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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

HONORABLE BENJAMIN CULBERTSON, Circuit Court Judge

Case No. 2019-001749

Coleen Kennedy.....Appellant

v.

South Carolina Technical College System & Horry-Georgetown Technical College
.....Respondents

INITIAL BRIEF OF APPELLANT

Donald Gist, Esquire
Aaron Wallace, Esquire
Gist Law Firm, PA
4400 North Main Street
Columbia, SC 29203
(803) 771-8007
Attorneys for Appellant

Bob J. Conley
Emmanuel Ferguson
Cleveland & Conley, LLC
171 Church Street, Suite 310
Charleston, SC 29401
(803) 577 -9626
Notice to Attorneys for Respondents

TABLE OF CONTENTS

Table of Authorities.....2
Statement of Issues on Appeal2
Standard of Review3
Statement of the Case3
Arguments7
Conclusion13

TABLE OF AUTHORITIES

CASES

Rwe Nukem Corporation v. Ensr Corporation, 644 S.E.2d 730, 373 S.C. 190 (S.C. 2007)...3
Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).....3
Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988).....3
Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991).....3
Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct.App.2000)...3
Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (S.C., 2004)8
Crabtree v. Elizabeth Arden Sales Corp., 1305 N.Y. 48., 110 N.E.2d 551 (1953).....9
Stulsaft v. Mercer Tube & Mfg. Co., 288 N.Y. 255, 43 N.E. 2d 31 (1942).....9
Young v. Independent Pub. Co., 254 S.E.2d 681, 273 S.C. 107 (S.C., 1979).....9
Cape v. Greenville County School Dist., 618 S.E.2d 881, 365 S.C. 3 6 (S.C., 2005).....9
Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 634, 620 S.E.2d 65. 67 20010
Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 698 S.E.2d 773 (S.C., 2010).10

OTHER AUTHORITIES

S.C. Code Ann. Section 9-1-2210(H).....8

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THERE WAS A REQUIREMENT THAT MS. KENNEDY RESIGN HER EMPLOYMENT BECAUSE TERI PROHIBITED RESPONDENT'S ABILITY TO CONTRACT WITH MS. KENNEDY SEPARATE AND APART FROM THE STATUTE.
2. WHETHER THE CONTRACT IN THIS CASE WAS VIOLATED BY RESPONDENT.
3. WHETHER RESPONDENTS COULD CONTRACT WITH MS. KENNEDY FOR EMPLOYMENT BEYOND HER TERI PERIOD THUS DISPENSING WITH THE NEED FOR MS. KENNEDY TO REAPPLY FOR EMPLOYMENT.

STANDARD OF REVIEW

“The circuit court may properly grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Rwe Nukem Corporation v. Ensr Corporation*, 644 S.E.2d 730, 373 S.C. 190 (S.C. 2007) (quoting Rule 56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)). In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). If triable issues exist, those issues must go to the jury for consideration. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991); *Joubert v. South Carolina Dep’t of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct.App.2000).

STATEMENT OF THE CASE

Appellant began employment with Respondents on or about January 1, 2007. During her tenure while working at Respondents’ institution, Appellant completed her job duties and responsibilities in a way that met Respondents’ performance standards and employee policies. Appellant contends that at all times during the course of her employment with Respondents, Appellant performed her job admirably.

It was Respondents’ custom, practice and pattern that Appellant would enter into a continuing employment contract with Respondents for a nine (9) month academic year period and

would subsequently enter into a supplemental continuing employment contract with Respondents for the summer academic term.

On or about January 5, 2016, Appellant emailed Respondents' agent, Ann Daniels, concerning her desire to continue teaching full-time after the completion of her TERI. Respondents and their agents failed to respond to Appellant's request; Appellant contacted Respondent HGTC's President, Neyle Wilson, by letter on or about January 18, 2016, again to reaffirm and reiterate her desire and capacity to continue working for Respondents, as a full-time faculty member, in the nursing department upon the completion of the TERI program on December 31, 2016. (Kennedy Email Dated 1/05/16 and Email dated 1/18/16)

On or about January 20, 2016, Respondent HGTC, by and through its agent, Christy Cimineri and President Wilson, contacted Appellant. President Wilson's letter to Appellant solidified Appellant's value and performance while working at Respondents' institution – "You have been an asset to the College in the 9 years that you served while employed at HGTC!" (Wilson Letter Dated 1/20/16).

