

Appeal No. 09-102775-A

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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ANDREA S. NORRIS, PH.D.

Plaintiff-Appellant

v.

UNIVERSITY OF KANSAS  
AND  
DAVID SHULENBURGER

Defendants-Appellees

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BRIEF OF APPELLEES

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APPEAL FROM THE DISTRICT COURT OF  
DOUGLAS COUNTY, KANSAS  
THE HONORABLE SALLY K. POKORNY  
DISTRICT COURT CASE NO. 2006 CV 68

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ORAL ARGUMENT REQUESTED

FILED

NOV 16 2009

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## I. NATURE OF THE CASE

This is an appeal from the District Court's grant of summary judgment to the defendants, the University of Kansas and Provost David Shulenburg, on plaintiff Andrea Norris' claim for tortious interference with an alleged prospective business expectancy arising from her dismissal from her at-will, at the pleasure of appointment as Director of the Spencer Museum of Art at the University of Kansas.

Plaintiff Andrea Norris, Ph.D., was the Director of the Spencer Museum of Art at the University of Kansas. Dr. Norris' continued service in that position was at the pleasure of Provost David Shulenburg to whom she reported as Director.

On March 2, 2004, Provost Shulenburg provided Dr. Norris with written notice that, effective immediately, she was relieved of her duties as Director and was placed on administrative leave with pay through June 30, 2004, when her appointment with the University of Kansas would end.

Dr. Norris sued the University of Kansas and Provost Shulenburg alleging three claims: 1) tortious interference with a prospective contractual or business relationship; 2) breach of implied contract; and 3) breach of good faith and fair dealing. (R. Vol. I, pp. 8-14) In response to the Defendants' Motion to Dismiss, the District Court dismissed Counts two and three of plaintiff's petition, the contract claims, as untimely based on the thirty-day statute of limitations period under the Kansas Judicial Review Act. (R. Vol. I, pp. 95-103).

The plaintiff's remaining tortious interference claim was litigated, and following the close of discovery, Defendants moved for summary judgment. (R. Vol. II, pp. 191-254; Vol. V, pp. 416-595). On May 29, 2009, the District Court granted Defendants'

Motion for Summary Judgment holding that the tort of intentional interference with a prospective contractual relation as defined in the Restatement of Torts Section 766B requires evidence that “a third person [has] prevent[ed] the prospective relationship of the two parties from continuing.” (R. Vol. VI, pp. 652). The District Court ruled that Dr. Norris could not show interference by a third party because neither the University nor its Provost David Shulenburger were third parties to the alleged prospective employment relation between Dr. Norris and the University. (R. Vol. VI, pp. 649-659).

Dr. Norris filed a timely Notice of Appeal on June 26, 2009.

## II. ISSUE ON APPEAL

1. The District Court did not err in granting summary judgment to the defendants on Dr. Norris' tortious interference with prospective contract or business relation claim because: 1) at-will employment is not sufficiently certain to establish an expectancy of continued employment; 2) an employer and the employer's supervisor cannot interfere with the employer's own employment relationship with the employee, 3) a supervisor's employment decision made in the course and scope of authority while acting for the employer does not constitute intentional misconduct; and 4) defendants are immune from suit based on the discretionary function immunity.

### III. STATEMENT OF FACTS

#### A. The Parties.

Defendant the University of Kansas is a State institution of higher education governed by the Kansas Board of Regents. (R. Vol. I, pp. 8 @ Pet. ¶ 2). The Spencer Museum of Art, located on the University's Lawrence campus, is a unit within the University, and through its staff and collection of works, supports and contributes to the academic research and teaching at the University.

Defendant David Shulenburg was the Provost and Executive Vice Chancellor of the University of Kansas from 1996 through June 2006. (R. Vol. I, pp. 8 @ Pet. ¶ 3). As Provost and Executive Vice Chancellor, Dr. Shulenburg was the chief academic and chief operating officer for the University of Kansas, Lawrence campus. (R. Vol I, pp. 8 @ Pet. ¶ 3).

