

[Cite as *Lill v. Ohio State Univ.*, 2017-Ohio-8095.]

NANCY L. LILL, Ph.D.

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2015-00387

Judge Dale A. Crawford

DECISION

{¶1} This matter came to be heard on Plaintiff's, Nancy L. Lill, Ph.D., Complaint against Defendant, Ohio State University (OSU), seeking damages, along with declaratory and equitable relief, for breach of contract and conversion. The Court conducted a trial on June 20-22, 2016. After evidence was taken and arguments completed, the Court issued an oral decision granting, in part, and denying, in part, Plaintiff's request for relief, and the July 12, 2016 Interim Decision memorialized the Court's findings of fact and conclusions of law. In the Interim Decision, the Court concluded that Plaintiff showed no right to relief regarding her claim of conversion, and Defendant's motion to dismiss was granted with respect to that claim. However, the Court rendered judgment in favor of Plaintiff's breach of contract claim, and sent the matter back to Defendant (the Provost) to take such steps as he or she deemed necessary to assure a new, fair and impartial evaluation with respect to Plaintiff's tenure review.

{¶2} On May 3, 2017, Plaintiff's new tenure review concluded, and Plaintiff was denied tenure.¹ On May 17, 2017, the Court conducted a status conference with the parties to discuss further proceedings in this case, and on May 19, 2017, the Court ordered the parties to file briefs in lieu of a damages trial. On June 16, 2017, Plaintiff filed her post-trial brief. On July 14, 2017, OSU filed its post-trial brief, and finally, on

¹The Court was advised that Plaintiff was put through another tenure process pursuant to the Court's Interim Order and she was denied. There was no allegation that the new tenure process was defective in any way.

July 28, 2017, Plaintiff filed her response to OSU's post-trial brief. This case is now before the Court for a damages determination.

Background

{¶3} This case has a lengthy history and the Court discusses the pertinent facts from its July 12, 2016 Interim Decision below. Plaintiff was hired by Defendant in 2008 as a tenure-track Associate Professor in Defendant's Department of Pathology in the College of Medicine. As Plaintiff had eight years of experience as an Assistant Professor at the University of Iowa College of Medicine, she was placed on a four-year tenure-track. Defendant's tenure review process was governed by the University Faculty Rules and the Department of Pathology's Appointment Promotion and Tenure Document (AP&T) which the parties stipulated were incorporated in Plaintiff's employment contract entered into by the parties on August 14, 2008. (Plaintiff's Ex. 20).

{¶4} Plaintiff began the tenure review process in the summer of 2011. Plaintiff's department chair and college dean recommended against tenure, as did the Provost. (Defendant's Ex. E-G/Plaintiff's Ex. 28). Finally, the University President and the Board of Trustees found against tenure. Plaintiff appealed her tenure denial to the Committee on Academic Freedom and Responsibility (CAFR), alleging numerous violations of her tenure review process. After consideration, the CAFR found reasonable adequate grounds existed for asserting that Dr. Lill's tenure evaluation was improper and referred Dr. Lill's appeal to the University Faculty Hearing Committee. (Plaintiff's Ex. 13/Defendant's Ex. J). Pursuant to Faculty Rule 3335-5-05(C)(6), after an evaluation and a hearing, if the committee finds an improper evaluation occurred it shall:

“* * * 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 hearing committee, shall take such steps as may be deemed necessary to assure a new, fair, and impartial evaluation. * * *”

{¶5} After an evaluation of the appeal, the Hearing Committee found that the Tenure Initiating Unit (TIU) used Defendant's unapproved 2011 AP&T document for Plaintiff's tenure review and it should have used the 2006 AP&T document. Further, the TIU did not obtain the minimum number of letters required by the 2006 AP&T document, and the timeline that the TIU used to solicit evaluation letters was not in accordance with the AP&T or the guidelines suggested by the OAA. The Hearing Committee determined that these complaints could be reasonably upheld. (Plaintiff's Ex. 14/Defendant's Ex. K).

{¶6} These findings were reported to OSU's then-Executive Vice President of Academic Affairs and Provost, Dr. Joseph Alutto, as well as the University's then-President Dr. E. Gordon Gee with recommendations. Dr. Alutto determined that he disagreed with the Hearing Committee's Findings of Error and proceeded with what Defendant argued at trial was a new, fair and impartial evaluation, ultimately confirming his original finding that Dr. Lill's tenure should be denied. (Defendant's Ex. L).

{¶7} The parties stipulated that Plaintiff's employment contract consists of her offer letter (Plaintiff's Ex. 20) and the incorporated rules, including but not limited to Faculty Rule 3335-5-05 (Defendant's Ex. 1/Plaintiff's Ex. 7), Faculty Rule 3335-5-05 (Plaintiff's Ex. 18), and the 2006 Department of Pathology AP&T Document (Plaintiff's Ex. 3). (Interim Decision, p. 6). The Court found that the findings of the Hearing Committee set forth in Plaintiff's Exhibit 14 was a determination that Plaintiff received an "improper evaluation." *Id.* Pursuant to Rule 3335-5-05(6)(b), upon receiving the Committee's findings, the Provost was required to "take such steps as may be deemed necessary to assure a new, fair and impartial evaluation." *Id.* (Defendant's Ex. I). Further, Defendant stipulated that the rules did not grant the Provost authority to disregard the Committee's findings and not grant a new, fair and impartial evaluation. *Id.*