Appellant continued to work for Respondents as a Professor of Nursing and in 2016, as a result of Appellant's admirable and satisfactory work performance, Appellant was, again, offered employment with Respondents during 2016 summer – May 23, 2016 to August 12, 2016. On or about May, Appellant entered into a supplemental contract with Respondents that obligated and bound Respondents to effectuate the following: Appellant would be paid a base salary of \$17,950.12, non-work bonuses could be earned/given, and Appellant would receive sick leave or other applicable types of leave.

Additionally, in the 2016 summer employment contract, which failed to include any employment contract disclaimer, Respondents informed Appellant that they could terminate the contract “in the event of substandard performance of disciplinary action.” Appellant had not received a substandard performance nor has she received any disciplinary actions. Appellant fully met her contractual responsibilities.

Appellant continued working for Respondents and as a direct result of Appellant’s satisfactory work performance, on or about August 22, 2016, Appellant entered into another employment contract with Respondents for nine (9) months with a base salary of \$60,584.00. This employment contract, like the 2016 summer employment contract, failed to include any employment contract disclaimer. This contract, like the summer 2016 employment contract, did not include, expressly or implied, a disclaimer. (Appellant’s August 22, 2016 Contract).

Respondents’ 9-month employment contract with Appellant, (1) informed Appellant that she would be employed through the duration of the 2016-2017 academic year, (2) limited Appellant’s ability to work for or perform services for another agency or institution, (3) provided for possible non-work bonuses, (4) provided sick leave, and (5) provided other types of leave in accordance with State policies. Appellant also was led to rely upon Respondents’ prior contract renewals for good performance to believe that her employment contracts were continuous therefore including the 2017 and 2018 academic year. (Appellant’s August 22, 2016 Contract).

Appellant signed and returned Respondents’ offer of employment, which is part of Appellant’s employment contract with Respondents. Under contract, Appellant continued working for Respondents during the 2016-2017 academic year, without infraction or reprimand.

On or about October 25, 2016, Appellant was notified that Respondents had hired another applicant for the Professor of Nursing position, though Appellant had interviewed for that vacant position and was assured by Respondents' agents that she was the applicant that would be offered the position and that her full-time employee (FTE) position would not be replaced or substituted for the FTE position which Appellant worked as of August 22, 2016.

Since hiring of another applicant and termination of Appellant, on or about December 2016, Respondents breached their employment contract with Appellant, as Appellant was classified as a State Full-time Employee (FTE).

Appellant's employment with Respondents was based upon her job performance. Appellant's August 22, 2016 employment contract did not indicate that she had failed to perform her job duties in a competent manner. Respondents' actions have deprived Appellant of her employment with Respondents and also limited her ability to secure other employment, as Appellant has continued to abide by her August 22, 2016 employment contract with Respondents which limited her ability to seek another employment with a State institution though Respondents have breached their own employment contract.

Appellant has suffered great financial loss – her 2016-2017 salary, 2017 summer salary, and 2017-2018 salary. As it was Respondents' pattern and practice, over the last ten (10) years, to enter into continuing contracts with Appellant for the summer terms and subsequent academic years as a result of Appellant exceedingly meeting Respondents' standards. Appellant is informed and believes that Respondent, therefore, breached its contract with Appellant.

On February 25, 2019 the Respondent filed a Motion for Summary Judgment which was heard before the court on July 24, 2019. At the hearing Appellant voluntarily withdrew her breach of contract with fraudulent intent claim. As for her remaining claims, an order was issued on August 5, 2019 dismissing Appellant's case based on the following erroneous conclusions of law:

- The court concluded that TERI was incorporated into Appellant's contractual terms as a matter of statutory law and that, therefore, she was required to resign her employment no later than December 31, 2016 regardless of the terms and conditions of her contract.
- The court concluded that the Respondent did not breach any agreement that Respondent had with Appellant stating that there was no evidence that Respondent terminated Appellant's employment.
- The court concluded that there is no evidence that Appellant was promised employment after her December 31, 2016 termination from employment and that Appellant understood that she would need to reapply for any open nursing instructor positions then available.

As is fully stated below, the court erred in granting Respondent's Summary Judgment Motion and the Decision of the lower court should be reversed.