Plaintiff Andrea Norris, Ph.D., was hired by the University of Kansas in February 1988 as the Director of the Spencer Museum of Art. (R. Vol. I, pp. 9 @ Pet. ¶ 4). Dr. Norris served in that capacity until March 2, 2004, when she was relieved of her duties and placed on administrative leave with pay until the end of her appointment on June 30, 2004. (R. Vol. I, pp. 32).

#### B. Dr. Norris' at the pleasure of Appointment as Director.

Dr. Norris's appointment as Director of the Spencer Museum of Art was an at-will, at the pleasure of appointment. (R. Vol. I, pp. 19 @ Answer ¶ 9). Each of the "Notice of Salary" letters provided to Dr. Norris and signed by her in July 2000, July 2001, July 2002, and August 2003 stated that her "official university job title code is Director Major Division/School." (R. Vol. I, pp. 25-28; R. Vol. II, pp. 211-214). Each of

the “Notice of Salary” letters also advised Dr. Norris that her administrative appointment as Director was “at the pleasure of the administrator to whom you report directly (Chairperson, Dean, Director, University Director, Vice Chancellor, Vice Provost, Provost, Executive Vice Chancellor, or Chancellor).” (R. Vol. I, pp. 25-28; R. Vol. II, pp. 211-214).

As Director of the Spencer Museum of Art, Dr. Norris reported directly to Provost Shulenburg, and her continued service as Director was at his pleasure. (R. Vol. II, pp. 193; R. Vol. V, pp. 418-419; R. Vol. III, pp. 306 @ Norris Dep. 16:25-17:4). As Director of the Spencer Museum of Art, Dr. Norris was within the unclassified professional staff class of University employees. (R. Vol. V., pp. 429).

The “Notice of Salary” letters provided to Dr. Norris for her appointment as Director of the Spencer Museum of Art also contained the statement:

Your appointment is subject to all applicable laws, regulations, policies, minutes, and resolutions of the State of Kansas, the Board of Regents, and the University of Kansas.

(R. Vol. I, pp. 25-28; R. Vol. II, pp. 211-214).

### **C. University and Regents Policy**

At-will, at the pleasure of appointments are recognized and authorized in both Regents and University policy. Kansas Board of Regents Policy Provides:

#### **c. Faculty and Staff**

(1) Appointments to both unclassified and classified positions are approved by the chief executive officer or the chief executive officer’s designee.

(2) Provosts, Vice Presidents, or Vice Chancellors, and Deans shall serve at the pleasure of the chief executive officer. Other university administrative staff positions may be designated as positions that serve at the pleasure of the chief executive officer: provided, however, that such

designation is stated in the administrator's written annual notice of appointment. . . .

(emphasis added) (R. Vol. V, pp. 434 and 491).

University policy likewise speaks to at-will, at the pleasure of appointments of individuals in the University's Handbook for Faculty and Other Unclassified Staff,

Section C.1, which states:

State law places the responsibility for the administration of the University in the Chancellor, who is the chief executive officer and is enjoined to act in accordance with the policies established by the Board of Regents. Thus, chairpersons, deans, vice chancellors, the Provost, and other administrative officers are accountable to the Chancellor, at whose pleasure they serve. In turn, the Chancellor has designated the Provost as the principal administrative and academic officer of the Lawrence campus. . . . The foregoing relationships must guide the selection and conditions of service of administrative officers within the University. . . .

(emphasis added) (R. Vol. V, pp. 567 and 432-433).

Also recognizing that appointments may be conditioned on limited terms such as at-will, at the pleasure of service, the University's Handbook for Faculty and Other Unclassified Staff, Section C.4.g "Reappointment" states:

Unless a more limited term of appointment has been stated in writing or timely notice of non-reappointment has been given, appointments to unclassified professional staff positions will be renewed at the beginning of the fiscal year.

