[Cite as *Walker v. Univ. of Cincinnati College of Med.*, 2017-Ohio-8277.]

MILTON WALKER Plaintiff v. UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE Defendant	Case No. 2009-09523 Judge Patrick M. McGrath Magistrate Anderson M. Renick DECISION

{¶1} On September 7, 2017, defendant, the University of Cincinnati College of Medicine (UCCM), filed a motion for summary judgment pursuant to Civ.R. 56(B). On September 22, 2017, plaintiff filed a response. On the same date, defendant filed a reply and a motion for leave to file the same, which is hereby GRANTED. The motion for summary judgment is now before the court for a non-oral hearing. L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} In 2005, plaintiff enrolled in UCCM as a medical student. In 2007, plaintiff was a third-year student in the four-year program. On October 23, 2007, Mary Heider, Ph.D., notified plaintiff by letter that defendant's College Promotion Board had unanimously recommended his dismissal from the program based upon his failure to make satisfactory academic progress. (Plaintiff's deposition, Exhibit H.) Specifically, the board recommended dismissal because plaintiff had failed to earn the 24 credits required to maintain enrollment in the first six months of clinical coursework. *Id*. According to the information in the dismissal letter, at the time of the recommendation, plaintiff was enrolled in only two courses, psychiatry and anesthesia, and he had cancelled his enrollment in internal medicine and withdrew from his pediatrics course because he was failing. (*Id*. page 1.) The promotion board noted that "[w]ith two below passing grades, it is not possible for Mr. Walker to meet the minimum requirement in Year II of earning 24 credits in six months of clinical casework." (*Id*. page 4.)

{¶5} Plaintiff appeared before the promotion board on October 22, 2007 and addressed his academic difficulties and stated that he had been diagnosed with attention deficit hyperactivity disorder (ADHD), but he related that he had not started treatment. *Id*. The board noted that plaintiff intended to appeal its recommendation and that "the Academic Appeal Board should have access to a full psychological assessment of Mr. Walker before it makes its recommendation to the Dean." *Id*.

{¶6} The appeals board conducted a formal hearing to consider whether plaintiff was "fit to pursue" his medical career and whether "extreme or extenuating circumstances" was cause to excuse his failure to earn sufficient academic credit. (Plaintiff's deposition, Exhibit I, page 3.) The appeals board unanimously agreed to uphold the promotion board's recommendation that plaintiff be dismissed. (Plaintiff's deposition, Exhibit J.) On December 14, 2007, David Stern, M.D., Dean of the college of medicine, notified plaintiff that, after considering all available information, he

concurred with the promotion board's recommendation and that plaintiff was dismissed from UCCM's program.

{¶7} Plaintiff alleges "breach of implied-in-fact contract," violation of 42 U.S.C. 1983, negligence, negligent supervision, intentional infliction of emotional distress, and breach of fiduciary duty. Defendant contends that plaintiff's relationship with UCCM was contractual and that the contract does not support any of his claims. The court agrees.

Breach of contract

{¶8} 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 (10th Dist.), quoting *Nilavar v. Osborn*, 137 Ohio App.3d 469, 483 (2nd Dist.2000). There is no dispute that a contractual relationship existed between plaintiff and defendant.

{¶9} "It is axiomatic that '* * * 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.*, 78 Ohio App.3d 302, 308 (10th Dist.1992), quoting *Behrend v. State*, 55 Ohio App.2d 135, 139 (10th Dist.1977). "This contract is typically found in a handbook, catalogue, or other guideline." *Tate v. Owens State Community College*, 10th Dist. Franklin No. 10AP-1201, 2011-Ohio-3452, ¶ 21. "However, where the contract permits, the parties may alter its terms by mutual agreement, and any additional terms will supersede the original terms to the extent the two are contradictory." *Lewis v. Cleveland State Univ.*, 10th Dist. Franklin No. 10AP-606, 2011-Ohio-1192, ¶ 14.

{¶10} Plaintiff's relationship was contractual and the contract included UCCM's academic performance standards and guidelines for promotion boards. (Plaintiff's

deposition, Exhibits B and C.) The court notes that plaintiff contends that UCCM's guidelines for the promotion board constituted an implied-in-fact contract. (Complaint, ¶ 13.) However, "[u]nlike express contracts, implied contracts are not created or evidenced by explicit agreement of the parties; rather, they are implied by law as a matter of reason and justice." *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508 ¶ 56, citing *B&J Jacobs Co. v. Ohio Air, Inc.*, 1st Dist. No. C-020264, 2003-Ohio-4835, ¶ 9. "An implied-in-fact contract arises from the conduct of the parties or circumstances surrounding the transaction that make it clear that the parties have entered into a contractual relationship despite the absence of any formal agreement." *Id.* Inasmuch as the guidelines at issue are a written agreement of the parties, they constitute an express, rather than an implied-in-fact contract.

{¶11} Plaintiff alleges that the promotion board breached his contract by relying on one section of the guidelines rather than another section, and he contends the two sections were inconsistent. Those sections are I(A) and III(D)(1)(a). Section I(A), ¶ 5 states, in part, that the "[j]udgments of a Promotion Board will be based upon information submitted by directors of courses or clerkships as well as by the student under consideration." Section III(D)(1)(a) provides specific requirements for third-year students and specifically states, in relevant part: "To maintain enrollment in the College in the third year, a student must achieve the following:

{¶12} "a. Earn a minimum of 24 credits with passing grades in the first six months of enrollment in third year courses. *Failure to do so will result in a recommendation of dismissal*." (Emphasis added).

{¶13} Although plaintiff contends that the promotion board was required to consider the information contained in a letter (Plaintiff's deposition, Exhibit G.) which was provided to the board, rather than the explicit 24-credit requirement set forth in Section III(D)(1)(a), the court finds that the provisions of the guidelines are clear. Furthermore, in interpreting a contract, the trier of fact must "attempt to harmonize all

the provisions rather than produce conflict in them." *Bleicher, supra*, quoting *Ottery v. Bland*, 42 Ohio App.3d 85, 87 (1987).

{¶14} Plaintiff's letter to the promotion board did not dispute his failure to comply with the 24-credit requirement. Rather, his letter urged the board to consider his ADHD condition. The court notes that the recommendation report issued by the promotion board acknowledged plaintiff's statements, including his ADHD diagnosis. Nevertheless, the 24-credit requirement of Section III(D)(1)(a) is clear and unambiguous. Furthermore, the academic appeal board also considered plaintiff's medical condition during its hearing. Moreover, during his deposition, plaintiff conceded the that the terms of the two provisions at issue do not conflict. (Plaintiff's deposition, page 17-18.)

{¶15} "As a general rule, courts must defer to the academic decisions of colleges and universities unless there has been 'such a substantial departure from the accepted academic norms as to demonstrate that the committee or person responsible did not actually exercise professional judgment.'" *Galiatsatos v. Univ. of Akron*, 10th Dist. Franklin No. 00AP-1307, 2001 Ohio App. LEXIS 4051 (Sep. 13, 2001), quoting *Bleicher v. Univ. of Cincinnati College of Med*., 78 Ohio App. 3d 302, 308, (10th Dist.1992).

{¶16} The transcript of the academic appeal board shows that plaintiff had the opportunity to respond to the promotion board's recommendation and that the board addressed plaintiff's arguments. The court finds that UCCM's academic boards exercised professional judgment and that defendant is entitled to summary judgment on plaintiff's claim of breach of contract.

Constitutional claims

{¶17} It is well-established that the court lacks subject matter jurisdiction over alleged violations of constitutional rights and claims arising under 42 U.S.C. 1983 because the state is not a "person" within the meaning of those sections. *See, e.g.*, *Jett v. Dallas Indep. School Dist*. (1989), 491 U.S. 701; *Bleicher, supra*, at 306-307. Thus,

this court is without jurisdiction to hear plaintiff's constitutional claims. *Graham v. Board of Bar Examiners*, 98 Ohio App.3d 620 (1994).

Negligence

{¶18} To the extent that plaintiff's claims are based on common-law negligence, such claims are barred by the application of "economic loss" theory. *See Chemtrol Adhesives, Inc. v. American Mfrs. Mutual Ins. Co.*, 42 Ohio St.3d 40,44 (1989); *Queen City Terminals, Inc. v. General American Transp. Corp.*, 73 Ohio St.3d 609, 615 (1995). In the absence of personal injury or property damage, economic loss may not be recovered under the tort theory of negligence. *Id*. Inasmuch as plaintiff's dismissal from defendant's academic program resulted in a purely economic loss, defendant is entitled as a matter of law to summary judgment on plaintiff's negligence claim.

