



Guidelines and Procedures for the Promotion of Faculty and the Rules of the University Faculty. Plaintiff contends that the alleged deviations constitute negligence, breach of contract and violation of the faculty and chairperson's statutory duty to abide by the university rules. Plaintiff also maintains that the voting faculty acted wilfully, intentionally, outrageously, and recklessly.

{¶4} Defendant denies liability as to each of plaintiff's claims. It is defendant's position that plaintiff simply misunderstood the applicable guidelines and rules, that he misunderstood what happened during the application process, or that his claims can be viewed as nothing more than a "conspiracy theory."

{¶5} Although part of plaintiff's claims are couched in terms of negligence and others in terms of violations of duty, the court finds at the outset that plaintiff's claim is one of breach of contract, where the contract in question is that which is defined by the rules and guidelines applicable to plaintiff's 1999 application for promotion. Further, although plaintiff contends that the individuals involved acted willfully, recklessly, and outside the scope of their employment, he has not attempted to bring suit against any of these individuals in the court of common pleas. Rather, plaintiff attempts to invoke the court's general jurisdiction in an effort to have this case transferred to the common pleas court for consideration of punitive damages pursuant to *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60.

{¶6} Plaintiff's complaint and arguments at trial recognize that the standard to be applied in this case is whether the conduct

in question was arbitrary and capricious as discussed in *Bleicher v. University of Cincinnati College of Medicine* (1992), 78 Ohio App.3d 302, 308. Thus, part of plaintiff's allegations are directed toward application of the *Bleicher* standard to this case.

Nevertheless, the court concludes that the ultimate issue to be determined is whether OSU breached its contract with plaintiff by failing to follow its guidelines and procedures in reviewing plaintiff's application and in declining to offer him a promotion.

{¶7} For the following reasons, the court finds that plaintiff failed to prove any of his claims by a preponderance of the evidence.

{¶8} As an auxiliary faculty member, plaintiff was not eligible for tenure and did not receive monetary compensation. However, he was eligible for promotion. At Ohio University, where plaintiff also taught as auxiliary faculty, he was promoted to full Professor in 2000. One of plaintiff's arguments in this case is that he was granted that promotion on the basis of the same credentials presented to OSU.

{¶9} The criteria for the promotion plaintiff was seeking are set forth, in part, in the March 1, 1999, "Department of Psychiatry Appointments, Promotion and Tenure Document." (Defendant's Exhibit B.) That document states:

{¶10} "\*\*\* Candidates for auxiliary faculty are expected primarily to contribute to the educational mission of the department. Promotion to this rank [associate professor] on the auxiliary faculty is usually based upon *substantial, prolonged and continuing contributions to departmental educational programs.* \*\*\*" (Emphasis added.)

{¶11} According to the testimony of Maria H. Neff, M.D., Ph.D., Chair of the Promotion and Tenure Committee for the Department of Psychiatry, this document is "the gospel" that her department follows for all three employment tracks: auxiliary; regular/clinical; and tenure. She described the promotion process as consisting of three stages.

{¶12} In the first stage of the process the applicant submits a dossier to the committee. The committee does not vote on whether a promotion or tenure should be granted. The committee reviews the dossier and determines whether it complies with all applicable standards and is otherwise complete. The guidelines for preparing the dossier are contained in the "1999/2000 Promotion & Tenure/Promotion Review Information" (Defendant's exhibit C) which was provided to all faculty. In this case, the guidelines were provided by way of an interoffice memorandum from Dr. Ronald St. Pierre, dated March 26, 1999.

{¶13} Upon review of plaintiff's dossier, the committee determined that certain information was lacking. Dr. Neff testified that she discussed the matter with Dr. Bornstein in an effort to assist plaintiff in collecting all the required documentation. Dr. Neff further explained that, as chair of the committee, she spent an extensive amount of time on this part of the process and that the committee as a whole tried to exhaust all possibilities to ensure that an applicant's dossier is complete. Nevertheless, the guidelines clearly state that preparation of the dossier is "primarily the responsibility of the candidate." Once this is accomplished, the process proceeds to the second stage.

{¶14} The second stage of the application process consists of presentation of the applicant's dossier to the members of the

Department of Psychiatry who are eligible to vote. In this case, the presentation took place at a meeting held on October 29, 1999.