(emphasis added) (R. Vol. V, pp. 568). The University's use of the phrase "unless a more limited term of appointment has been stated in writing" recognizes and is consistent with the Regents requirement that an employee who serves at the pleasure of must be given written notice of that condition of employment in the annual salary notice. (R. Vol. V, pp. 430-433, 427-430).

For unclassified professional staff whose appointments are not at-will, at the pleasure of appointments, University policy establishes deadlines by which an employee must be provided notice of non-reappointment under the University's Handbook for Faculty and Other Unclassified Staff, Section C.4.h, "Notice of Non-reappointment," which states:

Notice of non-reappointment is to be given as early as possible. The first three (3) years of service are considered a period during which notice must be given no later than May 17<sup>th</sup> for non-reappointment the following fiscal year or no later than 30 days prior to the end of the current appointment if appointment ends other than the last day of the fiscal year. After completion of the third full fiscal year, the individual must be provided notice no later than January 17<sup>th</sup> if he/she will not be reappointed the following fiscal year or no later than 150 days prior to the end of the current appointment if appointment ends other than the last day of the fiscal year.

(R. Vol. V., pp. 568).

However, the "Notice of Non-reappointment" provisions contained in the Handbook for Faculty and Other Unclassified Professional Staff, Section C.4.h., do not apply to those unclassified professional staff members whose appointments are at the pleasure of the administrator to whom they report. (R. Vol. V, pp. 436-439, 444).

#### **D. Termination of Dr. Norris' at the pleasure of Appointment.**

As Director of the Spencer Museum of Art, a major division within the University, Dr. Norris underwent regular five-year reviews of her leadership of the Museum. (R. Vol. I, pp. 34-35; R. Vol. V, pp. 573-595). In June 2003, Dr. Norris was provided with the results of the most-recently completed five-year review, which was unsuccessful. (R. Vol. III, pp. 268; R. Vol. V, pp. 573-595).

Dr. Norris did not take the news of the unsuccessful five-year review well alleging to Provost Shulenburg that the report contained inaccuracies and falsehoods

and requesting that it be expunged. (R. Vol. III, pp. 268). In further response to the unsuccessful five-year review report, Dr. Norris provided Provost Shulenburg with a written Memorandum dated July 10, 2003 in which she stated that “[t]hrough various approaches we will address all categories and enhance the museum staff performance in the coming years.” (R. Vol. III, pp. 268; 343-345).

On January 20, 2004, Provost Shulenburg and Dr. Norris met to review her progress in addressing the issues raised in the unsuccessful five-year review. (R. Vol. II, pp. 218).

On February 4, 2004, Provost Shulenburg met with Dr. Norris and informed her that he no longer had faith in the future of the Spencer Museum under her leadership. (R. Vol. II, pp. 193). Provost Shulenburg asked Dr. Norris to step down as Director effective June 30, 2004 in lieu of his dismissing her effective June 30, 2004. (R. Vol. II, pp. 193; R. Vol. III, pp. 303-304). Provost Shulenburg advised Dr. Norris that if she resigned as Director, in lieu of dismissal, she would be appointed to a one-year, unclassified academic staff position as a senior curator at the Spencer Museum for the period July 1, 2004 through June 30, 2005 at the same salary she had earned as Director. (R. Vol. III, pp. 268, 220).

Provost Shulenburg explained his rationale for offering Dr. Norris the opportunity to resign in lieu of dismissal, and why in the February 4, 2004 meeting he did not ask her to decide which option she wanted to take as follows:

... I didn't feel it was fair to ask her on the spot to make that decision. So I asked her to come back later and tell me which alternative was the most acceptable, and she chose neither.

[As to why the option to resign was presented] Well, it would have let her announce her resignation herself instead of a dismissal. And it would

have let her continue her employment so she could find a job. This is the sort of thing I've done with deans and others when we got to the point that there wasn't a good way that they could continue the job in a productive way for the university.

(R. Vol. V., pp. 446).

