[Cite as *Volpe v. Med. College of Ohio*, 2005-Ohio-6312.]

IN THE COURT OF CLAIMS OF OHIO
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LEONARD VOLPE	:	
Plaintiff	:	CASE NO. 2003-11909 Judge Joseph T. Clark
v.	:	
		DECISION
MEDICAL COLLEGE OF OHIO	:	
Defendant	:	

: : : : : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action against defendant alleging breach of contract and promissory estoppel. The case was tried to the court on the issues of liability and damages.

{¶ 2} Plaintiff's claims arise as a result of the termination of his employment from defendant, Medical College of Ohio (MCO). Plaintiff was employed as a cardiovascular surgical assistant (CVSA) with MCO beginning in November 2002 and ending in August 2003. His status was that of a "contingent" employee; he had no set work schedule, and he did not receive any health care or leave-time benefits. He was originally hired to work every third weekend per month to relieve two full-time employees who had been alternating weekend on-call duties. One of those employees was Luis Espinoza, a registered nurse first assistant, and the other was Chris Ludlow, a licensed physician's assistant.

{¶ 3} In March 2003, Ludlow was called to active duty in the armed services. As a result, plaintiff was asked, and agreed, to work the full-time hours that Ludlow had been working. Plaintiff contends that he subsequently became concerned that he did not have any written documentation memorializing the agreement. Plaintiff

maintains that he called the office of Gary Dechert, associate hospital administrator, and left a message inquiring whether he could get a contract. According to plaintiff, Dechert called him a few days later and stated that the contract was ready. He further contends that when he went to Dechert's office, Dechert asked whether the document he provided was "good enough" and stated: "You understand this is a contract?"

{¶ 4} The document plaintiff received, dated March 6, 2003, reads as follows:

{¶ 5} "RE: TEMPORARY INCREASE IN WORK SCHEDULE

{¶ 6} "Dear Leonard:

{¶ 7} "As a result of Christopher Ludlow, full-time Physician Assistant, being called into active duty with the Armed Forces, there will be a temporary need to fill the hours that he presently works. This letter is intended to confirm our agreement to the following:

{¶ 8} "· You will be expected to work the hours that Chris Ludlow would have normally been scheduled for.

{¶ 9} "· You will perform the duties as outlined in your present job description of CV [cardiovascular] Surgical Assistant.

{¶ 10} "·This agreement will commence upon Chris Ludlow's deployment and cease upon his return, which could potentially be up to a two-year commitment.

{¶ 11} "·You will maintain your contingency status at the same rate of pay.

{¶ 12} "Thank you for assistance in helping us to maintain patient services during Mr. Ludlow's absence." (Plaintiff's Exhibit 10.)

{¶ 13} At the time that plaintiff was hired and when he was approached to assume Ludlow's duties, MCO was under the impression that plaintiff was capable of performing the same duties that

Ludlow performed as a physician's assistant. MCO had never previously employed a CVSA; it had hired plaintiff at the behest of Dr. Samuel J. Durham, who was chief of the division of cardiothoracic surgery and an associate professor of medicine at MCO. Dr. Durham was also chief of thoracic surgery at St. Luke's and chief of pediatric cardiac surgery at St. Vincent's, which are both local hospitals. Dr. Durham had worked with plaintiff at St. Luke's Hospital and recommended him to MCO.

{¶ 14} In July 2003, questions arose as to plaintiff's scope of practice and whether he was authorized to perform some of the tasks that he was performing at MCO. There was no dispute that the services plaintiff performed in the operating room, under the direction of Dr. Durham,[1] were authorized. However, the scope of plaintiff's pre-operative and post-operative authority, when he was not under the direct supervision of a physician, became an issue. For example, it was brought to the attention of Vicki Geha, chief nursing officer, that plaintiff was writing doctor's orders and directing other staff to complete certain pre-operative tasks. There were also questions as to plaintiff's post-operative authority to remove patients' chest tubes and pacer wires. On August 7, 2003, plaintiff met with Dechert and Geha concerning the matter. In a letter summarizing that meeting Geha stated, in part:

{¶ 15} "*** As discussed, in my role, I am ultimately responsible [sic] the quality of nursing care provided at MCO, and, as such, am sending you this letter in order to formally document your role as a Surgical Assistant at the Medical College of Ohio. ***.

{¶ 16} "The following is a list of things that you *** *may not do* as a Surgical Assistant:

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[1]Plaintiff worked almost exclusively with Dr. Durham during his employment at MCO.

{¶ 17} "You may not write orders

{¶ 18} "You may not take verbal orders or recommend a treatment approach to other disciplines

{¶ 19} "You may not perform any treatments or procedures outside of the Operating Room and may only perform those procedures in the OR for which you have demonstrated competency

{¶ 20} "You may not assess patients, develop a plan of care, determine diagnoses or problems

{¶ 21} "You may not document assessment, plan of care, recommendations for treatment, or any analysis of actions

{¶ 22} "***

{¶ 23} "Also, as discussed, if you fail to follow the standards as written above you are in violation of State Laws and you place yourself, the Institution and other caregivers at risk. Continuation to perform any duties not allowed by your training and position will result in disciplinary action up to and including termination. Please consider this the last session of council [sic] on intended or unintended breaching of your scope of practice." (Emphasis in original.) (Plaintiff's Exhibit 16.)

{¶ 24} Plaintiff testified that he immediately began to comply with these dictates. However, as a result of the questions that were raised, MCO began to extensively research the issue of "scope of practice" of a CVSA. In so doing, MCO discovered that the CVSA program where plaintiff received training was certified in only three states and that Ohio was not among them. Neither the job title nor its associated responsibilities are recognized under any provision of the Ohio Administrative Code or the Ohio Revised Code. Ultimately, MCO determined that the surgical staff at MCO needed an assistant who was licensed to perform tasks that plaintiff was not authorized to perform, such as would be performed by a medical resident or a physician's assistant. Thus, by letter dated

August 20, 2003, plaintiff was notified that his services were no longer needed.

{¶ 25} Plaintiff insists that the document he received on March 6, 2003, constitutes a contract and that MCO breached the agreement by terminating his employment before Ludlow returned from active duty. He contends that he is entitled to recover the difference between what he would have made if he had continued working for MCO until Ludlow's return, which occurred in March 2004, and the amount that he earned at his subsequent employment. Plaintiff calculates that amount to be a $4,000 difference per month, for the six-month period from the time his employment at MCO was terminated and the date of Ludlow's return, or $24,000.

{¶ 26} In response to plaintiff's claims, defendant argues that the March 6, 2003, document was not intended to be and is not, in fact, a contract. Moreover, defendant argues that even if the document were accepted as a contract, it is not enforceable because there was a mutual mistake of fact regarding plaintiff's authority to perform the tasks that MCO needed him to perform. Further, defendant argues that plaintiff's damages estimation fails to take into consideration the value of benefits he received at his subsequent employment which he was not entitled to receive as a contingent employee of MCO.

{¶ 27} Upon review of the evidence, testimony, and the post-trial filings of the parties, the court makes the following determination.

{¶ 28} "Ohio courts have, traditionally, defined a contract as an agreement upon sufficient consideration to do, or not to do, a particular thing." *Bradley v. Farmers New World Life Ins. Co.* (1996), 112 Ohio App.3d 696, 710; citing *Lawler v. Burt* (1857), 7 Ohio St. 340. "To be valid, there must be, inter alia, a lawful subject matter, a meeting of the minds of the parties and an actual

agreement to do the thing proposed in the agreement from which the contract emerges. To be binding, the parties to the contract must have a common and distinct intention communicated by each party to the other." Id.

{¶ 29} Although plaintiff maintains that he communicated his intent to obtain a contract, and that Dechert communicated that the document he prepared for plaintiff was indeed a contract, Dechert denied that any such statements were made. According to Dechert, plaintiff requested documentation concerning his increased hours because he needed confirmation of employment in order to obtain financing for his home. Plaintiff testified at trial that he had entered into a land contract for the purchase of the home on January 30, 2002, whereby he paid a deposit and was required to obtain financing to pay the balance due within twelve months. Plaintiff further testified that, as of January 31, 2003, he had not yet paid the balance. When questioned on cross-examination whether he needed the March 6, 2003, document to demonstrate employment stability for the purposes of obtaining financing, plaintiff stated that the document was for his "personal use." When asked whether obtaining financing would be a personal use, plaintiff reiterated: "it was for my personal use."

{¶ 30} Dechert was questioned as to why he, as associate hospital administrator, would prepare such a document rather than a department of human resources' employee. In response, Dechert acknowledged that it was not one of his usual responsibilities and that human resources personnel typically prepared such documents. However, Dechert testified that in his experience human resources personnel would strictly interpret plaintiff's contingency status. He stated that he prepared the March 6, 2003, document to "accommodate" plaintiff. He denied ever having communicated to plaintiff that the document was an employment contract.

{¶ 31} In light of the conflicting testimony, the determination of this issue turns on witness credibility.

