12/27/16 Answer; 7/6/17 Answer.

{¶7} Following discovery, Appellee moved for summary judgment. 3/2/18 Motion for Summary Judgment. Appellee asserted Appellant had notice of all matters in his academic file. As such, Appellee asserted it did not breach the contract. It further asserted since there is an express contract through the handbook, the claim for implied contract and the promissory estoppel claims fail. 3/2/18 Motion for Summary Judgment. As to negligent misrepresentation, Appellee contended the matter is governed by contract and the tort claim does not survive. 3/2/18 Motion for Summary Judgment.

{¶8} Appellant filed a motion in opposition to summary judgment contending there were genuine issues of material fact. 4/30/18 Motion in Opposition to the Motion for Summary Judgment. Appellant asserted he was not on notice of all of the matters in his academic file. He contended the handbook indicated he was to be informed of complaints put in his file. Appellant asserted the implied breach of contract and promissory estoppel claims were alternatives if the court found there was not a contract. 4/30/18 Motion in Opposition to the Motion for Summary Judgment. He then dismissed his negligent misrepresentation claim. 4/30/18 Motion in Opposition to the Motion for Summary Judgment.

{¶9} Appellee filed a reply. 4/9/18 Reply in Support of Summary Judgment.

{¶10} The trial court granted the motion for summary judgment. 7/11/18 J.E. It found there was an express contract and thus, the implied contract theory failed as a matter of law. 7/11/18 J.E. The trial court concluded Appellee did not breach the contract. 7/11/18 J.E. It stated case law has upheld collegiality as a consideration in the tenure decision even though the term is not explicitly stated in the contract of employment, i.e., the handbook. 7/11/18 J.E. As to notice, the court explained:

> In his more recent summary judgment opposition submissions, Dr. Sich has focused upon the notion that he allegedly did not receive what he believes is the contractually required notice of matters that would affect his ability to be awarded tenure. This argument also fails. The record demonstrates that Dr. Sich received formal written notice from the VPAA [Vice President of Academic Affairs] in two separate annual review appraisals that negative

letters had been placed in his file due to his conflicts with other professors. Dr. Sich responded to those documented incidents. Indeed, the members of the Tenure Review Board voting against Dr. Sich's tenure application cited his response toz the formal notice he received concerning his ongoing conflict with Dr. Bergsma of the Theology department as evidence of Dr. Sich's non-collegial attributes and unsuitability for tenured faculty status.

Dr. Sich complains elsewhere that he was somehow unaware or did not have notice of the fact that the Tenure Review Board might review his personnel file, which contained evidence of multiple indecorous interactions with faculty and administrative staff. However, the Franciscan's Faculty Handbook explicitly states the Tenure Review Board's duties include a review of the candidate's personnel file. Furthermore, the letter of recommendation written by Dr. Sich's own department chair seemingly flagged these indecorous interactions, by referencing Dr. Sich's "many charged conversations and interactions" in connection with "the discussions, launch, and execution of the Pre-Engineering Program." Ohio case law vests tenure committees with substantial discretion to inform themselves about the credentials of a tenure candidate. *See Gall v. Sinclair Community College*, Montgomery App. No. 15597, 1996 WL 303614 (2nd Dist. Ct. App. June 7, 1996) (upholding tenure committee's consideration of due diligence materials outside those listed in the Faculty Handbook). Here, by the Tenure Review Board's consideration of materials expressly authorized by the Faculty Handbook, and specifically highlighted in a letter of recommendation issued on Dr. Sich's behalf (the letter submitted by his department chair), is entirely consistent with its official duties and does not demonstrate any sort of prohibited fraudulent or bad faith behavior. Furthermore, it is unreasonable for Dr. Sich to claim a lack of "notice" about incidents involving workplace conflicts in which Dr. Sich was a direct participant. Indeed, it appears to be a matter of common sense that any employer would necessarily consider an employee's history of work place conflicts and non-collegial behavior when considering that employee's

> request for a grant of lifetime employment. Thus, Dr. Sich's lack-of-notice argument is not supported by facts of record. Based on the foregoing, Dr. Sich's breach of contract claim fails as a matter of law.

7/11/18 J.E.

{¶11} The trial court also found the promissory estoppel claim failed because the sole authority to grant or deny tenure rests with the President of Appellee and Appellant could not identify any statement from Appellee's President indicating Appellant would be granted tenure. 7/11/18 J.E.

{¶12} Appellant timely appealed the decision and raises one assignment of error.

Assignment of Error

"The trial court erred in granting Franciscan University of Steubenville Summary Judgment on Dr. Sich's Breach of Contract Claim."

{¶13} Under Civ.R. 56(C), summary judgment can be granted when there remains no genuine issue of material fact and when reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56 must be construed in a manner that balances the right of the non-movant to have a jury try claims that are adequately based in fact with the right of the movant to demonstrate, prior to trial, that the claims have no factual basis. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47 at ¶ 11, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548 (1986).

{¶14} We consider the propriety of granting summary judgment under a de novo standard of review. *Ohio Govt. Risk Mgt. Plan v. Harrison,* 115 Ohio St.3d 241, 2007–Ohio–4948, 874 N.E.2d 1155, ¶ 5; *Comer v. Risko,* 106 Ohio St.3d 185, 2005–Ohio–4559, 833 N.E.2d 712, ¶ 8. In accordance, we apply the same legal standards binding the trial court. Under a de novo standard of review, we review the case independently and give no deference to the trial court's decision. *See, e.g., Diley Ridge Med. Ctr. v. Fairfield Cty. Bd. of Revision*, 141 Ohio St.3d 149, 2014-Ohio-5030, 22 N.E.3d 1072, ¶ 10.

