[Cite as *Obukhoff v. Case W. Res. Univ.*, 2010-Ohio-1435.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93381

DENNIS OBUKHOFF

PLAINTIFF-APPELLANT

vs.

CASE WESTERN RESERVE UNIVERSITY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-565509

BEFORE: Rocco, P.J., Kilbane, J., and Celebrezze, J.

RELEASED: April 1, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

John R. Climaco
David M. Cuppage
Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A.
55 Public Square, Suite 1950
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Peter M. Poulos
Senior Counsel and Chief Litigation Counsel
Case Western Reserve University
311 Adelbert Hall
10900 Euclid Avenue
Cleveland, Ohio 44106

David H. Wallace
Patricia F. Krewson
Taft, Stettinius & Hollister LLP
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114

KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff-appellant, Dennis Obukhoff, appeals from a decision of the common pleas court granting summary judgment for the defendant-appellee, Case Western Reserve University ("Case") on his complaint and Case's counterclaim. In four assignments of error, Obukhoff contends that the court erred by granting summary judgment to Case on each of his three claims and by denying his motion to compel the production of documents. We find there are no genuine issues of material fact and that Case is entitled to judgment as a matter of law on each of Obukhoff's claims. We further find that the court did not abuse its discretion by denying Obukhoff's motion to compel. Therefore, we affirm.

Procedural History

{¶ 2} The complaint in this case was filed June 17, 2005. It asserted that Obukhoff and Case were parties to a contract pursuant to which Case would provide him with educational services at its school of medicine in exchange for his tuition payments, and Case agreed to follow its student handbook. The complaint also asserted that Case employed Obukhoff as a paid laboratory assistant. Obukhoff claimed that Case breached these two contracts by constructively dismissing him from the medical school and failing to pay him for his services. He further sought an injunction and declaratory judgment to prohibit Case from noting on its permanent record that he "withdrew in lieu of dismissal." Case answered and counterclaimed,

asserting that the complaint was frivolous and demanding recovery of fees and costs pursuant to R.C. 2323.51.

{¶ 3} On October 2, 2006, Case moved for summary judgment on all counts of the complaint and on the counterclaim. Obukhoff opposed this motion but did not file a cross-motion for summary judgment. All briefs and evidence submitted in connection with the motion for summary judgment were filed under seal, as required by a stipulated protective order previously entered by the court.[1]

{¶ 4} The court granted Case's motion. It held that "[t]he court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that Case Western Reserve University is entitled to judgment as a matter of law. No just reason for delay." Case immediately requested a hearing to determine the amount of costs, fees, and expenses it should be awarded on its counterclaim. The court, without hearing, awarded Case costs against Obukhoff, but denied any award of fees and expenses.

[1]The stipulated protective order declared confidential (1) all medical records concerning Obukhoff's physical and mental conditions and (2) "any and all records, decisions, communications, evaluations, and all other information relating to [Case], the School of Medicine and/or its students."

{¶ 5} Obukhoff appealed the court's order granting summary judgment. Case separately appealed the order denying an award of fees and expenses. The appeals were consolidated for review. This court dismissed the appeals for lack of a final appealable order because the trial court had not addressed Obukhoff's declaratory judgment claim regarding the notation on Obukhoff's transcript. *Obukhoff v. Case W. Reserve Univ.*, Cuyahoga App. Nos. 90096 and 90271, 2008-Ohio-2654.

{¶ 6} After the appeal was dismissed, the common pleas court entered a supplemental judgment in which it concluded that "Plaintiff is not entitled to a declaratory judgment that declares that Defendant is prohibited from placing an annotation on the permanent record that Plaintiff 'withdrew in lieu of dismissal.'" The court further determined that Case "was entitled to place the 'withdrawal in lieu of dismissal notation' on the permanent record" because "it is undisputed that Plaintiff voluntarily agreed to have this notification appear on his transcript during his administrative appeal of the Committee of [sic] Students' decision [to dismiss him]." Obukhoff then filed the present appeal.

Facts

{¶ 7} The material facts in this case are not in dispute. Obukhoff enrolled at Case's school of medicine in August 2002. He completed his first year with barely passing grades. During his second year, he failed four exams. As required by the medical school's student handbook, Obukhoff was referred to the Committee on Students. The student handbook warned that "identification" (that is, a less than passing grade) "on more than three Year II subject committee interim examinations, even if some or all have been successfully remediated over the course of the year, will nevertheless usually result in the student repeating Year II, as decided by the Committee on Students."

{¶ 8} The minutes of the Committee on Students show that Obukhoff told the Committee that he "had personal issues to deal with outside of the School of Medicine, which impacted his academics. He also stated that he felt he had cultural differences that he had to deal with as far as his fellow students were concerned." In January 2004, the Committee placed Obukhoff on academic leave and required him to complete a program focusing on interpersonal communication skills and counseling. Upon successful completion of this program, he would "be considered for restarting Year II."

