

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Louis Jefferson, Jr.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-236
The University of Toledo,	:	(Ct. of Cl. No. 2008-11818)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on October 16, 2012

Lafe Tolliver, for appellant.

Michael DeWine, Attorney General, *Randall W. Knutti* and *Craig S. Rapp*, for appellee.

APPEAL from the Court of Claims of Ohio

BRYANT, J.

{¶1} Plaintiff-appellant, Louis Jefferson, Jr., appeals from a judgment of the Court of Claims of Ohio finding in favor of defendant-appellee, The University of Toledo ("University"). Because competent, credible evidence supports the conclusion of the Court of Claims that the University did not breach its contract with plaintiff, we affirm.

I. Facts and Procedural History

{¶2} Plaintiff filed his original complaint on December 26, 2008; pursuant to Civ.R. 15(A) and leave of court, he filed an amended complaint on November 9, 2009, alleging the University breached its contract with plaintiff by changing the sequence of courses in which he was enrolled, failing to allow plaintiff to remediate classes, and

rescinding plaintiff's special status registration. Plaintiff additionally alleged the University was negligent for republishing incorrect scores from plaintiff's medical school transcript and for failing to abide by its policies in constructing a coherent course schedule. The Court of Claims ordered the issues of liability and damages bifurcated for trial.

{¶3} According to the evidence presented at the trial on liability, plaintiff in August 2004 matriculated in the five-year medical student program of the Medical College of Ohio at Toledo. In 2006, the college merged into the University of Toledo, creating a single school responsible for the prior obligations of each institution. The University's five-year program, a year longer than the normal program, was designed to provide an opportunity for disadvantaged students to acquire the necessary background skills to succeed in the study of medicine.

{¶4} The University gave incoming students an unalterable, prearranged schedule of courses for the academic year that was divided into separate academic curricular sections called a "block." (Tr. 122-24, 130-31.) The schedule for five-year students included classes with physician assistant students as well as medical school classes. Classes with physician assistants were designed to provide additional foundational knowledge for the five-year students and, although they were taught in the medical school, were considered graduate courses.

{¶5} In January 2005, plaintiff accepted a paid research position with Dr. Cooper, a member of the University's faculty, causing plaintiff to leave the state at times for work. Plaintiff subsequently failed to appear for an examination in Clinical Medicine, and the professor of the course, Dr. Keck, denied him the opportunity to retake the examination. Plaintiff then chose to withdraw from the class and enrolled in a Behavioral Science class in place of Clinical Medicine.

{¶6} Following his first year, plaintiff received a grade of "B" in Human Physiology and a "C" in both Gross Anatomy and Pathophysiology, all classes in the physician's assistant program. Plaintiff received grades of "F" in Neuroscience and in Behavioral Science I, both medical school courses. As a result, plaintiff's grade point average ("GPA") fell below a 1.5, triggering the Student Promotions Committee's automatic review. An advisory body to Dr. Gold, dean of the College of Medicine, the

Student Promotions Committee was composed of members of the medical school faculty and was charged with determining whether students with low GPAs would be dismissed from the medical school.

{¶7} As part of the review process, plaintiff requested that the University grant him permission to remediate the courses he failed. Dr. Carol Bennett-Clarke, professor of Neuroscience and associate dean of preclinical curriculum at the College of Medicine, testified that remediation, if granted, allowed a student who failed a medical school subject as a first or second-year student to spend the summer in independent study and then to take an examination on the failed subject. If the student passed the examination, he or she was permitted to continue advancing through the curriculum. The University outlined the guidelines for remediation of failed courses and dismissal for five-year medical students in Policy No. 04-013-03 ("Policy").

{¶8} On June 6, 2005, the Student Promotions Committee, in a tie vote, was unable to reach a consensus on whether to recommend plaintiff be dismissed. In its letter of recommendation, the Student Promotions Committee suggested to Dr. Gold that if he allowed plaintiff to remain in medical school, plaintiff should not be allowed to remediate classes he failed or to work during the academic year. After receiving the Student Promotions Committee's report, Dr. Gold sent plaintiff a letter dated July 20, 2005, permitting him to remain in the program subject to plaintiff's acceptance of a series of conditions. Among other conditions, plaintiff's request to remediate classes was denied, although plaintiff was afforded the opportunity to retake in their entirety those classes he failed. Plaintiff responded to Dr. Gold's letter with a signed acceptance of the conditions.