Dr. Norris provided Provost Shulenburger with a written response dated February 16, 2004, to the February 4, 2004 meeting. (R. Vol. II, pp. 217-219). Dr. Norris' response asserted that the five-year review report was "defamatory and libelous" and contained "inaccuracies," and "egregious falsehoods" that must be expunged along with her being provided a formal apology from the five-year review panel committee members. (R. Vol. II, pp. 217). Dr. Norris advised Provost Shulenburger that legal action could be avoided if she were allowed one of two options: 1) to continue as Director of the Spencer Museum of Art until the next five-year review scheduled in 2008; or 2) to continue as director of the Spencer Museum of Art until June 30, 2005, when Dr. Norris would step down as Director and accept an appointment as a senior research curator through June 30, 2010 when she would retire from the University. (R. Vol. II, pp. 218).

On March 2, 2004, Provost Shulenburger met with Dr. Norris and provided her with written notice that, effective immediately, she was being relieved of her duties as Director of the Spencer Museum of Art and was being placed on administrative leave with pay through June 30, 2004 when her appointment as Director would end. (R. Vol. II, pp. 215-216). Provost Shulenburger's March 2, 2004 letter informing Dr. Norris of this personnel action stated:

I understand from your letter of February 16 that you disagree with this action. However, in view of the concerns raised in three consecutive five-year reviews of your performance as director, and because there is little to

suggest that the future will be substantively different, I have decided that termination of your appointment as director is the best course of action for the sake of the Museum and the University.

(R. Vol. II, pp. 215-216).

Dr. Norris submitted paperwork to the University retiring from her University of Kansas employment effective July 1, 2004. (R. Vol. II, pp. 195, 248-253).

**E. Dr. Norris' Lawsuit.**

On February 13, 2006, Dr. Norris filed her lawsuit against the University of Kansas and Provost Shulenburg. (R. Vol. I, pp. 8). Dr. Norris' lawsuit plead three claims: 1) tortious interference with a prospective contractual or business relationship; 2) breach of implied contract; and 3) breach of good faith and fair dealing.

In response to the Defendants' Motion to Dismiss, the District Court dismissed Counts two and three of plaintiff's petition, the contract claims, as untimely based on the thirty-day statute of limitations period under the Kansas Judicial Review Act. (R. Vol. I, pp. 95-103).

The plaintiff's remaining tortious interference claim was litigated, and following the close of discovery, Defendants moved for summary judgment. (R. Vol. II, pp. 191-254; Vol. V, pp. 416-595). On May 29, 2009, the District Court granted Defendants' Motion for Summary Judgment holding that the tort of intentional interference with a prospective contractual relation as defined in the Restatement of Torts Section 766B requires evidence that "a third person [has] prevent[ed] the prospective relationship of the two parties from continuing." (R. Vol. VI, pp. 652). The District Court ruled that Dr. Norris could not show interference by a third party because neither the University nor its

Provost David Shulenburger were third parties to the alleged prospective employment relation between Dr. Norris and the University. (R. Vol. VI, pp. 649-659).

Dr. Norris filed a timely Notice of Appeal on June 26, 2009.

#### IV. ARGUMENTS AND AUTHORITIES

- A. **The District Court did not err in granting summary judgment to the defendants on Dr. Norris' tortious interference with prospective contract or business relation claim because: 1) at-will employment is not sufficiently certain to establish an expectancy of continued employment; 2) an employer and the employer's supervisor cannot interfere with the employer's own employment relationship with the employee; 3) a supervisor's employment decision made in the course and scope of authority while acting for the employer does not constitute intentional misconduct; and 4) defendants are immune from suit based on the discretionary function immunity.**

##### 1. Introduction.

Dr. Norris' claim against the University and Provost Shulenburg alleged that they tortiously interfered with her alleged prospective contract or business relationship for continued employment with the University. In her opposition to summary judgment, Dr. Norris explained the theory of her claim as follows:

. . . [Dr. Norris] was a member of the unclassified professional staff at the University. . . . [Dr.] Norris was employed on and after January 17, 2004, the deadline for notifying unclassified professional staff that their contracts would NOT be renewed. Dr. Norris had every expectation, as of January 18, 2004, that she would remain employed for at least another academic year. The defendants knew plaintiff, as an unclassified employee, had the expectation she would be employed for at least one more year. It is this expectation with which Defendants maliciously and intentionally interfered.