{¶ 9} While he was on academic leave, Obukhoff obtained a paid research position with Dr. Mary Laughlin, a Case faculty member. Obukhoff

was informed that he had to perform his research at the laboratory during normal business hours. He submitted four salary vouchers for the weeks of July 12, 19, and 26 and August 2, 2004, and was paid for that time. Thereafter, he claimed, he was instructed to submit his time to a laboratory assistant, Margie Kozik, and she would complete his time vouchers. He testified that he was not paid again for any other work he performed. He testified that the time he submitted reflected the actual amount of time he spent in the laboratory (or less), although the specific dates and hours he listed for his work were not necessarily accurate.

{¶ 10} Obukhoff repeated his second year at the medical school beginning in the fall of 2004. Obukhoff was referred to the Committee on Students again in the spring of 2005 based on (1) a letter that Dr. Laughlin wrote to Dr. Ricanati (Obukhoff's society dean) about Obukhoff's behavior in her lab, (2) an incident that occurred earlier in Obukhoff's academic career in which a female student had complained that Obukhoff was harassing her, and (3) Obukhoff's failure to remediate a failed exam. Obukhoff claimed that he did not receive email notification of the remediation date. The committee required Obukhoff to remediate the exam by the next Committee meeting and to submit to a "fitness for duty" examination.

{¶ 11} The fitness for duty examination concluded that Obukhoff had an unspecified personality disorder with strong narcissistic traits and an inability

to perceive or admit to his own mistakes. According to the report, Obukhoff perceived himself as superior, was unable to "self-evaluate and self-criticize," and "is interpersonally exploitative and lacks sympathy." The examiner viewed these traits as a "concern to anyone training a medical student."

{¶ 12} The Committee on Students reviewed the conclusions of the fitness for duty examination at its next meeting. In addition, the Committee heard new information concerning Obukhoff's poor patient interviewing skills. Following a review of these new matters as well as a recapitulation of the matters that led to Obukhoff's referral to the Committee, the Committee met with Obukhoff. After this meeting, some of the Committee members expressed concern about his "lack of insight" into the issues presented. They then voted to dismiss him from the medical school.

{¶ 13} Obukhoff asked the Committee to reconsider its decision. A faculty advocate appeared before the Committee on his behalf. At the conclusion of this meeting, the Committee affirmed its decision.

{¶ 14} Obukhoff then appealed the Committee's decision to Dean Ralph Horwitz. Obukhoff and Associate Dean Dan Anker met with Dean Horwitz for approximately 30 minutes. Dean Horwitz later told Associate Dean Anker to inform Obukhoff that he would be given the opportunity to withdraw before the letter dismissing him was issued, and that his record would reflect that he had withdrawn in lieu of dismissal. Obukhoff did not recall whether he was

told that his record would reflect that he withdrew in lieu of dismissal. However, he submitted a letter to the Dean withdrawing from the medical school.

Law and Analysis

{¶ 15} In his first assignment of error, Obukhoff urges that the common pleas court erred by granting summary judgment to Case on his claim for constructive dismissal from the medical school. For purposes of this assignment of error, we accept as true that appellant was constructively dismissed when he withdrew from the medical school after he was notified that he was being dismissed and after he exhausted his appeals pursuant to the terms of the student handbook. See, e.g., *Swink v. Greater Cleveland Regional Transit Auth.*, Cuyahoga App. No. 92725, 2009-Ohio-6105, ¶17.

{¶ 16} We review the decision to grant summary judgment de novo, applying the same standard of review the common pleas court applied under Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that (1) no genuine issue of material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) construing the evidence most strongly in favor of the nonmoving party, it appears from the evidence 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. *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832.

{¶ 17} Obukhoff claims due process required that Case provide him with written notice of the grounds upon which the school intended to dismiss him, and with a hearing at which he could be present when the case was presented against him. He also complains that Case should have prepared a record of the proceedings before the Committee on Students. Obukhoff's complaint claims a breach of the contract between the parties; he does not state a claim for violation of a constitutional right to due process. As a private institution, Case does not owe Obukhoff a constitutional right of due process. *Ray v. Wilmington College* (1995), 106 Ohio App.3d 707, 710, 667 N.E.2d 39, citing *Geraci v. St. Xavier High School* (1978), 13 Ohio Ops.3d 146, certiorari denied (1979), 444 U.S. 839, 100 S.Ct. 76, 62 L.Ed.2d 50. Consequently, it is not required to provide the formal notice, hearing, and record that appellant demands unless they are required by the parties' contract. Obukhoff has presented no evidence that these requirements are part of the parties' contract.