{¶9} In the 2005-2006 academic year, plaintiff passed Behavioral Science I in his second attempt but failed Neuroscience for a second time. Plaintiff also failed Cellular & Molecular Biology and then contested his grade. Dr. Chakraborty and Dr. Lee, who were responsible for determining grades, heard plaintiff's reasons for contesting the grade and decided they lacked a cause to alter the score.

{¶10} On June 21, 2006, the Student Promotions Committee again met to discuss the possibility of dismissing plaintiff due to his repeated failure to pass Neuroscience. Although plaintiff did not attend the meeting, the Student Promotions Committee received an e-mail from plaintiff that outlined plaintiff's explanations for his academic

record. The Student Promotions Committee determined not only could it discern "no significant pattern of improvement" in plaintiff's second year of school but plaintiff violated several conditions in Dr. Gold's letter. (Defendant's exhibit F.) As a result, the Student Promotions Committee, with five votes in favor of dismissal and one abstention, voted to dismiss him.

{¶11} In February 2007, following his dismissal from the five-year program at the College of Medicine, plaintiff attempted to register as a special status student in order to enroll in Neuroscience, a medical school class. The University applied the special status designation to non-matriculated students who sought to take graduate-level courses without earning a terminal degree. Plaintiff discussed his request to enroll in Neuroscience with Dr. Bisesi, senior associate dean of the College of Graduate Studies, and Dr. Mooney, the instructor of Neuroscience. After an extended dialogue, Dr. Mooney denied plaintiff's request to enroll in Neuroscience.

{¶12} Following the trial on liability, the Court of Claims found for the University. The court determined the University did not breach its contract when it dismissed plaintiff, as it exercised its professional judgment "conscientiously and with careful deliberation" in light of plaintiff's inability to improve his academic performance and his failure to abide by the conditions in Dr. Gold's letter. (Decision, at 5.) Nor did the court find merit in plaintiff's negligence claim, concluding plaintiff's sole avenue for recovery was under the law of contract.

II. Assignments of Error

{¶13} On appeal, plaintiff assigns the following errors:

[I.] The lower trial court erred when it did not find that the Appellant suffered a breach of contract when he was not allowed to remediate certain coursework.

[II.] The lower trial court erred when it did not find that the Appellant did in fact suffer a breach of contract when he was not allowed to take coursework as a special status student.

[III.] The lower trial court erred when it did not find that the Appellant suffered a breach of contract when he was erroneously found to be in violation of the letter of conditions regarding probation as issued by Dr. Gold, Dean of Medicine at UT/MCO.

[IV.] The lower trial court erred when it did not find that the Appellant suffered a breach of contract when is [sic] course load contract was unilaterally changed and all to his detriment.

Appellant's four assignments of error raise a single issue: whether the Court of Claims' decision that the University did not breach its contractual duties to plaintiff is against the manifest weight of the evidence.

III. First, Second, Third, and Fourth Assignments of Error - Breach of Contract

{¶14} "Judgments 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." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus; *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 15 (stating "[t]he phrase 'some competent, credible evidence' in *C.E. Morris* presupposes evidentiary weighing by an appellate court to determine whether the evidence *is* competent and credible"). "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 81 (1984).

{¶15} In *Bleicher v. Univ. of Cincinnati College of Medicine*, 78 Ohio App.3d 302, (10th Dist.1992), as here, the university dismissed a medical student for failing to demonstrate adequate academic performance. *Bleicher* acknowledged the long-standing principle 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.' " *Id.* at 308, quoting *Behrend v. State*, 55 Ohio App.2d 135, 139 (10th Dist.1977), paragraph two of the syllabus. "The terms of such contract are found in the college catalog and handbook supplied to students." *Embrey v. Cent. State Univ.*, 10th Dist. No. 90AP-1302 (Oct. 8, 1991).

{¶16} A court's standard for reviewing the academic decisions of a college "is not merely whether the court would have decided the matter differently but, rather, whether the faculty action was arbitrary and capricious." *Bleicher* at 308, citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 (1978). Accordingly, a "trial court [is] required

to defer to academic decisions of the college unless it perceived '* * * such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.' " *Bleicher* at 308, quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

A. *Remediation*

{¶17} Plaintiff's first assignment of error asserts the Court of Claims erred in finding the University did not breach its contract with plaintiff when the University determined he was not eligible to remediate certain courses he failed in his first year.

{¶18} The construction of written contracts is a matter of law. *McConnell v. Hunt Sports Ent.*, 132 Ohio App.3d 657, 675 (10th Dist.1999), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander* at paragraph two 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." *Id.* at 246.