LEGAL ARGUMENTS

- 1. There was no requirement that Ms. Kennedy resign her employment because TERI did not prohibit Respondent's ability to contract with Ms. Kennedy separate and apart from the statute**

Appellant being issued a contract of employment did not violate the currently defunct TERI Statute located at S.C. Code Ann. Section 9-1-2210(H). Although the statute indicates that "A program participant shall terminate employment no later than the day before the fifth annual anniversary of the date the member commenced participating in the program", there is no violation

of the statute by allowing Ms. Kennedy to finish the term of her contract. Respondents had every ability to terminate her employment under TERI, but retain her employment simply pursuant to the balance of her contract as a contractual employee rather than a TERI employee.

In *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (S.C., 2004) *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (S.C., 2004), the court dealt with a mirrored image of the instant case. Specifically, in that case MUSC brought claims against Dr. Arnaud, an employee, for failing to resign his employment as agreed upon in a contract. Dr. Arnaud had entered into the TERI program following an agreement that he would resign his employment after a set period of time. Dr. Arnaud was of the conclusion that entering into the TERI program would supersede his previous contractual promise to resign and his contract in the entirety. The court held that participation in the TERI program did not grant Dr. Arnaud the right to disavow his previous standing contract with MUSC.

This case, deals with similar issues although it is now a state entity attempting to skirt its contractual obligation to Ms. Kennedy by attempting to disavow its contractual commitment to her. Like Dr. Arnaud, the Respondents cannot hide behind the TERI statute and, instead, must abide by the terms of the contract which it entered into with Ms. Kennedy. The Respondents' Motion for Summary Judgment must, therefore, be denied and the ruling of the trial court must be reversed and this case remanded for trial.

2. The contract in this case was clearly violated

The contract in this case clearly indicates both the term of Appellant's employment, the scope of the contract, and the expectations of both parties. It is by all technical accounts a written

employment contract for the terms of the 2016-2017 School Year which was drafted and issued to Appellant by Respondent for her signature (which she signed).

Dr. Marilyn Fore, Senior Vice President, had all authority to issue the contract, both actual and apparent. Both parties mutually assented to be bound by the contract and adequate consideration was given to include Ms. Kennedy being given a salary as specified in the specific terms of the contract. There is no contract disclaimer on the document. The document is a classic employment contract.

Without regard to all statutes, policies, and other written documentation, the Respondent cannot dispute that Ms. Kennedy was offered a thirty-nine week employment contract to act as a faculty member and teacher for the Horry George Town Technical College. Any ambiguities must be construed against the drafter (ie. Respondent) as opposed to Appellant.

The elements required to satisfy the statute of frauds in order to have a valid employment contract are a.) compensation; b) determinable duration (an initial starting date and date of termination); c) reciprocal rights, duties, and obligations; and d.) a written instrument if contract not to be performed within one year. *Crabtree v. Elizabeth Arden Sales Corp.*, 1305 N.Y. 48., 110 N.E.2d 551 (1953); *Stulsaft v. Mercer Tube & Mfg. Co.*, 288 N.Y. 255, 43 N.E. 2d 31 (1942). *Young v. Independent Pub. Co.*, 254 S.E.2d 681, 273 S.C. 107 (S.C., 1979). An employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause. *Cape v. Greenville County School Dist.*, 618 S.E.2d 881, 365 S.C. 316 (S.C., 2005). “[I]n order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement” *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (200 Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 698 S.E.2d 773 (S.C., 2010).

In her deposition Ms. Kennedy states:

Q: And what was your position at Horry-Georgetown Technical College in January of 2016?

A: In January of 2016 I was a professor of nursing.

(Pl. Dep. 15: 16-20).

Ms. Kennedy: In August I was offered a contract by Horry-Georgetown Tech, a nine-month contract. I knew my TERI was ending, but I was offered a contract in August, a nine-month contract. And so when I received that contract, it was for nine months. It ran through - - through May 2017.

(Pl. Dep. 19: 14-20).

Q: Okay. So in August of 2016 were you planning on leaving your position in December of 2016?

A: No, because the contract I had signed was through May of 2017.

Q: So how could you keep your position and remain on TERI?

A: Well the TERI - - I would end the TERI in December, and I would work as a professor of nursing, just like I had through the five years through May of 2017.

(Pl. Dep. 20: 12-22).

