THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Honorable J. Derham Cole, Circuit Court Judge

Case No. 2009-CP-42-5567

Melanie Taylor,

Petitioner,

v.

Converse College,

/Respondent.

PETITIONER'S BRIEF

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I. STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in determining that the contract at issue was complete and only capable of one interpretation and, therefore, there was not a scintilla of evidence to support Petitioner's claim that a curricular exigency never existed?

II. STATEMENT OF THE CASE

Petitioner filed a Summons and Complaint in the Seventh Judicial Circuit on October 13, 2009 alleging causes of action for breach of contract, breach of contract accompanied by a fraudulent act, declaratory judgment and request for temporary and permanent injunctive relief, fraud in the inducement, and intentional misrepresentation. (R. pp. 33-42.) Respondent filed an Answer on November 20, 2009 denying Petitioner's allegations and asserting multiple affirmative defenses. (R. pp. 43-56.) Petitioner filed a Partial Motion for Summary Judgment as to her breach of contract claim and her request for injunctive relief on April 28, 2010. (R. pp. 113-114.) Respondent filed a Motion for Summary Judgment as to all of Plaintiff's causes of action on April 29, 2010. (R. pp. 57-112.) Before the scheduled hearing, both parties submitted Memoranda in Support of their Motions with attached exhibits and depositions. (R. pp. 115-790.)

A hearing on both Motions for Summary Judgment was held before the Honorable J. Derham Cole on September 17, 2010. Plaintiff supplemented the record on April 28, 2010 with additional information regarding a non-tenured teacher who was hired by Respondent to teach piano pedagogy classes after Petitioner's termination. (R. pp. 791-93.) Judge Cole granted Defendant's Motion for Summary Judgment on August 2, 2011. (R. pp. 1-32.) Petitioner received written notice of the entry of the Order on August 8, 2011 and filed and served a Notice of Appeal from Judge Cole's Order

Granting Defendant's Motion for Summary Judgment on August 18, 2011. (R. pp. 794-829.) On November 7, 2012, the Court of Appeals filed a *per curiam* decision affirming the Lower Court's grant of Respondent's motion for summary judgment. (App. pp. 954-963.) Counsel for Petitioner filed a Petition for Rehearing Pursuant to SCACR Rule 221 on November 19, 2012. (App. pp. 964-972.) The Court of Appeals ruled on the Petition for Rehearing by denying the same on December 19, 2012. (App. pp. 972-973.) Petitioner then filed a Writ of Certiorari with this Court on January 13, 2013. The amount involved on appeal is estimated to be $700,000.

III. STATEMENT OF FACTS

Petitioner was a tenured Associate Professor in the Petrie School of Music at Converse College. (R. p. 135.) In May of 2009, Petitioner was told by the College's President, Betsy Fleming, that because the piano pedagogy major was being eliminated, Petitioner was being terminated as President Fleming felt Petitioner was "tied" to the piano pedagogy major. (R. p. 310.) Respondent's Faculty Handbook "is a guideline of employment for the Faculty" (R. p. 385) and the Lower Court found that the Faculty Handbook constituted Petitioner's employment contract (R. p. 17).

The Faculty Handbook contains the policies regarding tenure and the termination of tenured employment, and states in pertinent part, "In order to preserve institutional integrity, the employment of a faculty member on tenure . . . may be terminated at any time for the following reasons: financial exigency, curricular exigency (which includes such reorganization of the academic structure as may eliminate the department or discipline of the affected faculty member), medical circumstances or cause." (R. pp. 7, 447.) Respondent has denied it suffered from a "financial exigency." (R. p. 147, 369.)

Respondent has also stipulated Petitioner was a qualified member of the faculty and the action taken against her was not a "for-cause" termination. (R. p. 172.)

The letter sent to Petitioner from Respondent's Director of Human Resources does not mention a curricular exigency or the elimination of a department or discipline, but instead states that Petitioner is being "phased out" because Respondent "has suffered financially as a result of the recent turn down in the economy." (R. p. 561.) However, approximately one month later, Respondent alleged for the first time that there was a "curricular exigency" at Converse and/or that Petitioner's department or discipline had been eliminated. (R. pp. 552-57.) Though the term "for cause" is defined and there are preliminary procedures set forth in the Faculty Handbook relating to a dismissal for cause, there are no definitions of the terms "financial exigency" or "curricular exigency." (R. p. 447.) The terms "department" and "discipline" are also not defined in the Faculty Handbook though Respondent evidently admits Piano Pedagogy is not a "department." (R. pp. 141, 148-149.)