{¶19} The University's Policy required students to obtain a GPA of 2.5 or higher at the end of the first year in order to advance. Students with GPAs between 2.4 and 1.5 were placed on academic probation and required to improve their GPAs to at least 2.5 within one year or face dismissal. Students with GPAs below 1.5 were subject to the Student Promotions Committee's mandatory review for possible dismissal from the program. The Policy further stated that a student who failed a class in the medical school curricular block during the first year of study "may be eligible" to remediate the failed class, but "[i]n order to be considered eligible," the student's final grade for the failed block must not be below 50 percent. (Plaintiff's exhibit No. 23.) Those students who were not eligible for remediation were required to repeat the failed curricular block during the next academic year.

{¶20} Plaintiff contends that since his final grades for the failed medical school curricular blocks were above 50 percent, he qualified for remediation under the Policy and was entitled to receive such benefit as part of his contract. Contrary to plaintiff's

contention, the Policy's use of the phrases "may be eligible" and "to be considered eligible" indicate the drafters' intent to condition remediation on the University's discretion. Although plaintiff's final grade averages for the blocks he sought to remediate were above 50 percent, his grade averages merely allowed him "to be considered eligible" for remediation. The plain language of the contract thus does not support plaintiff's contention that he was contractually entitled to remediation as a matter of right.

{¶21} Plaintiff alternatively contends that because other students could fail one or more classes and still be allowed the chance to remediate, the University arbitrarily exercised its discretion in denying plaintiff's appeal to remediate. Although Dr. Bennett-Clarke admitted students theoretically could fail multiple classes and still be approved to remediate those classes, she also stated each student's situation was unique. Dr. Bennett-Clarke explained that even in cases where a student obtains a score above 50 percent in the class, the student is not automatically qualified to remediate. Dr. Bennett-Clarke said that since plaintiff's "grade point average was below a 1.5 * * * he was very much on [academic] probation. So that would have been the restriction in his case." (Tr. 147-48.)

{¶22} In describing the process for evaluating an individual student's request for remediation, Dr. Bennett-Clarke stated the Student Promotions Committee examines the totality of the student's circumstances. In plaintiff's case, the Student Promotions Committee was unable to reach consensus on whether plaintiff should be dismissed from medical school after his first year, but it agreed he should not be allowed to remediate either of the classes he failed. In so recommending to Dr. Gold, the Student Promotions Committee stated that not only were "most of [plaintiff's] problems * * * self-inflicted" but he also was "unrealistic about what he can accomplish." (Defendant's exhibit L.) Ultimately, Dr. Gold allowed plaintiff to remain enrolled, subject to the condition that plaintiff was not allowed to remediate failed classes. Plaintiff, however, was afforded the opportunity to retake those failed classes in their entirety, and plaintiff agreed to those conditions. The evidence thus demonstrates the Student Promotions Committee evaluated plaintiff's individual circumstances and devised a plan it believed would address plaintiff's needs. Nothing in plaintiff's evidence suggests the Student Promotions Committee acted arbitrarily.

{¶23} The plain language of the Policy, together with evidence of the University's deliberate, professional evaluation of plaintiff's eligibility for remediation and the alternatives to it, provide competent, credible evidence to support the conclusion of the Court of Claims. Plaintiff's first assignment of error is overruled.

B. Special Status Student

{¶24} Plaintiff's second assignment of error asserts the Court of Claims erred in concluding the University did not breach its contract with plaintiff when it denied him the right to register as a special status student to take Neuroscience.

{¶25} According to Dr. Bennett-Clarke, registering for professional courses requires the approval of the professor of the class. The court also received evidence that Dr. Mooney, who taught Neuroscience, refused to allow plaintiff to enroll in the class because plaintiff planned to take the class via distance learning mode. In an e-mail to plaintiff, Dr. Bisesi stated "it was clear" plaintiff "planned to view archived lectures and felt that [he] could pursue course [sic] from Thousand Oaks, CA." (Defendant's exhibit O.) Indeed, plaintiff stated that he was living in Thousand Oaks, California two days before the start of the course when he requested the materials to enter the class.