Attendees had previously been provided a copy of plaintiff's dossier and had an opportunity to review its contents. There were 9 members of the department; at least 6 were required to participate in the voting process for a valid outcome. The applicant was required to provide copies of the dossier for distribution to the voting faculty. Once the vote was taken, Dr. Neff was required to report the outcome to Dr. Bornstein.

{¶15} The third and final stage of the application process was for Dr. Bornstein to review the report of the voting faculty and make his own decision. In the case of auxiliary faculty, that is the end of the line. There is an intra-university appeal process available pursuant to Faculty Rule 3335-47-05, however, plaintiff did not avail himself of that process.

{¶16} The 1999/2000 "Promotion & Tenure/Promotion Review Information" states:

{¶17} "Cases involving the promotion of auxiliary faculty are forwarded to successive levels of review only if the administrator's recommendation at the preceding level was positive. A negative recommendation at any level means that the final decision is negative and the case will not go forward. \*\*\* Auxiliary faculty should not be considered for promotion if there is little documentation of their accomplishments--particularly in the area of academic services to the department in which the appointment resides."

{¶18} In plaintiff's case, the voting faculty unanimously opposed a promotion. In her report to Dr. Bornstein, dated November 5, 1999, Dr. Neff stated:

{¶19} "\*\*\*\* [A]fter careful review of the dossier of Dr. Scarnati and thorough discussion, the faculty of the Department of Psychiatry unanimously (6 opposed, 0 in favor) voted against the promotion of Dr. Scarnati at the present time. The reason being that he does not meet the criteria outlined by the University, College of Medicine and Public Health and Department of Psychiatry rules.

{¶20} "The Department of Psychiatry Promotion and Tenure Document states, 'substantial, prolonged and continuing contributions to departmental educational programs' as a specific bench mark for promotion to the rank of Auxiliary Associate Professor of Clinical Psychiatry. This includes clinical teaching of medical students and psychiatry residents with evidence of a satisfactory teaching evaluation. Dr. Scarnati's teaching activities with the Department of Psychiatry are restricted to medical students only. Dr. Scarnati has no involvement with post graduate resident education; despite, that he was advised to do so. In addition, the recent teaching evaluations of Dr. Scarnati by the medical students are poor, ranging from 'average' to 'no good.' Dr. Scarnati has been involved with teaching activities with other universities, but this does not pertain to his request for promotion in our department.

{¶21} "The faculty of the Department of Psychiatry appreciate the contributions of Dr. Scarnati to our educational program, and are willing to consider a re-application when the criteria for the promotion are satisfied."

{¶22} Dr. Bornstein reviewed the report and, in a letter dated November 16, 1999, informed plaintiff of the decision of the

eligible faculty and stated that he concurred with their recommendation against promotion. (Plaintiff's Exhibit 21.)

{¶23} In his complaint and at trial, plaintiff asserted a myriad of allegations regarding the manner in which his credentials were reviewed and evaluated. One of his primary concerns was that it had never been demonstrated to his satisfaction that there was, in fact, an October 29, 1999, meeting to review his dossier/application materials. Plaintiff bases this contention on the following alleged deviations from the guidelines and procedures: 1) the faculty who voted did not prepare written evaluations of him; 2) the minutes of the committee meeting were not signed; and, 3) the minutes do not accurately reflect who was present nor do they specify each member's vote.

{¶24} In the alternative, plaintiff contends that, if a meeting was held, it was conducted during a one-hour lunch period, during which there could not possibly have been sufficient time to fully review and consider his extensive 26-page dossier. (Plaintiff's Exhibit 10.) Plaintiff maintains that such meeting, if it occurred, would have been "so informal as to be non-existent."

{¶25} Additionally, plaintiff maintains that there was no "peer" review of him as required under Faculty Rule 3335-47-01 and that the voting faculty unfairly based its decision upon a mere four student evaluations, whereas he taught a total of 52 students.

With respect to the teaching of residents, plaintiff alleges that OSU was responsible for sending him the students he taught, and no residents were sent to the clinic where plaintiff worked.

{¶26} In support of his claims, plaintiff presented his own narrative testimony and the testimony of Drs. Bornstein and Neff. Additionally, plaintiff called as witnesses these members of the

eligible faculty who voted against his promotion: Dr. Ronald L. St. Pierre; Dr. Donald Smeltzer; Dr. Mary Fristad; and, Dr. Herman Tolbert. Dr. Stephen Olsen, who also voted against plaintiff, testified by way of deposition. Dr. Janice Kiecolt-Glaser also voted, but was not available to testify either at trial or by way of deposition. Plaintiff also submitted numerous exhibits.