The Faculty Handbook states it is the Board, not the President who "may remove any faculty member at any time by majority vote." (R. p. 448.) Additionally, Respondent's Bylaws state in Section 9, "The Academic Affairs Committee *shall* advise the President and Board on matters affecting the academic programs of the College including tenure of employment of faculty." (R. p. 530.) (emphasis added) There is no evidence in the record that Respondent's Academic Affairs Committee ever recommended to the Board that Petitioner's tenure or employment end as required in the Faculty Handbook. (R. p. 448.) President Fleming admitted in her deposition there was no mandate from the Board to make any curricular changes; rather, the Board's mandate

to President Fleming was to "develop programmatic changes in the *long term*." (R. pp. 306-07.) (emphasis added) Similarly, the Chairman of Respondent's Board stated, "[d]uring a November 2008 meeting of the Executive Committee of the Board, I, along with my fellow members of the Executive Committee, instructed President Fleming to create proposals for organizational and operational changes at Converse to ensure the long-term viability and success of the College." (R. p. 62.) President Fleming stated that the Executive Committee of Respondent's Board believed the College had entered into a curricular exigency in November of 2008, but also admitted that there are no Executive Committee Board minutes to support that fact. (R. pp. 307, 321.) Respondent's Board first began discussing changes regarding the School's academic structure in November of 2007, but still had not made any recommendations regarding the revised music curriculum as of January 2010. (R. pp. 336, 345-46.) The Board's Minutes from the meeting directly prior to the time Petitioner was terminated do not reflect any discussion about reducing or eliminating tenured professors, or of tenured faculty being "phased out." (R. pp. 532-51.)

Only ten to twenty percent (10-20%) of the classes Petitioner taught concerned piano pedagogy, which are courses regarding how to teach piano. (R. p. 293.) The Dean of the Petrie School of Music testified all piano performance majors at Converse are required to take piano pedagogy classes. (R. p. 201.) Even though 80% of the courses taught by Petitioner at Converse were not piano pedagogy courses, President Fleming testified in her deposition, "[i]t was my belief that the other areas in which [Petitioner] taught are areas that could be taught by other faculty members." (R. p. 345.)

Respondent's Faculty Handbook states, "a term contract will not replace or have priority over the tenure system." (R. p. 434.) The next sentence in this same paragraph then states, "The term contract will be issued by the administration upon approval of the Board of Trustees on the following conditions...as long as a tenured position is not available for a tenurable person qualified for that position." (Id.) The only deference given to Petitioner's tenured status by President Fleming was an offer to "phase out" her employment, which Petitioner rejected. (R. pp. 271-74, 345.) Several months after Petitioner's termination, Respondent hired a non-tenured professor named Erica Broadnax Pauley to teach some of the same piano pedagogy courses Petitioner had taught. (R. pp. 791-93.)

The Dean of the Petrie School of Music, Miles Hoffman, testified Petitioner's "discipline" is music, not Piano Pedagogy. (R. p. 201.) Petitioner taught at least twenty-seven (27) different music courses at Converse's Petrie School of Music from 1997 until September 1, 2010. (R. pp. 136-138.) According to Dean Hoffman, Petitioner has experience teaching, and can still teach, Applied Piano, Music Theory, and Musicology, which courses are still being taught at Converse. (R. pp. 200-201.) Piano Pedagogy was not a "discipline" which was eliminated; the Piano Pedagogy *major* was eliminated, but Piano Pedagogy courses continued to be taught at Converse. (R. pp. 201, 205.)

IV. LEGAL ARGUMENT

A scintilla of evidence exists to support Petitioner's claim that a curricular exigency never existed and, therefore, the Court of Appeals erred in determining that the contract at issue was complete and only capable of one interpretation.

In Devore v. Piedmont Insurance Co., 144 S.C. 417, 420, 142 S.E. 593, 594 (1928), this Court held that "While it is unquestionably true that the construction of a

written instrument, ordinarily, is a question to be determined by the Judge, and not by the jury, nevertheless that rule is not applicable when the writing is incomplete, or its provisions susceptible of more than one inference. In such cases parole testimony is admissible, and the inference must be drawn by the jury..." Here, more than one inference can be drawn from the term "curricular exigency" and it is unclear whether a curricular exigency existed because the term in not fully defined and the contract is incomplete as it lacks a definition of curricular exigency, department, and discipline.