(emphasis in original) (R. Vol. III, pp. 276-277).

Thus it is clear that Dr. Norris' tortious interference claim is premised on her assertion that it was the University of Kansas, her employer, and Provost Shulenburg, her employer's agent, who tortiously interfered with her alleged prospective contract or business expectancy for continued employment, not a third party outside the employment relationship.

In her opposition to summary judgment, Dr. Norris acknowledged that no Kansas case has ever held that an at-will employee like Dr. Norris could maintain a claim for tortious interference with a prospective contract or business expectancy against the employer and the employer's officers and agents. (R. Vol. III, pp. 279).

## **2. Standard of Review**

The Court of Appeals standard of review on appeal from summary judgment is a familiar one:

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, 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. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

Miller v. Westport Ins. Corp., 288 Kan. 27, Syl. ¶ 1, 200 P.3d 419 (2009).

Summary Judgment is warranted if the evidence, read in the light most favorable to the plaintiff, demonstrates that no genuine issue of material fact exists. K.S.A. 60-256(c). The party defending against the motion for summary judgment, however, must establish each element of his or her cause of action in order to avoid summary judgment. Dozier v. Dozier, 252 Kan. 1035, 1041, 850 P.2d 789 (1993). “The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.” Bethany Medical Center v. Knox, 10 Kan.App.2d 192, 193, 694 P.2d 1331 (1985) (citation omitted).

### **3. Elements of a Tortious Interference with Prospective Contract or Business Relation Claim.**

Kansas recognizes a cause of action for tortious interference with a prospective contract or business relationship. The requirements for this tort are:

(1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) reasonable certainty that, except for the conduct of the defendant, the plaintiff would have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct.

*Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 423, 77 P.3d 130 (2003). This tort is aimed at preserving future or potential contractual relations. *Turner v. Halliburton Co.*, 240 Kan. 1, 12, 722 P.2d 1106 (1986).

### **4. Dr. Norris, as a matter of law, cannot prove the existence of a prospective contract or business relationship because an at-will, at the pleasure of appointment, which can be terminated at any time, is not sufficiently certain to create an expectation of continued employment.**

The starting point for analysis of whether Dr. Norris can prove the existence of a prospective contract or business relationship, an essential element of her tortious interference claim, is to determine the nature of Dr. Norris' University employment. The "Notice of Salary" provided to and signed by Dr. Norris expressly defined the nature of the employment relationship.

As explained by Ola Faucher, Director of Human Resources and Equal Opportunity, the written "Notice of Salary" signed by Dr. Norris provided her with four key pieces of information defining her University appointment: 1) it told her what the annualized salary would be for her appointment; 2) it told her the University job title for the appointment; 3) it told her what the specific conditions or limitations were for her

appointment, i.e. “at the pleasure of,” “contingent on funding;” and 4) it told her the general conditions of the appointment, which were that it was subject to “all applicable laws, regulations, policies, minutes, and resolutions of the State of Kansas, the Board of Regents, and the University of Kansas.” (emphasis added) (R. Vol. V, pp. 469).

The uncontroverted material facts establish that Dr. Norris’ “Notice of Salary” explicitly advised her that her appointment as Director of the Spencer Museum of Art was “at the pleasure of the administrator to whom you report directly.” (R. Vol. I, pp. 25-28; R. Vol. II, pp. 211-214). Dr. Norris, however, ignored the explicit “at the pleasure of” statement contained in the “Notice of Salary” and argued to the District Court that the University’s “Notice of Non-Reappointment” provision contained in the Handbook for Faculty and Other Unclassified Staff applied to her. (R. Vol. III, pp. 283). Based on that provision, Dr. Norris argued that she was entitled to another year of employment because she did not receive notice of non-reappointment before January 17, 2004. (R. Vol. III, pp. 283).