{¶26} Plaintiff does not dispute that the course instructor's permission is required for a student to enroll in a class. Nor does plaintiff point to any academic policy governing the requirements for a professor in the medical school to accept a special status student into his or her class. Rather, plaintiff contends he did not intend to take the course as a long distance learner, so the University acted arbitrarily when it denied his request to register. According to plaintiff, Dr. Mooney informed plaintiff he would not be able to take the class because Dr. Mooney believed plaintiff was trying to "circumvent the University's decision to dismiss" him. (Tr. 60.)

{¶27} The parties presented the Court of Claims with two different reasons why Dr. Mooney acted as he did, Dr Mooney's and plaintiff's. The Court of Claims assessed the credibility of the witnesses and apparently determined the University's witnesses were more persuasive. Because the University's evidence, if believed, is competent, credible evidence that the University exercised professional judgment, plaintiff's second assignment of error is overruled.

C. Letter of Conditions

{¶28} Plaintiff's third assignment of error asserts the trial court erred in concluding the University did not breach its contract with plaintiff when the University determined plaintiff failed to abide by the terms contained in Dr. Gold's letter of July 20, 2005.

{¶29} "[W]here 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." *Stratton v. Kent State Univ.*, 10th Dist. No. 02AP-887, 2003-Ohio-1272, ¶ 29, citing *Ottery v. Bland*, 42 Ohio App.3d 85, 87 (10th Dist.1987). Plaintiff does not dispute the Court of Claims' finding that plaintiff's continued enrollment at the University was contingent on his signed agreement to abide by the conditions contained in Dr. Gold's letter. Instead, plaintiff contends the University arbitrarily determined he did not abide by the conditions.

{¶30} The conditions outlined in Dr. Gold's letter were several. Plaintiff initially was placed on a one-year period of academic probation, during which he was to raise his GPA to at least 2.5 or again face review for possible dismissal. In addition, plaintiff was not permitted to remediate those courses he failed but was eligible to repeat those courses during the next academic year; plaintiff was required to take and complete a component of Clinical Medicine since he withdrew from the course in the prior year; and plaintiff was required to refrain from accepting employment during the 2005-2006 academic year unless he received approval from Dr. Gold. Finally, the letter required monthly meetings with members of the College of Medicine to review plaintiff's performance and reminded plaintiff of the various University services, including personal counseling, that were available to help plaintiff should he choose to use them.

{¶31} The Student Promotions Committee determined plaintiff violated the conditions by: (1) failing Neuroscience a second time, (2) failing to register for Clinical Medicine during the 2005-2006 academic year, and (3) working during the academic year without receiving permission. Plaintiff admitted he failed Neuroscience for a second time and does not dispute that admission upon appeal. Moreover, the Student Promotions Committee cited plaintiff's failure to pass Neuroscience a second time as cause for its review for possible dismissal.

{¶32} Plaintiff also admitted he did not take and complete a component of Clinical Medicine during the 2005-2006 academic year. Plaintiff, however, argued that provision of the contract was modified at his meeting on September 8, 2005 with Dr. Gold. Plaintiff's signed acceptance of the conditions in fact notes he accepted the conditions "[a]s modified," but nothing on the document indicates the content of the modification. (Plaintiff's exhibit No. 7.)

{¶33} Despite plaintiff's testimony, the Court of Claims determined plaintiff was required under the contract to register for Clinical Medicine during the 2005-2006 academic year. Evidence supporting the court's conclusion includes the Student Promotions Committee's hearing report noting plaintiff was instructed to register for Clinical Medicine in the summer of his 2005-2006 academic year and was not registered as of the date of the hearing, June 21, 2006. The Student Promotions Committee concluded that "[i]t [was] unlikely that [plaintiff] intended to register because of his work commitments." (Defendant's exhibit F.)

{¶34} Whether or not the contractual provision was actually modified is ultimately not dispositive, as the Court of Claims also found plaintiff violated the prohibition on working during the academic year without approval. Although plaintiff contends he did not begin employment until the summer after the academic term ended, plaintiff does not cite to the record for the dates when his employment began, and an independent review of the record does not reveal such information. Rather, the evidence includes the Student Promotions Committee's summary of an e-mail plaintiff sent to the Student Promotions Committee, stating he missed classes and moved to Florida to start work prior to final exams due to his financial circumstances.

{¶35} Whatever the reasons plaintiff posited for failing to fulfill the conditions he agreed to, the Court of Claims received competent and credible evidence to support its conclusion that plaintiff breached more than one of the conditions in Dr. Gold's letter. Plaintiff's third assignment of error is overruled.

D. Course Load

{¶36} Plaintiff's fourth assignment of error asserts the Court of Claims erred in not finding that the University changed plaintiff's course schedule in a manner that prejudiced his academic performance.

