[Cite as *Lewis v. Cleveland State Univ.*, 2011-Ohio-1192.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph Lewis,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-606 (C.C. No. 2006-07457)
Cleveland State University,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 15, 2011

Joseph Lewis, pro se.

Michael DeWine, Attorney General, *Christopher P. Conomy*, and *Daniel R. Forsythe*, for appellee.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Plaintiff-appellant, Joseph Lewis, appeals from the judgment of the Court of Claims of Ohio entering judgment in favor of defendant-appellee, Cleveland State University ("CSU"), and finding that Jennifer Alexander, Ph.D., William Bowen, Ph.D., Sanda Kaufman, Ph.D., Mark Rosentraub, Ph.D., and Mark Tumeo, Ph.D., members of CSU's faculty, are entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Said

judgment was rendered after the trial court overruled appellant's objections to the magistrate's decision issued subsequent to a trial before the magistrate.

{¶2} In 2002 and 2003, appellant, an African-American male, was enrolled as a student at CSU and was a Ph.D. candidate in the Maxine Goodman Levin College of Urban Affairs. To proceed in the Ph.D. program and take part in the required comprehensive examinations required of all Ph.D. candidates, appellant was required to complete a common core of five courses. The matter on appeal concerns core course UST 803 Quantitative Research Methods I that appellant took during the fall semester of 2002. Appellant received a "C" grade in this course, which resulted in appellant filing a grade dispute with CSU's Graduate College Grade Dispute Committee ("Graduate Committee"). Prior to resolution of the grade dispute, appellant was notified in September 2004 of the Academic Standards Committee determination that his failure to achieve a grade of "B" or better in core course UST 803 prevented him from taking part in comprehensive examinations. Ultimately, appellant did not prevail in his grade dispute and because he did not achieve a grade of "B" or better in UST 803, appellant did not take his comprehensive exams and did not receive a Ph.D. from CSU.

{¶3} Appellant filed a complaint in the Court of Claims of Ohio on November 27, 2006, alleging breach of contract and interference with the pursuit of education by use of threat, intimidation, and force on the basis of race, in violation of R.C. Chapter 4112, R.C. 2927.12, 2913.02, 2903.21, 2903.22, 2909.07, and 2913.42. In the complaint, appellant sought 2.5 million dollars in damages, a declaratory judgment, and injunctive relief, i.e., that he be able to submit a dissertation and complete the doctoral program.

{¶4} On January 3, 2007, appellant filed a motion requesting a determination of immunity, which the trial court held would be combined with the trial on the merits. A trial on the issue of liability commenced before a magistrate on September 10, 2008. Post-trial briefs were submitted, and the magistrate rendered a decision on May 15, 2009, finding that appellant's claims against CSU failed, and the remaining defendants were entitled to immunity. Appellant filed objections to the magistrate's decision on May 29, 2009, and filed supplemental objections on July 17, 2009. On May 26, 2010, the trial court rendered a decision overruling appellant's objections, adopting the magistrate's decision, and entering judgment in favor of CSU. Specifically, the trial court found appellant was not an employee of CSU, appellant's breach of contract claims failed as did his claims of ethnic intimidation, and immunity was applicable to the employees of CSU named as defendants in the complaint.

{¶5} Appellant now appeals to this court and brings three assignments of error for our review:

> [I.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT BY ABUSING ITS DISCRETION AND INCORRECTLY CONCLUDING THAT THERE WAS NO EMPLOYMENT RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT.
>
> [II.] THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT IN VIOLATION OF THE OHIO CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA BY CONCLUDING DEFENDANT WAS NOT IN BREACH OF CONTRACT WITH PLAINTIFF-APPELLANT THEREBY DENYING PLAINTIFF-APPELLANT EQUAL PROTECTION OF THE LAW.

> [III.] THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT BY CONCLUDING DEFENDANT AND ITS AGENTS DID NOT ENGAGE ETH[N]IC INTIMIDATION, CRIMINAL CONDUCT, AND THAT DEFENDANT AGENTS WHERE ENTITLED TO IMMUNITY.