{¶27} Upon review of the evidence, testimony, and the arguments of the parties, the court finds that there was no deviation from the applicable rules and guidelines in the evaluation of plaintiff or his credentials. Rather, the court concludes that defendant was correct in its assertion that plaintiff simply misunderstood how the process worked and what procedures were involved. For example, the evidence is clear that the October 29, 1999, meeting actually took place. The fact that the minutes were not signed is immaterial. The court can find no requirement in the guidelines that the minutes be signed. Dr. Neff identified the minutes and testified that she prepared them, she also confirmed that there was no rule requiring that they be signed. The testimony of the other faculty who voted is consistent in establishing that a meeting was held. The court is convinced that plaintiff was provided a full, fair, and professional evaluation in the second stage of the process even if the meeting lasted no more than one hour. The court is also convinced that prior to the voting stage, plaintiff's dossier was reviewed and his credentials evaluated by a five-member committee, notwithstanding that there was no vote taken in that process.

{¶28} Additional confusion arose in this case because plaintiff attempted to apply provisions of Faculty Rule 3335-47-04, "Promotion and tenure review procedures" (Plaintiff Exhibit 20)

that, according to Dr. Neff and as shown on the document itself, were generated for use in the year 2002. That document refers to a separate written assessment by the chair and also references "evaluations and reports," copies of which can be requested by an applicant. That rule was not in effect in 1999. Plaintiff also attempted to apply rules that were in effect when he had previously applied for a promotion in 1996. At that time he did receive written evaluations. Plaintiff has also asserted that the failure to provide these evaluations constitutes a violation of the Ohio Public Records Act, pursuant to *State ex. rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 1994-Ohio-246. However, neither the Act nor the holding in *James* requires provision of documents that plainly do not exist.

{¶29} Further, the 1999-2000 rules did not require that a list of eligible faculty and their respective votes be provided. In this case, even if such requirement had remained in effect, it would be inconsequential—plaintiff was aware of which faculty voted and that their vote was unanimous; the answer that he appears to be seeking is obvious.

{¶30} In the course of trial, in his examination of witnesses, and upon cross-examination by defendant, plaintiff admitted to being confused about other aspects of the process. For example, plaintiff stated that he did not realize that the University, the College of Medicine and Public Health, and the Department of Psychiatry each had their own set of rules and guidelines. He testified that he had never seen Defendant's Exhibit B, the so-called "gospel" for Department of Psychiatry promotion process. Plaintiff also stated that he assumed that if the document was so important it would have been provided to him. In his closing

argument, plaintiff acknowledged that he had come to realize that he did not have all the information he needed when he submitted his application.

{¶31} Other areas of misunderstanding concern plaintiff's ability to separate his own responsibilities from those of OSU. Among other things, the testimony shows that plaintiff was incorrect in assuming that collection of student evaluations was OSU's responsibility, and that he was not required to initiate the process of teaching residents. According to Dr. Neff, in the 1999 application process, it would have been plaintiff's responsibility to obtain internal documentation such as student evaluations for his dossier; the department's responsibility was to provide a mechanism through which such information could be obtained. She further testified that it was plaintiff's responsibility to work with the residency program to involve the residents in his clinic. Dr. Bornstein corroborated that testimony and explained that residents are assigned to clinics, not to individual professors.

{¶32} Furthermore, the testimony was consistent that the key to obtaining promotion was involvement with the department, an active interest in improving and enriching the programs offered, and concern for the quality of teaching. Dr. Neff gave examples for that type of involvement such as: organizing new programs; writing educational journal articles or text books; participating in grand rounds and bringing forth new ideas for approval by the department heads.

{¶33} With respect to plaintiff's claim that he did not receive a valid peer review, Faculty Rule 3335-47-01 provides, in part:

{¶34} "\*\*\* Peers are those faculty who can be expected to be most knowledgeable regarding an individual's qualifications and

performance--normally tenure initiating unit colleagues. \*\*\*  
[F]aculty vested with responsibility for providing peer review have an obligation to participate fully and knowledgeably in review processes, to exercise the standards established in faculty rule 3335-47-02 and other standards specific to the academic unit and discipline, and to make negative recommendations when these are warranted to maintain and improve the quality of the faculty. \*\*\*"

{¶35} Plaintiff contends that because only three of the faculty who evaluated him were psychiatrists, one of whom was not a licensed clinical psychiatrist, he was not provided a proper peer review in accordance with the standards specific to his discipline.