{¶8} The Court determined that it was clear that Dr. Alutto did not conduct a new hearing, nor was the review fair and impartial considering it did not incorporate the

findings of the Hearing Committee. *Id.* at 8. Dr. Alutto did not take such steps to assure that a re-review was done with the applicable 2006 standards, nor did he obtain or seek to obtain the appropriate number of evaluation letters required by the rules. *Id.* He advised the Hearing Committee that it was simply not necessary; new letters, regardless of how good they were would not change his mind. *Id.* As such, the Court concluded that the Provost's failure to take such steps to assure a new, fair and impartial evaluation constituted a breach of contract. *Id.* Moreover, the Court determined that damages could not be determined until such time as a new, fair and impartial evaluation was conducted. Therefore, the Court sent the matter back to OSU and the Provost to take such steps as he or she deemed necessary to assure a new, fair and impartial evaluation was conducted considering the findings of the Committee as set forth in Plaintiff's Exhibit 14. The new evaluation concluded on May 3, 2016, and Plaintiff was denied tenure. This case is now ripe for a damages determination by the Court.

Analysis

{¶9} Contract interpretation is a matter of law for the court. *City of St. Marys v. Auglaize Cnty Bd. of Comm'rs*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561. When interpreting a contract, the court's main objective is always to give effect to the intent of the parties as expressed in the written contract itself. *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 1999-Ohio-162, 714 N.E.2d 898. The intent of the parties is always presumed to reside in the precise language and terms they employed and set forth in the agreement. *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987). And, in determining the intent of the parties, a court must read the contract as a whole and attempt to give effect to every part and term of the contract. *Foster Wheeler Enviresponse v. Franklin Cnty Conv. Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202, 678 N.E.2d 519.

{¶10} Most important for the court is the admonition from the Ohio Supreme Court that “[i]t is not the responsibility or function of this court to rewrite the parties’ contract in order to provide for a more equitable result. *Id.* at 362. A contract “does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto.” *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 172, 143 N.E. 388 (1924). Also important to the court’s review is the long accepted tenet in contract interpretation that, if there are ambiguities in a contract, the document will be strictly construed against the party who drafted it or selected its language. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 1996-Ohio-393, 667 N.E.2d 949; *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 406 N.E.2d 515 (1980).

{¶11} “[T]he extent of damages suffered by a plaintiff is a factual issue, it is within the jury’s [or fact finder’s] province to determine the amount of damages to be awarded.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 475, 2007-Ohio-6948, 880 N.E.2d 420 (2007). Furthermore, “a party seeking damages for breach of contract must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty.” *Tri-State Asphalt Corp. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 94API07-986, 1995 Ohio App. LEXIS 1554 (Apr. 11, 1995), citing *Geygan v. Queen City Grain Co.*, 71 Ohio App.3d 185, 195, 593 N.E.2d 328 (12th Dist.1991).

{¶12} Plaintiff’s position provided for yearly appointment subject to annual reviews and renewal of her appointment. (Defendant’s Ex. P). The position was a tenure-track position, and she was to be reviewed for tenure and promotion no later than during the fourth year of her appointment (2011-2012). Finally, Plaintiff’s contract provided that if she were denied tenure, she would receive a terminal faculty appointment for the academic year following the tenure review year. Thus, in Plaintiff’s fourth year of appointment, there were three employment outcomes available to her.

{¶13} First, should she have decided not to apply for tenure or withdraw her consideration for tenure, her contract with OSU concluded after her four-year

appointment. Second, if she applied for tenure and was denied, she would receive one terminal year of appointment, the 2012-2013 year. Third, if she applied for tenure and was granted tenure, she would receive new employment as a tenured professor with terms not provided for under her probationary contract. Simply, if she received tenure, her position as a tenured professor at OSU would be under a new employment contract. Importantly, there is no provision in her contract with OSU for her probationary period to extend beyond the four, potentially five, year period. In her post-trial brief and reply, Plaintiff tries to characterize this case as an improper termination case. (Plaintiff's Post-Trial Brief, pp. 1, 3-4, Plaintiff's Reply, pp. 1-2). The Court disagrees; this was not an improper termination by Defendant. Rather, Plaintiff's contract with OSU expired.

Conclusion

{¶14} The Court finds that Plaintiff is not entitled to any monetary damages as a result of the breach of contract by OSU. Here, Plaintiff applied for tenure, received a proper hearing, was denied tenure, and received her terminal year of employment. She received all the benefits afforded to her by her employment contract with OSU. After her terminal year of employment, her contract with the University concluded, and she was not hired for a new position. Contrary to Plaintiff's argument that until a proper evaluation was conducted there was no way to determine when her employment would have ended, Plaintiff's employment contract with OSU determined when her employment ended. Plaintiff failed to present the Court with any evidence that her contractual relationship with OSU entitled her to further benefits beyond those detailed in her employment contract.

DALE A. CRAWFORD
Judge

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JUDGMENT ENTRY

{¶15} This case was tried to the Court on the issue of Plaintiff's damages. The Court considered the arguments and evidence presented in the parties' briefs and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of Plaintiff. The Court finds that Plaintiff is not entitled to monetary damages as a result of Defendant's breach of contract. Court costs are assessed against Defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

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