{¶6} "Civil '[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' " *Cunningham v. Ohio Dept. of Transp*., 10th Dist. No. 08AP-330, 2008-Ohio-6911, ¶20, quoting *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, syllabus.

{¶7} When considering whether a civil judgment is against the manifest weight of the evidence, an appellate court is guided by a presumption that the findings of the trier of fact were correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id. at 80.

{¶8} According to appellant, in response to a complaint he filed concerning Dr. Kaufman's performance as an instructor in UST 803, the faculty members named as defendants in this litigation began a pattern of retaliation and racial harassment that hindered and denied appellant his right to complete the doctoral program. In appellant's first assignment of error, appellant challenges the trial court's determination that his discrimination claims brought pursuant to R.C. Chapter 4112, which prohibits a number of

discriminatory practices by an employer, were without merit because appellant was not an employee of CSU. Appellant contends he was an employee of CSU by virtue of his internship with the Federation of Community Planning ("FCP") that required appellant to work 20 hours per week at CSU. Appellant also contends Frances Hunter, who served as CSU's Coordinator for Graduate Assistance and Interns, testified that appellant was an employee of CSU because of the 20-hour per week work requirement.

{¶9} Appellant, however, misconstrues Ms. Hunter's testimony. While Ms. Hunter acknowledged that the contract between FCP and appellant required appellant to work 20 hours per week, Ms. Hunter did not testify that appellant was an employee of CSU. Rather, Ms. Hunter explained that appellant was an employee of FCP pursuant to the contract between FCP and appellant. According to Ms. Hunter, there were two contracts, one providing that FCP would pay appellant a fellowship stipend, and one providing that appellant would get a tuition grant as a scholarship through CSU. Both contracts, however, were dependent on the hours of work required by FCP, which is not a part of CSU, but rather is an outside research organization.

{¶10} The only contract admitted into evidence was a Graduate Tuition Grant Services Agreement ("tuition agreement") between CSU and appellant. The tuition agreement provides that a research tuition grant is being awarded to appellant, that grant recipients must be registered for one to 12 credit hours per contract term, and that a work commitment must not exceed 20 hours per week. However, the tuition agreement also expressly provides that the contract is "tied to an internship," and, therefore, appellant's "service hours should be noted as '0.' " In accordance with this language, appellant's

service hours were listed as "0 per week." Thus, the evidence indicates the work which appellant was required to perform in order to obtain the stipend and tuition grant for which he contracted was required by FCP, not CSU, and both the stipend and the tuition grant were dependent on the agreement between appellant and FCP.

{¶11} Nonetheless, appellant argues the magistrate's conclusion in this regard was wrong because the magistrate indicated in his decision that Ms. Hunter testified appellant was to receive a $1,000 stipend and a $1,000 tuition grant when, in fact, the respective amounts at issue were $1,500 and $2,880. While appellant is correct that Ms. Hunter did not testify to any specific amounts that appellant was to receive, such is not relevant and does not change the evidence that the stipend was to be paid by FCP and the tuition grant was a scholarship dependent on the internship contract between FCP and appellant.

{¶12} Given the evidence in the record, we cannot say the trial court's determination that appellant did not meet his burden of establishing an employment relationship with CSU for purposes of his discrimination claims brought pursuant to R.C. Chapter 4112 is not supported by competent credible evidence. Accordingly, we overrule appellant's first assignment of error.

{¶13} In his second assignment of error, appellant contends the trial court erred in concluding CSU did not breach its contract with appellant. The construction of written contracts is a matter of law. *Leiby v. Univ. of Akron*, 10th Dist. No. 05AP-1281, 2006-Ohio-2831, ¶17, citing *McConnell v. Hunt Sports Ents.* (1999), 132 Ohio App.3d 657, 675, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. "[W]here the terms in an existing contract are clear and unambiguous, this

court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander* at 246.