{¶37} Plaintiff contends that, after he and the University entered into their contractual relationship, the University added a course to his first-year curriculum called Clinical Medicine. Plaintiff stated he never was enrolled in Clinical Medicine and never requested to withdraw from the class. Under cross-examination, however, plaintiff admitted to writing an e-mail to Dr. Bennett-Clarke asking to withdraw from the course.

{¶38} In terms of the content of the first-year curriculum, Dr. Bennett-Clarke testified that, after becoming an Associate Dean in 1998, she served on several committees tasked with overseeing and designing the curriculum for the medical students at the University. The minutes of the pertinent meetings, including diagrams of the curriculum for the five-year program from 2003-2006, were introduced at trial. Based on her review of the minutes, Dr. Bennett-Clarke concluded the schedule remained unchanged from 2003 through 2006 and the course entitled Clinical Medicine was part of the curriculum throughout that time period. Dr. Bennett-Clarke further testified plaintiff would not have had the opportunity to make any changes to his course schedule, as the University predetermined the schedule. Contrary to plaintiff's claim that he was never enrolled in Clinical Medicine, Dr. Bennett-Clarke stated plaintiff must have been enrolled in the class because he "wouldn't have had a choice" in the matter. (Tr. 130.)

{¶39} In an attempt to refute Dr. Bennett-Clarke's testimony, plaintiff introduced at trial a document that showed a different schedule for the first year of the five-year program. Plaintiff stated the document represented the curriculum as he understood it when he entered the University's five-year program. Dr. Bennett-Clarke, however, stated she had not seen the document on any prior occasion and the document did not represent a curriculum the University offered for the five-year program. She further noted the only date on the document referred to the start of the program in the fall of 1988, so the document did not "say that was the curriculum that was in place when Mr. Jefferson was here." (Tr. 164.)

{¶40} As to whether plaintiff was enrolled in the course and sought to withdraw, plaintiff testified he met with Dr. Metting, the associate dean of Student Affairs, and Dr. Bennett-Clarke because he felt Clinical Medicine was "not something [he] signed up for." (Tr. 32.) Dr. Bennett-Clarke, however, testified plaintiff approached her because his accepting a research position with Dr. Cooper created a conflict with the schedule for

Clinical Medicine. Drs. Bennett-Clarke and Metting originally considered allowing plaintiff to use the research position as independent study in lieu of attending Clinical Medicine, but, after discovering that plaintiff's research position was paid, they denied the request since academic credit could not be awarded for paid activity. Dr. Bennett-Clarke stated plaintiff later approached her, asking for excused absences from Clinical Medicine due to travel requirements for his research position. Although Dr. Bennett-Clarke was receptive to the idea, she declined plaintiff's request after learning the number requested exceeded her expectations for excused absences.

{¶41} Dr. Bennett-Clarke testified she and Dr. Keck, the professor for Clinical Medicine, discussed their shared concerns that plaintiff's numerous absences from class might hinder his performance on an upcoming exam. Plaintiff admitted he did not attend the exam for Clinical Medicine even though Dr. Bennett-Clarke informed him via e-mail he was "not excused from Prof. Keck's exam." (Emphasis deleted.) (Defendant's exhibit C.) Dr. Bennett-Clarke stated that, after plaintiff failed to appear for the exam, he was offered the choice of staying in Clinical Medicine or withdrawing, and plaintiff admits he chose to withdraw. Dr. Bennett-Clarke said that, after plaintiff withdrew, she helped him replace Clinical Medicine with Behavioral Health so plaintiff could maintain his financial aid. Although Behavioral Health conflicted with another class, the University offered to videotape one of the lectures so plaintiff would not miss class material. Dr. Bennett-Clarke stated plaintiff never availed himself of the opportunity.

{¶42} The record does not support plaintiff's contention that the University was less than accommodating to the scheduling conflicts that plaintiff caused in deciding to accept a paid research position and to withdraw from Clinical Medicine. Nor does his evidence support his contention that the University abandoned professional judgment in addressing his enrollment and withdrawal issues surrounding the course in Clinical Medicine. Coupling that evidence with the competent, credible evidence that the University's curriculum remained unchanged during plaintiff's enrollment, the contentions raised in plaintiff's fourth assignment of error lack merit. Plaintiff's fourth assignment of error is overruled.

IV. Disposition

{¶43} Having overruled all four of plaintiff's assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