In holding that Respondent's decision to phase out eight curricular programs constituted a curricular exigency, the Court of Appeals erred and violated established precedence from this Court. The terms used in the handbook are "discipline" and "department," not "programs." The term "department" is not defined in the Faculty Handbook though Respondent evidently admits Piano Pedagogy is not a "department." (R. pp. 148-149.) The term "discipline" is also not defined in the Faculty Handbook. (R. p. 141.) One month after President Fleming's May 1, 2009 termination letter was sent to Petitioner, Respondent alleged for the first time that Petitioner's department or discipline had been eliminated. (R. pp. 552-557.) The Dean of the Petrie School of Music testified Petitioner's "discipline" is music, not Piano Pedagogy, thus, creating a scintilla of evidence that the discontinuance of the Piano Pedagogy major did not meet the definition of "curricular exigency." (R. p. 201.)

Further, whether Respondent Board's mandate to "develop programmatic changes in the long term" was a "curricular exigency" is a question of fact to be decided by the jury as the term "curricular exigency" is not fully defined in the Faculty Handbook or Respondent's Bylaws. President Fleming admitted in her deposition there was no

mandate from the Board to make any curricular changes, but instead to "develop programmatic changes in the *long term.*" (R. pp. 306-07.) (emphasis added)

The term "exigency" is defined in Webster's Dictionary as an urgent situation "needing immediate attention or remedy, urgent, excessively demanding." (Webster's II New Riverside University Dictionary, 1984.) An Affidavit submitted by the Chairman of the Board, William Webster, and attached to Respondent's Motion for Summary Judgment, states, "[d]uring a November 2008 meeting of the Executive Committee of the Board, I, along with my fellow members of the Executive Committee, instructed President Fleming to create proposals for organizational and operational changes at Converse to ensure the long-term viability and success of the College." (R. p. 62.) President Fleming testified in her deposition that the Executive Committee of Respondent's Board believed the College had entered into a curricular exigency in November of 2008, but President Fleming also admitted in her deposition that there are no Executive Committee Board minutes to support that fact. (R. pp. 307, 321.)

While Respondent's Board first began discussing changes regarding the School's academic structure in November of 2007, they still had not made any recommendations regarding the revised music curriculum as of January 2010. (R. pp. 336, 345-46.) Additionally, the Dean of the School of Music testified piano pedagogy was not a discipline, and the piano pedagogy program was not eliminated; instead, a major was eliminated but piano pedagogy courses continued to be taught at Converse. (R. pp. 201, 205.)

The termination letter sent to Petitioner from Respondent's Director of Human Resources does not mention a curricular exigency or the elimination of a department or

discipline. Instead, the letter states that Petitioner is being "phased out" because Respondent "has suffered financially as a result of the recent turn down in the economy." (R. p. 561.) However, Respondent has always denied it suffered from a "financial exigency" or terminated Petitioner due to a financial exigency; Respondent instead takes the position that Petitioner was terminated because of *curricular* exigency. (R. p. 147, 369.) The fact that the termination letter never mentions curricular exigency is further evidence that a curricular exigency, as defined by the Faculty Handbook, never actually existed and, thus, Respondent breached its contract when it terminated Petitioner.

Whether a curricular exigency actually existed is a disputed question of fact which must be resolved by a jury, especially in light of the timing of the events leading up to Petitioner's termination and the ambiguities and lack of definitions in the contract. It is entirely reasonable that a jury could find a curricular exigency never existed, particularly in light of the well-known legal principle that ambiguities in a contract should be construed against the drafter (here, Respondent) of the contract. *See Chapman v. Metropolitan Life Ins. Co.*, 172 S.C. 250, 173 S.E. 801 (1934) (*citing Bergholm v. Peoria Life Ins. Co.*, 284 U.S. 489 (1932)).

The facts outlined herein demonstrate that a scintilla of evidence exists to support Petitioner's claim that Respondent did not experience a curricular exigency. *See Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment"). Therefore a jury should decide whether there was actually a

"curricular exigency" and the Lower Court and Court of Appeals erred in deciding the issue.

V. CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court reverse the Opinion of the Court of Appeals and remand her breach of contract cause of action to the Lower Court to be set for a jury trial.

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I, Nancy Bloodgood, Esquire, certify that on July 9, 2014, I served a copy of the **Petitioner's Brief** via First Class Mail by placing a copy of said documents in the United States mail with sufficient postage thereon to the following:

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