There is no doubt that the term of the contract extended for a full nine months not concluding until May 2017. Ms. Kennedy was terminated unilaterally several months early in December 2016. The termination of Ms. Kennedy without just cause caused Ms. Kennedy damages. This was caused by Respondent's clear breach of Ms. Kennedy's contract of employment.

3. Since Respondents could contract with Ms. Kennedy for employment beyond her TERI period there was no need for her to reapply

Appellant being issued a contract of employment did not violate the currently defunct TERI Statute located at S.C. Code Ann. Section 9-a-2210(H). Although the statute indicates that “A program participant shall terminate employment no later than the day before the fifth annual anniversary of the date the member commenced participating in the program”, there is no violation of the statute by allowing Appellant to finish the terms of her contract. Respondent had every right to terminate her employment under TERI, but had every obligation to retain her employment pursuant to the balance of her contract as a contractual employee rather than a TERI employee.

In *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (S.C., 2004), the court dealt with a mirrored image of the instant case. Specifically, in that case MUSC brought claims against Dr. Arnaud, an employee, for failing to resign his employment as agreed upon in a contract. Dr. Arnaud had entered into the TERI program following an agreement that he would resign his employment after a set period of time. Dr. Arnaud was of the conclusion that entering into the TERI program would supersede his previous contractual promise to resign and his contract in the entirety. The court held that participation in the TERI program did not grant Dr. Arnaud the right to disavow his previous standing contract with MUSC.

This case deals with similar issues although it is now a state entity attempting to skirt its contractual obligations to Appellant by attempting to disavow its contractual commitments to her. Like Dr. Arnaud, the Defendant cannot hide behind the TERI statute and, instead, must abide by the terms of the contract which it entered into with Ms. Kennedy.

Moreover, at the hearing in this matter, the Court disregarded issues which go to the weight of the evidence in this case.

Court: Then why did she reapply and go through the interview process if she's relying on this August 22nd letter?

Mr. Wallace: Again, I think that goes to the weight of the evidence, but you know, you have testimony saying one thing and the email saying another. But this was after she came back and signed the contract. There was one point in time, I would say a period prior to having the agreement, where some of the discussions went back and forth about her actually when she was going to be having—I think some of this conversation went forward before August of 2016 about what exactly her having to reapply or having not reapply was in January of '16, prior to the August of 2016 signing of the actual contract.

Now, in between August of 2016 and December, I know prior to the expiration of that December of 2016 TERA, she was at that point being exerted pressure on her saying, look, you are going to have to do this, you are going to have to do that. She's an employee at this point. She's working pursuant to the contract, but if they are telling her they are going to put her out the door, right, she's trying to keep her job. She's also telling them I still want to keep my position. I think that will go to the weight of the evidence as compared to - - that is something for the jury to look at, okay, did you have this belief, did you not have this belief. I have deposition testimony saying you had it. I have a contract saying this is what it was. The jury can look and say ma'am, I don't think that is what—we don't believe you. A jury can say, ma'am, based on what you said and the contract, we believe you had a lot of undue influence put on you. You have your bosses coming in telling you one thing, you know. I think that you were under a lot of pressure and may have

said things that may have hurt you, but I think it goes to the weight of the evidence. That is really the underlying basis of the case. I mean, those are the issues with the contract. (Transcript 13-14).


Thus the trial court completely disregarded clear jury issues with respect to this case as it relates to the contractual violations of the Respondents.

The Respondent's motion should be denied, the trial court's decision reversed, and this case remanded for trial.

CONCLUSION

For the reasons stated above the Court should reverse the decision of the lower court dismissing Appellant's case on Summary Judgment. Appellant respectfully requests that this ruling be overturned and this case be restored to the active case roster.

Respectfully,



Donald Gist, Esquire
Aaron Wallace, Esquire
Gist Law Firm, PA
4400 North Main Street
Columbia, SC 29203
(803) 771-8007
Attorneys for Appellant

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, I have served the Appellant's Initial Brief and Designation of Matter on Respondent's Attorney at their last known address at:

Bob J. Conley
Emmanuel Furgeson
Cleveland & Conley, LLC
171 Church Street, Suite 310
Charleston, SC 29401
(803) 577 -9626


Aaron Wallace, Esquire
Gist Law Firm, PA
4400 North Main Street
Columbia, SC 29203
(803) 771-8007

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