However, the court is persuaded by the testimony that the persons who evaluated plaintiff were the most knowledgeable about his qualifications and his performance – they were his colleagues in the department. There is nothing in the rule that implies that only psychiatrists can evaluate psychiatrists. Moreover, there were not even 6 licensed clinical psychiatrists employed within the department. The testimony is clear that plaintiff's colleagues valued his services and held him in high regard based upon his accomplishments, but did not feel that the quantity or quality of his involvement with the department was sufficient. In short, plaintiff's accomplishments outside OSU, while noteworthy, were not enough to justify promotion.

{¶36} Taking all of plaintiff's contentions into consideration, the court finds that he is essentially disputing a "judgment call" made by his academic superiors.

{¶37} The law is well-settled that trial courts generally defer to the academic decisions of colleges and universities unless there has been such a substantial departure from the accepted academic

norms so as to demonstrate that the committee or person responsible did not actually exercise professional judgment. *Bleicher, supra* at 308. In *Gogate v. Ohio State University* (1987), 42 Ohio App.3d 220, the Tenth District Court of Appeals cautioned trial courts to be diligent not to intrude into faculty employment determinations and not to substitute their judgment with respect to the qualifications of faculty members for promotion or tenure. The court noted that determinations on such matters as teaching ability, research and service simply cannot be evaluated solely on the basis of objective factors. *Id.*, 226.

{¶38} In the instant case, there is no evidence that there was any deviation from accepted academic norms, much less a deviation substantial enough to demonstrate that the committee, any of the faculty who voted, or Dr. Bornstein, failed to actually exercise professional judgment. Similarly, there is no evidence that any of the persons involved acted arbitrarily, capriciously, intentionally or recklessly, as those terms are construed in *Bleicher*.

{¶39} To the extent that plaintiff has raised an issue of civil immunity, the court finds, pursuant to R.C. 2743.02(F) and 9.83, that the individuals named by plaintiff were unquestionably employees of OSU at the time plaintiff's claims arose. Those individuals are: Drs. Bornstein; Maria Neff; Mary Fristad; Herman Tolbert; Donald Smeltzer; Stephen Olsen; Janice Kiecolt-Glaser; Dr. Ronald L. St. Pierre; and then OSU President William Kirwan. Based upon the totality of the evidence presented, the court further finds that none of these individuals acted "with malicious purpose, in bad faith, or in a wanton or reckless manner." See R.C. 9.83.

{¶40} As to scope of employment, an employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does

not automatically take such act outside the scope of employment. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775. Rather, the act must be so divergent that it severs the employer-employee relationship. *Id.* Malicious purpose involves harboring ill will or enmity or exercising malice, and malice can be defined as the willful and intentional design to do injury or harm to another, usually seriously, through conduct that is unlawful or unjustified. *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-454. For the same reasons noted with respect to plaintiff's breach of contract claims, the court cannot find that any of the individuals involved with plaintiff's promotion application acted in such a way as to sever the employer-employee relationship. Accordingly, all of these individuals are entitled to civil immunity and the courts of common pleas do not have jurisdiction over this matter. Further, even if the principles espoused in *James H. v. Dept. of Mental Health & Mental Retardation*, supra, were applicable to the instant case, plaintiff would not be eligible for punitive damages on this basis.

{¶41} For all of the foregoing reasons, the court concludes that there was no breach of contract in this case, that there was no negligence, and that there was no wilful or reckless conduct on the part of any individuals involved in the decision to deny plaintiff's application for promotion. Accordingly, judgment shall be granted in favor of defendant.

{¶42} This case was tried to the court on the issue of liability and to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Drs. Bornstein; Maria Neff; Mary Fristad; Herman Tolbert;

Donald Smeltzer; Stephen Olsen; Janice Kiecolt-Glaser; Dr. Ronald L. St. Pierre; and then OSU President William Kirwan are entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over this matter. Judgment is rendered in favor of defendant. 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.

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J. WARREN BETTIS  
Judge

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Filed December 19, 2003

To S.C. reporter December 29, 2003