{¶14} As this court has held, " '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 Medicine* (1992), 78 Ohio App.3d 302, 308, quoting *Behrend v. State* (1977), 55 Ohio App.2d 135, 139. The terms of such contract are found in the college catalog and handbook supplied to students. *Embrey v. Cent. State Univ.* (Oct. 8, 1991), 10th Dist. No. 90AP-1302, citing *Smith v. Ohio State Univ.* (1990), 53 Ohio Misc.2d 11, 13; *Leiby* at ¶15. 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. *Bleicher* citing *Ottery v. Bland* (1987), 42 Ohio App.3d 85, 87. In interpreting the contract, the trial court was required to "attempt to harmonize all the provisions rather than produce conflict in them." *Ottery* at 87, citing *Farmers Natl. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309.

{¶15} The parties do not dispute the existence of a contract. Instead, the dispute is over the contract terms or more specifically what appellant was required to achieve to be eligible to take his comprehensive exams. According to appellant, he had to maintain a 3.00 grade point average in all of his courses, whereas CSU asserts appellant had to achieve a grade of a "B" or better in each of the required core courses to be eligible to take the comprehensive exams.

{¶16} It is undisputed the 2002-2004 CSU Bulletin Graduate Catalog ("graduate catalog") states that Ph.D. students must complete "a common core of five courses with a

grade-point average of 3.00 or better." (Graduate catalog at 234.) It is appellant's position that this is the only contract between the parties and it unambiguously provides that he needed a grade point average of 3.00 or better in all of his courses rather than a 3.00 or better in each of his core courses to proceed in the Ph.D. program. Because appellant contends this contract language is unambiguous, he asserts the trial court erred in considering testimony from CSU's faculty members and the Ph.D. in Urban Studies and Public Affairs Program Student Handbook ("student handbook"), which provides that "[a] minimum grade of 3.0 is required for all core courses; a grade below 3.0 requires repeating the course."[1] (Student handbook at 4.) (Emphasis sic.)

{¶17} At this time we reiterate the premise in *Behrend* that the specific nature of a contractual relationship between a student and a university may well vary with the specific situation presented. Id. at 139. Additionally, as stated in *Embrey*, the terms of the contract between a student and university are found "*in the college catalog and handbook* supplied to students." Id. (Emphasis added.) Additionally, in interpreting such a contract, "the trial court is required to 'attempt to harmonize all the provisions rather than produce conflict in them.' " *Bleicher* at 308, quoting *Ottery* at 87.

{¶18} With these basic principles in mind, we find no error in the trial court's consideration of both the graduate catalog and student handbook to determine the terms of the contract between the parties. Additionally, when read together and harmonized, it is clear appellant was required to attain a "B" or better in each of the required core courses in order to proceed in the Ph.D. program.

[1] Though he contends the trial court erred in considering this evidence, the record reflects it was appellant who introduced the student handbook into evidence and elicited testimony from the witnesses regarding the meaning of the phrase "grade-point average of 3.00" as set forth in the graduate catalog.

{¶19} Because the contract terms are discernable from the graduate catalog and the student handbook, it is not necessary to rely on the testimony of the faculty members with respect to the contract terms. Nonetheless, we note our conclusion is supported by the testimony of Dr. Tumeo, who served as the Vice Provost of Research and Dean of the Graduate College of CSU during all relevant times of this litigation, and testified both the graduate catalog and the student handbook must be read in conjunction with each other because while the graduate catalog summarizes the program requirements, each program has a specific handbook that provides details of that specific program. According to Dr. Tumeo, the requirement that a student must attain a "B" or better in each of the five core courses "is how this has always been interpreted." (Tr. 51.)

{¶20} Upon review, we find the trial court's determination, that to proceed in the Ph.D. program appellant was required to achieve a grade of "B" or better in each of the five core courses did not amount to a breach of contract between the parties, is supported by competent credible evidence. Consequently, we overrule appellant's second assignment of error.

{¶21} By appellant's final assignment of error, he argues that the trial court erred in concluding CSU's agents did not engage in ethnic intimidation or criminal conduct, and that they were entitled to immunity. Although the assignment of error indicates appellant is challenging the trial court's conclusion that immunity was applicable to the faculty members named as defendants in this matter, appellant does not advance any argument in support of this challenge. An appellant must demonstrate each assigned error through an argument supported by citations to legal authority and facts in the record. App.R. 16(A)(7); *Cross v. Ohio Adult Parole Auth. Chief*, 10th Dist. No. 09AP-364, 2009-Ohio-

5027, ¶3. If an appellant neglects to advance such an argument, a court of appeals may disregard the assignment of error. App.R. 12(A)(2); *Ford Motor Credit Co. v. Ryan*, 189 Ohio App.3d 560, 2010-Ohio-4601, ¶23, citing *Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶16-17. Accordingly, we will disregard the portion of this assignment of error that appellant fails to separately argue.

{¶22} According to appellant, he presented "numerous exhibits" in support of his testimony that he was subjected to harassment and intimidation. Specifically, appellant contends he was discriminated against by Maria Codinach, CSU's Director of the Office of Affirmative Action, because she failed to properly investigate and forward his complaints against Dr. Bowen. Appellant also contends his testimony established that Dr. Bowen threatened appellant both physically and professionally on several occasions and discriminated against him on the basis of his race. Though being made aware of Dr. Bowen's actions, appellant asserts CSU's personnel did nothing to assist appellant or to stop Dr. Bowen's behavior.

{¶23} Dr. Rosentraub, Dean of Urban Studies from 2001 through 2007, testified that throughout his involvement with appellant he was not aware of any evidence of either ethnic intimidation or menacing against appellant. The trial court also heard testimony from Dr. Keating, Associate Dean and Chair of the Department of Urban Studies from 1992 through 2007. Dr. Keating testified that while in December of 2002 he received a complaint from appellant and other students about Dr. Kaufman, none of the complaints pertained to racial discrimination. Dr. Keating also testified that his investigation into the complaints revealed no evidence of racial discrimination. While appellant presented

evidence that Dr. Keating had discussed appellant's complaints with Ms. Codinach, she testified that she had no recollection of appellant filing a formal complaint with her office.

{¶24} Dr. Kaufman testified and denied grading appellant differently because of his race or otherwise holding him to a standard that was different from that of other students. Likewise, Dr. Bowen expressly denied threatening appellant in any manner or otherwise resorting to name-calling or the use of racial slurs when talking to appellant.

{¶25} As the trial court discussed, the issue of ethnic intimidation and discrimination turns on witness credibility. The trial court found "no testimony which would call Dr. Bowen's credibility into question." (Decision at 8.) The trial court is in the best position to assess the credibility of the witnesses, and there is a presumption that its findings as trier of fact are correct. *Seasons Coal Co.* The trial court, as trier of fact, was free to believe all, part or none of the testimony regarding the conversations between appellant and the other witnesses, and the trial court could assign much, little or no weight to such testimony. *Barker v. Century Ins. Group,* 10th Dist. No. 06AP-377, 2007-Ohio-2729, ¶16, citing *In re D.F.,* 10th Dist. No. 06AP-1052, 2007-Ohio-617, quoting *Maxton Motors, Inc. v. Schindler* (Dec. 26, 1984), 3d Dist. No. 4-83-23.

{¶26} Given the deference to be accorded to the factfinder when making credibility determinations, we do not find that the trial court erred in its conclusion. After reviewing the evidence, we find that the record contains some competent, credible evidence to support the trial court's judgment that appellant was unable to establish the CSU's agents engaged in either ethnic intimidation or criminal conduct with respect to their treatment of appellant. As such, we overrule appellant's final assignment of error.

{¶27} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

BROWN and KLATT, JJ., concur.

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