{¶15} The issue on appeal is not whether Appellant's actions were collegiate or decorous or whether collegiality can be considered when granting tenure – Appellant has

abandoned that argument. The issue is whether the Appellant received notice of the complaints against him.

{¶16} Section III, subsection D of the 2016 Handbook concerns yearly appraisals and indicates faculty members must be aware of complaints or incidents that may affect future promotion. The complaints are to be documented by the department chair or the VPAA and put in the annual review report that is given to the faculty member.

{¶17} It is undisputed that there were complaints in Appellant's file. He acknowledges notice of two of the matters and admits he was aware it could affect his ability to get tenure. As to the other matters, he contends he was not aware and they were not in his file when he reviewed it before the tenure process, but were there after his request for tenure was denied. Appellant contends Section III, subsection D of the 2016 Handbook required him to be notified of complaints or incidents that would affect his future promotion. Since there is an indication in the record he may not have received notice of certain complaints, he contends there is a genuine issue of material fact as to whether Appellee breached the contract. If he was required to receive notice of those issues and did not, then he contends the tenure committee, VPAA and the President of the University could not consider those matters in recommending tenure or granting tenure.

{¶18} Appellee counters arguing Appellant had notice of these complaints and the record indicates he had notice. It asserted these complaints included correspondence in which Appellant was a part; therefore, he had notice. Furthermore, one of the recommendation letters submitted by Appellant to support his tenure also confirmed that there was knowledge of a history of conflicts with faculty and administrators.

{¶19} In a tenure appeal decision, the Tenth Appellate District has stated:

> The construction and interpretation of written contracts involves issues of law that an appellate court reviews de novo. *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. The purpose of contract construction is to realize and give effect to the parties' intent. *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "[T]he intent of the parties to a contract resides in the language they chose to employ in the

> agreement." *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). When "'the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.'" *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, 857 N.E.2d 583, ¶ 12, quoting *Shifrin* at 638, 597 N.E.2d 499.

McKeny v. Ohio Univ., 10th Dist. Franklin No. 17AP-392, 2017-Ohio-8589, 99 N.E.3d 1244, ¶ 19.

{¶20} We find no merit with Appellant's position that he did not receive notice of every negative complaint in his file. The record indicates he received notice. The record demonstrates he was a part of these incidents and knew of them, especially when it concerned his emails. Also, the previous chair of his department was aware of the interactions and noted so in general terms in the recommendation letter. As the trial court noted, this letter references "'many charged conversations and interactions' in connection with 'the discussions, launch, and execution of the Pre-Engineering Program.'" 6/21/18 J.E. Incidents regarding the launch of the pre-engineering program was one of the complaints Appellant claimed he did not receive notice. At the minimum, the letter clearly indicates the chair and Appellee were aware that the charged conversations regarding the start of the pre-engineering program and enrollment could affect his ability to obtain tenure. Furthermore, it shows collegiality was an issue that he was aware may affect his ability to obtain tenure.

{¶21} Thus, while Appellant may have not had formal notice, from the record he had notice of these situations and the impact they may have on his ability to gain tenure.

{¶22} Furthermore, it is noted the recommendation from the tenure board committee was largely based on the incidents that Appellant admittedly knew were in his file. Summary Judgment Exhibit 32.

{¶23} Appellant also contends two of the tenure board members were biased against him, the VPAA told him not to worry about the letters he was aware existed in his file, and the VPAA did not guide or mentor Appellant as was required. The record does not clearly support these contentions.

{¶24} The depositions of the tenure board members do not indicate they were biased against him even though some of them had previous unpleasant interactions with him. One member avowed the recommendation was based on what was in the file, not on the interaction with Appellant.

{¶25} As to the claim that the VPAA told Appellant not to worry about the formal complaints in the file, the record does not support this conclusion. There is a dispute as to whether the VPAA actually made that statement; the VPAA denies making the statement. Regardless, formally placing a complaint in a file and the fact that Appellant is given the opportunity to respond to the complaint by placing a written explanation in the file indicates it is a serious matter. Appellant was aware the tenure board would have access to these complaints and responses. A review of these two complaints and the responses clearly indicates they were something of concern. Furthermore, the fact that the sole purpose of the prior chair's recommendation letter was to vouch for Appellant's collegiality growing in a positive direction, indicates there is knowledge that the complaints and responses were something that would affect his ability to obtain tenure.

{¶26} As to the VPAA mentoring Appellant about his collegiality, the handbook does not clearly require mentoring. Appellant contends Appellee's President stated during deposition the VPAA was responsible for mentoring and guiding a new professor so he or she would be awarded tenure. A review of the deposition indicates this is an inaccurate portrayal of the deposition testimony.

{¶27} 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." *Bleicher v. Univ. of Cincinnati College of Med.*, 78 Ohio App.3d 302, 308, 604 N.E.2d 783 (10th Dist.1992). The Tenth Appellate District has 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. *Saha v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1139, 2011-Ohio-3824, ¶ 37.

{¶28} In this situation, with that guidance, we affirm the trial court's summary judgment decision. The record indicates it is uncontroverted that Appellant had notice of

the two major infractions that led to the tenure committee's recommendation to deny tenure and to the VPAA's recommendation to deny tenure. As the trial court notes, Appellant had notice of the other matters because he was involved and/or they were his emails. Furthermore, the previous chair's recommendation letter indicates Appellant was aware that his interactions with the administration could affect tenure. The prior chair's purpose for the recommendation letter was to address collegiality. Thus, there was notice and there are no indications of a substantial departure from accepted academic norms as to demonstrate that the President, VPAA, or tenure committee did not actually exercise professional judgment.

{¶29} This assignment of error lacks merit. The trial court's decision is affirmed

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.