{¶ 18} Obukhoff claims that there are genuine issues of material fact whether Case complied with its own procedures in dismissing him. The procedures to which he refers are alleged customs of the Committee on Students, as described

by the testimony of Dean Ralph Horwitz.[2] Viewing Dean Horwitz's testimony in the light most favorable to Obukhoff, we accept that it was customary for the student to be present at the meeting of the Committee on Students when the reasons for the student's presence before the Committee were explained. There is no evidence, however, that this custom rose to the level of a contractual obligation. See, e.g., *Fennessy v. Mt. Carmel Health Sys., Inc*., Franklin App. No. 08AP-983, 2009-Ohio-3750, ¶18. There is no evidence of a meeting of the minds among the parties with respect to this customary procedure; at most, it was a unilateral policy that Case could change at any time. Therefore, we reject Obukhoff's argument that a variation from this custom amounted to a breach of contract.

{¶ 19} "[P]rivate colleges and universities have the right to make regulations, establish requirements and set scholastic standards largely as the responsible governing board shall decide. Compliance with scholastic standards and disciplinary requirements are enforced within a broad range of discretion. * * * [C]ourts will not interfere in these matters in the absence of a clear abuse of discretion by the governing board." *Schoppelrei v. Franklin Univ.* (1967), 11 Ohio

[2]Even though Dean Horwitz testified that he was not a member of the Committee on Students, Obukhoff's counsel asked him if he knew "whether the Committee on Students' procedures and policies requires that [Obukhoff] be there when Dean Ricanati related the reasons for his presence." Dean Horwitz responded that "I believe it is customary that the student is present when the reasons are described." Dean Horwitz subsequently corrected his answer to read "there is no policy or procedure that requires the student to be present. I do not know whether students are customarily present when the reasons are read before the committee."

App.2d 60, 62, 228 N.E.2d 334. There is no evidence that the Committee on Students here abused its discretion by dismissing Obukhoff. Therefore, the first assignment of error is overruled.

{¶ 20} Obukhoff's second assignment of error claims the common pleas court erred by granting summary judgment to Case on his claim for a declaratory judgment. The common pleas court concluded that Case "was entitled to place the 'withdrawal in lieu of dismissal' notation on the permanent record," because the student handbook did not prohibit such a notation and Obukhoff voluntarily agreed to have this notification appear on his transcript.

{¶ 21} Dean Horwitz testified that he told Associate Dean Anker to inform Obukhoff "that if [he] were to withdraw prior to dismissal, that we would have a notation on his file that he had withdrawn in lieu of dismissal." However, Associate Dean Anker's testimony was not before the court; Obukhoff did not recall whether he was told that his record would reflect a withdrawal in lieu of dismissal. Consequently, we do not know what Associate Dean Anker told Obukhoff, or what Obukhoff actually agreed to.

{¶ 22} Nevertheless, the notation clearly and accurately describes what actually occurred. Obukhoff was told that he would be dismissed; he withdrew before that occurred, to prevent a dismissal on his record from damaging his career. Nothing in the student handbook prevented Case from noting that Obukhoff withdrew in lieu of dismissal. Therefore, we overrule the second assignment of error.

{¶ 23} In his third assignment of error, Obukhoff claims the court erred by granting summary judgment to Case on his claim for breach of his contract of employment with Dr. Laughlin's laboratory. The parties admit that there was a general agreement that Obukhoff would perform laboratory work in Dr. Laughlin's laboratory and that he would be paid for it. However, there is no evidence that the terms of this arrangement were sufficiently agreed to form a contract.

{¶ 24} In order for a contract to exist, there must be a meeting of the minds on the essential terms of the agreement. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134. In this case, at a minimum, there had to have been a meeting of the minds about what services Obukhoff would perform and the amount or rate at which he would be paid. In his deposition testimony, Obukhoff concedes that he was never clearly told what work he would be paid for, how he would be paid, or when. He apparently believed that he would be compensated on an hourly basis, but the basis for this belief is unclear. Dr. Laughlin testified that "[her] policy is I ask [the student] to keep an accounting of [his] time and to provide that to my lab manager, who is Margie Kozik, and certainly, we will provide [him] a stipend * * *." Stipends are generally fixed payments — a salary or an allowance — rather than an hourly rate of pay. See, e.g., Webster's Unabridged Dictionary (2d ed. 1998) 1872. We find no evidence of agreement on either the work to be performed or the method of payment sufficient to form a contract. Therefore, Case was entitled to judgment as a matter of law on Obukhoff's claim.

{¶ 25} Finally, Obukhoff contends that the court abused its discretion by denying his motion to compel disclosure of redacted records from the Committee on Students regarding other, similarly situated students. He claims this information was relevant to his constructive dismissal claim, to demonstrate that the stated reasons for his dismissal were pretextual. Obukhoff is not claiming that his dismissal was motivated by unlawful discrimination, however. It is not clear what he claims the real motivation for his dismissal was, or why that would result in a breach of a contract between the parties. He has not demonstrated that the court abused its discretion by denying his motion.

{¶ 26} Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR