[Cite as *Leiby v. Univ. of Akron*, 2005-Ohio-6315.]

IN THE COURT OF CLAIMS OF OHIO
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TODD LEIBY	:	
Plaintiff	:	CASE NO. 2004-10094 Judge J. Craig Wright
v.	:	DECISION
THE UNIVERSITY OF AKRON	:	
Defendant	:	

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{¶ 1} On October 5, 2005, defendant filed a motion for summary judgment pursuant to Civ.R. 56. Plaintiff responded to defendant's motion on October 12, 2005. The matter is now before the court on a non-oral hearing.

{¶ 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 County*, 104 Ohio St.3d

660, 661, 2004-Ohio-7108; citing, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶ 4} Plaintiff attended the University of Akron for undergraduate study from 1994 until earning a bachelor's degree in sociology/law enforcement in 2000. Plaintiff then enrolled in defendant's graduate program in 2001, earning a master's degree in science management/human resources in 2003.

{¶ 5} The crux of plaintiff's complaint is that defendant breached the parties' contract by permitting several instructors to reuse examinations from previous semesters and/or to reuse the same or similar questions on examinations from one semester to the next.

{¶ 6} A breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performs its obligations; the other party fails to fulfill its contractual obligations without legal excuse; and the non-breaching party suffer damages. *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108.

{¶ 7} The relationship between a university and a student who enrolls, pays tuition, and attends class is contractual. *Elliott v. University of Cincinnati* (1999), 134 Ohio App.3d 203; *Behrend v. State* (1977), 55 Ohio App.2d 135. The court looks to the university guidelines supplied to students for the terms of the contractual relationship. *Bleicher v. University of Cincinnati College of Medicine* (1992), 78 Ohio App.3d 302.

{¶ 8} In this case, there is no dispute that the terms of the contract between plaintiff and defendant are contained in the University of Akron undergraduate and graduate bulletins. However, after careful review of the graduate bulletin provided to the court in connection with the motion for summary judgment, the court is unable to identify any term prohibiting the reuse of examinations and examination questions. Indeed, when plaintiff was asked in his

deposition to identify the specific passage in the bulletin prohibiting such a practice, plaintiff was unable to identify the specific language. (Leiby Deposition, Page 52.) Instead, plaintiff relies on a passage in the bulletin entitled "Inside the Classroom," under the heading "Expectations and Responsibilities." (Defendant's Exhibit 1, Page 9.) Specifically, plaintiff cites a sentence in that section that reads "Faculty must not tolerate academic dishonesty nor discrimination or harassment from students to other students." (Leiby Deposition, Page 49.) Plaintiff asserts that a prohibition against reusing examinations and questions is to be "implied" from this provision. (Leiby Deposition, Page 50.)

{¶ 9} The court disagrees with plaintiff's contention that there is an implied prohibition against reusing questions and examinations. Where contractual language is clear and unambiguous, "[the] court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246. Additionally, "[i]f a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322.

{¶ 10} The terms of the student handbook and graduate bulletin are clear and unambiguous as a matter of law. No section of the handbook either directly or impliedly prohibits instructors from using old examinations and/or examination questions. In short, defendant did not breach the contract, as a matter of law.

{¶ 11} Additionally, to the extent that plaintiff alleges a claim for educational malpractice based upon his contention that his diplomas are worthless, Ohio law does not recognize such a

claim. *Malone v. Academy of Court Reporting* (1990), 64 Ohio App.3d 588, 593; *Lemmon v. University of Cincinnati* (2001), 112 Ohio Misc.2d 23.

{¶ 12} Construing the evidence most strongly in plaintiff's favor, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment shall be granted. Defendant's October 31, 2005, motion to strike the documents attached to plaintiff's response is DENIED as moot.

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		JUDGMENT ENTRY
THE UNIVERSITY OF AKRON	:	
Defendant	:	

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

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, defendant's motion for summary judgment is GRANTED and 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.

_____
J. CRAIG WRIGHT
Judge

Entry cc:

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