

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.

PETITION FOR WRIT OF CERTIORARI

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
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Charleston, SC 29492
(843) 972-0313
Attorneys for Petitioner

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JAN 22 2013
SC Court of Appeals

I. CERTIFICATE OF COUNSEL PURSUANT TO SCACR 242(D)(1)

The undersigned counsel certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals. Specifically, Counsel for Petitioner filed a Petition for Rehearing Pursuant to SCACR Rule 221 on November 19, 2012. The Court of Appeals ruled on the Petition for Rehearing by denying the same on December 19, 2012.

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II. QUESTIONS PRESENTED FOR REVIEW

- 1. Can an attempt to do an act be ratified and did the Court of Appeals err in failing to consider the effect of Respondent's improper ratification?**
- 2. 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?**

III. STATEMENT OF THE CASE

Petitioner was a tenured Associate Professor at 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 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 Circuit Court found that the Faculty Handbook constituted Petitioner's employment contract. (R. p. 17.) The Faculty Handbook "is a guideline of employment for the Faculty." (R. p. 385.) 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.)

One month after President Fleming sent Petitioner the May 1, 2009 letter, 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 is no definition of the terms “financial exigency,” “curricular exigency,” “department,” or “discipline.” (R. pp. 141, 148, 149, 447.) However, the Faculty Handbook does state it is the Board, not the President who “may remove any faculty member at any time by majority vote.” (R. p. 448.) Additionally, the College’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.) Further, Respondent’s Faculty Handbook states, “a term contract will not replace or have priority over the tenure system.” (R. p. 434.)

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.) The only deference given to Petitioner’s tenured status by President Fleming was an offer to “phase out” her employment, which Petitioner rejected. (Id.; R. pp. 271-74.)

IV. ARGUMENT

1. **Whether an attempt to do an act can be ratified is a novel question of law for this Court and whether Respondent’s ratification was proper is a question for the jury to consider.**

Per Respondent’s Faculty Handbook, the termination of a tenured professor requires a majority vote of the Board of Trustees. (R. pp. 447-448.) On April 24, 2009, a majority of Respondent’s Board of Trustees did not vote to revoke Petitioner’s tenure or end her employment. (R. pp. 532-551.) However, one week after the Board met in April and took no action regarding Petitioner, President Fleming sent Petitioner a letter which provided in part:

This Letter Agreement contains the terms of your employment relationship with Converse College. ...The College and you, Melanie Taylor, release each other from any claims they may have against each other up through the date that you sign this Letter Agreement. *Upon acceptance of this agreement, you will no longer be tenured.* (R. pp. 150-151, 558.) (emphasis added).

President Fleming’s letter was an attempt to terminate Petitioner and revoke her tenure. The term “curricular exigency” does not appear in Respondent’s Board minutes until one month after President Fleming attempted to terminate Petitioner. (R. pp. 139-41.) Further, the Board did not discuss Petitioner’s employment or possible termination until one month after President Fleming attempted to terminate Petitioner. Though President Fleming admitted she had no authority to amend Petitioner’s contract, the May

1, 2009 letter is evidence she certainly intended to do so prior to the time she notified the Academic Affairs Committee of the Board or the Board of her decision to phase out Petitioner's employment and revoke Petitioner's tenure. President Fleming testified that had Petitioner signed the May 1, 2009 letter, Petitioner would have lost her tenured status. (R. p. 327.) After the letter had been sent to Petitioner, Respondent's Board of Trustees met to "ratify" its President's attempt to terminate Petitioner without notice or an opportunity for Petitioner (or the Music Curriculum Committee or the Dean of the Petrie School of Music) to appear or be heard. (R. pp. 552-557.)

Whether an attempt to do an act can be lawfully ratified is a novel question of law. See Brazell Bros. Contractors v. Hill, 245 S.C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent.") (emphasis added). The contract states the Board, not the President, "may remove any faculty member at any time by majority vote." (R. p. 448), but whether the Board acted pursuant to the Faculty Handbook when it *ratified* Petitioner's termination is a material issue of fact for the jury to decide as it requires an interpretation of the terms of the Handbook. Additionally, whether the Board could technically ratify an attempt is a novel question of law for this Court to consider. The Lower Court erred in holding the Board's ratification was valid and in deciding this issue at the summary judgment stage of litigation and the Court of Appeals erred in affirming the Lower Court's decision. The South Carolina Supreme Court held in Barber v. Carolina Auto Sales, 236 S.C. 594, 115 S.E.2d 291 (1960), that "whether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is

usually a question of fact for the jury and not one of law for the court.” Whether the President’s act was authorized is an issue for the jury to decide as the contract is silent on that point. President Fleming testified because the Faculty Handbook is silent as to the meaning of these terms, she can do as she pleases. (R. pp. 328-29.)

If a jury found that President Fleming’s act was unauthorized, then the jury would also need to consider whether Respondent had the ability to ratify her actions and whether the ratification was proper, especially in light of the fact that there was no notice or an opportunity for Petitioner (or the Music Curriculum Committee or the Dean of the Petrie School of Music) to appear or be heard.

- 2. At least 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 is not fully defined and the contract is incomplete as it lacks a definition of 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 precedent 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.)

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.) 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.) Further, 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 also admitted in

her deposition that there are no Executive Committee Board minutes to support that fact. (R. pp. 307, 321.) 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 continue to be taught at Converse. (R. pp. 201, 205.)

At least 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.




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I, Nancy Bloodgood, Esquire, certify that on January 17, 2013, I served a copy of the **Petition for Writ of Certiorari** via First Class Mail by placing a copy of said documents in the United States mail with sufficient postage thereon to the following:

Thomas H. Keim, Jr., Esquire
Lucas J. Asper, Esquire
Ford & Harrison LLP
100 Dunbar Street, Suite 300
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Attorneys for Respondent

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211



Nancy Bloodgood, Esquire

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Attorneys and Counselors at Law

NANCY BLOODGOOD
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REPLY TO CHARLESTON

PAUL J. FOSTER, JR., 1928-1999

January 17, 2013

The Honorable Daniel Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Melanie Taylor v. Converse College
Case Tracking No.: 2011197947
Case No.: 2009-CP-42-5567
Our File No.: 8305.0000

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of Petitioner's Petition for Writ of Certiorari. Please file the original and return a clocked-in copy of the same to me. I have also enclosed the Proof of Service and \$100.00 filing fee in connection with the above-referenced matter.

Additionally, pursuant to SCACR 242(e), I have enclosed two copies of the Appendix for the above-referenced matter, one unbound and one bound.

I am providing opposing counsel and the Clerk of the Court of Appeals with a copy of this letter, a copy of the Petition for Writ of Certiorari and a copy of the Proof of Service. It is my understanding that SCACR 242(e) does not require that a copy of the Appendix be served on the Respondent and, therefore, I have not sent a copy of the Appendix to Counsel for the Respondent. If you have any questions or require anything else at this time, please let me know.

Sincerely,

Nancy Bloodgood

NB/alk

Enclosures

cc: Thomas H. Keim, Jr., Esquire, Ford & Harrison LLP
Melanie Taylor
Clerk, South Carolina Court of Appeals

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SC Court of Appeals

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