Negligent supervision

{¶19} The factors needed to establish a claim for negligent supervision or retention are: 1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employer's act or omission causing plaintiff's injuries; and, 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 729 (10th Dist.1999), citing *Evans v. Ohio State Univ*., 112 Ohio App.3d 724, 739 (10th Dist.1996). The elements of a negligent supervision claim are the same as those for negligent retention. *Browning* v. *Ohio State Highway Patrol*, 151 Ohio App.3d 798, 811, 2003-Ohio-1108 (10th Dist.), citing *Harmon v. GZK, Inc*., 2nd Dist. Montgomery No. 18672, 2002-Ohio-545. Liability for negligent retention arises where an "employer chooses to employ an individual who 'had a past history of criminal, tortious, or otherwise dangerous conduct about which the [employer] knew or could have discovered through reasonable investigation.'" *Abrams v. Worthington*, 169 Ohio

App.3d 94, 2006-Ohio-5516, ¶14 (10th Dist.) quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 61 (1991).

{¶20} When a complaint sets forth only conclusory allegations that defendant was negligent in hiring and/or training an employee without alleging any facts suggesting that defendant possessed actual or constructive knowledge of the employee's alleged incompetence or that negligence was the proximate cause of plaintiff's injuries, plaintiff cannot prevail on a claim for negligent supervision or retention. *Ford v. Brooks*, 10th Dist. Franklin No. 11AP-664, 2012-Ohio-943, ¶ 24; *Cooke v. Montgomery Cnty.*, 158 Ohio App.3d 139, 2004-Ohio-3780, ¶ 24 (2d Dist.).

{¶21} In this case, plaintiff failed to plead facts establishing that defendant had notice that members of either the Dean's office faculty or the boards that considered plaintiff's academic record were incompetent or that it was otherwise foreseeable that those members would commit a breach of any duty owed to plaintiff. During his deposition, plaintiff conceded that there is no evidence to support his negligent supervision claim. Moreover, in his response to defendant's motion, plaintiff stated the he "will concede/relinquish" his negligence supervision. Accordingly, defendant is entitled to judgment as a matter of law on plaintiff's claim for negligent supervision.

Intentional infliction of emotional distress

{¶22} In order to prevail on his claim of intentional infliction of emotional distress, plaintiff must show that: "(1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused him psychic injury; and (4) the mental anguish plaintiff suffered was serious." *Hanly v. Riverside Methodist Hosp.*, 78 Ohio App.3d 73, 82 (10th Dist.1991), citing *Pyle v. Pyle*, 11 Ohio App.3d 31, 34 (8th Dist.1983).

{¶23} To constitute conduct sufficient to give rise to a claim of intentional infliction of emotional distress, the conduct must be "so outrageous in character, and so extreme

in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager v. Local Union 20, Teamsters*, 6 Ohio St.3d 369, 375 (1983), quoting 1 Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment *d*.

{¶24} Untrue statements, even those that are disrespectful, harassing, childish, and unprofessional, do not amount to extreme and outrageous conduct that will sustain a claim for intentional infliction of emotional distress. *Lennon v. Cuyahoga Cnty. Juvenile Court,* 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶ 23. Upon review, the court finds that the actions taken by defendant's employees, including any conduct which involved defendant's alleged refusal to correct its errors that caused him "to experience unnecessary suffering," cannot be reasonably construed as extreme and outrageous for purposes of recovering on a claim for intentional infliction of emotional distress.

Breach of fiduciary duty

{¶25} A fiduciary is a person or entity that has a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, ¶ 35. "The elements for a breach-of-fiduciary-duty claim include the following: '(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom.'" *Valente v. Univ. of Dayton,* 438 F.Appx. 381, 387 (6th Cir.2011), quoting *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App. 3d 213, 2010-Ohio-2902 (10th Dist.).

{¶26} The Sixth Circuit Court of Appeals has observed that Ohio courts have not applied a breach of fiduciary duty claim to the university-student context. *Id.; Patel v. Univ. of Toledo*, 10th Dist. Franklin No. 16AP-378, 2017-Ohio-7132, ¶ 49.

{¶27} The court finds that the relationship between plaintiff and UCCM regarding plaintiff's performance in the medical program was purely contractual and not fiduciary. Therefore, plaintiff's claim for breach of fiduciary duty is without merit.

{¶28} Based upon the foregoing, plaintiff's constitutional claims shall be dismissed. The court finds that there are no genuine issues of material fact as to plaintiff's remaining claims and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted.

PATRICK M. MCGRATH
Judge

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MILTON WALKER Plaintiff v. UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE Defendant	Case No. 2009-09523 Judge Patrick M. McGrath Magistrate Anderson M. Renick JUDGMENT ENTRY

{¶29} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, plaintiff's constitutional claims are DISMISSED and defendant's motion for summary judgment is GRANTED. Judgment is rendered in favor of defendant. All previously scheduled events are VACATED. All other pending motions are DENIED as moot. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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