{¶ 32} "In determining the issue of witness credibility, the court considers the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear, and know the things about which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any; together with all facts and circumstances surrounding the testimony." *Adair v. Ohio Dept. of Rehab. & Corr.* (1998), 96 Ohio Misc.2d 8, 11; See 1 Ohio Jury Instructions (1994), Section 5.30.

{¶ 33} Applying these criteria, and considering all the facts and circumstances surrounding the testimony presented herein, the court finds that plaintiff's testimony lacks credibility. The reason he offered for requesting a "contract" lacked candor and was not persuasive in light of his acknowledged, overdue need for financing the purchase of his home. Moreover, the court found it disingenuous for plaintiff to suggest that, had his purpose been only to obtain financing, Dechert would not have been the appropriate person to provide the same. In contrast, Dechert's testimony as to why he prepared the document was reasonable and forthright; he was able to project plaintiff's earning capacity in a more favorable light than plaintiff would likely have received from human resources personnel. Dechert also testified that he had obtained documentation of his own earnings status from MCO staff outside the human resources department.

{¶ 34} Thus, the evidence fails to establish a common and distinct intention communicated by each party to the other. Accordingly, plaintiff has not shown the existence of an agreement, based upon a meeting of the minds and mutual assent, to which the

parties intended to be bound. See *Cuyahoga County Hosp. v. Price* (1989), 64 Ohio App.3d 410, 415.

{¶ 35} Moreover, even if plaintiff had established the basic elements of a contract, there is no evidence that Dechert was in a position to enter into a binding contract with him. R.C. 3350.03, which sets forth the duties and responsibilities of the board of trustees of MCO, provides that:

{¶ 36} "The board of trustees of the medical college of Ohio at Toledo shall employ, fix the compensation of, and remove the president and such numbers of professors, teachers, and other employees as may be deemed necessary. The board shall do all things necessary for the creation, proper maintenance, and successful and continuous operation of the college. ***."

{¶ 37} Thus, pursuant to R.C. 3350.03, only the board of trustees had authority to enter into employment contracts. See, also, *Drake v. Medical College of Ohio* (1997), 120 Ohio App.3d 493, 495-496.

{¶ 38} In sum, the preponderance of the evidence fails to establish either that the parties formed a contractual agreement or that Dechert had the authority to form such agreement with plaintiff. Accordingly, the claim of breach of contract must fail and the court need not address defendant's arguments concerning a mutual mistake of fact.

{¶ 39} In the alternative, plaintiff contends that he is entitled to relief under the doctrine of promissory estoppel. That doctrine is defined as:

{¶ 40} "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the

promise." Restatement of the Law, Contracts 2d (1973), Section 90; *McCroskey v. State* (1983), 8 Ohio St.3d 29, 30.

{¶ 41} In order for a claim of promissory estoppel to succeed, the threshold element of a promise must be met. Defendant must have made a promise to plaintiff which should have reasonably been expected to induce action. *McCroskey*, at 30. In addition, to support a claim for promissory estoppel, representations concerning job security must be specific promises. *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131.

{¶ 42} In this case, the court finds that the representations made in the March 6, 2003, document do not rise to the level of a specific promise of continued employment. The language is clear that plaintiff was to retain his status as a contingent employee and that the length of time that his additional hours would be needed could only "potentially" be "up to two years." As defined by the parties, a contingent employee was one who worked only when needed and was afforded no employment benefits. In essence, then, nothing changed in plaintiff's employment status except that he had a greater opportunity for increased working hours. Therefore, plaintiff could not have reasonably relied on any alleged promises about his employment made by Dechert.

{¶ 43} Further, as stated previously, R.C. 3350.03 provides that only the board of trustees can make binding employment contracts. In *Drake v. MCO*, supra, at 496, the court held that "[a]ny representations made by [other university officials] would be contrary to express statutory law and, thus, promissory estoppel does not apply." The court also noted that "public officers cannot bind the state by acts outside their express authority." Id. citing *Kirk Williams Co. v. Ohio State University Bd. of Trustees* (June 13, 1989), Franklin App. No. 88AP-697, and *City of Cincinnati v. Cameron* (1878), 33 Ohio St. 336.

{¶ 44} Since the only representations at issue in this case are those made by Dechert in the March 6, 2003, document, plaintiff's estoppel claim must also fail. Accordingly, judgment shall be rendered in favor of defendant.

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		JUDGMENT ENTRY
MEDICAL COLLEGE OF OHIO	:	
Defendant	:	

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This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, 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.

_____
JOSEPH T. CLARK
Judge

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