Dr. Norris’ argument seeks to imply a different condition of employment contrary to the express “at the pleasure of” condition stated in the “Notice of Salary.” The general rule in Kansas, however, is that an express contract on a given subject matter excludes the possibility of an implied contract of a different or contradictory nature. Duvanel v. Sinclair Refining Co., 170 Kan. 483, Syl. ¶ 1, 227 P.2d 88 (1951).

Applying this general rule, the Court in George v. Kansas State Univ. rejected an argument similar to Dr. Norris’ in this case. In George, the Court rejected a claim that the defendant was impliedly obligated to renew the plaintiff’s teaching contract despite express wording in the contract that “it is understood that this appointment carries with it

no expectation of continuing employment and not consideration for tenure.” *Id.* 1991 WL 286915, 58 Fair Empl. Prac. Cas. (BNA) 142 (D.Kan. 1991).

Thus, the written “Notice of Salary” containing the express statement that Dr. Norris’ University appointment was “at the pleasure of the administrator” to whom she directly reported, as a matter of law, defined her appointment. The uncontroverted facts, therefore, established that Dr. Norris’ appointment with the University was at-will and could be terminated at any time and for any reason with or without notice.

By definition, an at-will employee has no express contract that specifies the duration of employment. *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 54, 551 P.2d 779 (1976). Instead, an at-will employment relationship is terminable by either party at any time and for any reason or for no reason at all. Under the American common law, an employer may discharge an at-will employee for good cause, for no cause, or even for a wrong cause, without incurring liability to the employee for wrongful discharge. See *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 134, 815 P.2d 72 (1991); *Morris v. Coleman Co.*, 241 Kan. 501, 508, 738 P.2d 841 (1987). Therefore, the at-will employee has no enforceable expectation of continued employment. *Morton Buildings Inc. v. Dept. of Human Resources*, 10 Kan.App.2d 197, 695 P.2d 450 (1985).

Because an at-will employee has no enforceable expectation of continued employment, it logically follows that the at-will employment relationship lacks the reasonable certainty required to establish a prospective contract or business relationship. Therefore, as a matter of law, Dr. Norris cannot prove that essential element of her tortious interference claim, and defendants are entitled to judgment for that reason.

**5. The District Court did not err in ruling that a claim for tortious interference with a prospective contract or business relationship requires evidence of interference by a third party.**

Dr. Norris claims that the University and Provost Shulenburger tortiously interfered with her alleged prospective contract of continued employment with the University. The tort of intentional interference with a prospective contract or business relation is defined in Restatement 2d of Torts, Section 766B, which provides:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

- (a) Inducing or otherwise causing a **third person** not to enter into or continue the prospective relation or
- (b) preventing **the other** from acquiring or continuing the prospective relation.

(emphasis added).

Dr. Norris argues that tortious interference with a prospective contract or business relation does not require third party interference. *See* Applt. Br. pp. 14. Instead, Dr. Norris asserts that a party and the party's agent to the prospective contract or business relation can be held liable for interfering with their own prospective contract or business relation. Dr. Norris' argument, however, ignores the phrases "third person" and "the other" in Section 766B. To conclude that Section 766B's inclusion of those phrases contemplates that a party to the prospective contract or business relation could interfere with his own relation with the plaintiff is an unreasonable construction of the plain language of Section 766B.

Dr. Norris' brief dedicates pages of discussion to the comments to Restatement 2d of Torts, Section 766B, along with a litany of citations to cases from other jurisdictions,

which Dr. Norris asserts establish that a third party's interference is not required to prove the tort of intentional interference with a prospective contract or business relation. *See* Applt. Br. pp. 14-28.

It is unnecessary to address each of these arguments and distinguish the litany of cases cited by Dr. Norris because they are inapposite since Kansas law answers the question whether a party and the party's agent can tortiously interfere with that party's own contractual relationship with a plaintiff. It is well settled law that neither the corporation nor a corporate employee acting in the course and scope of their employment can be held liable for taking action under a contract that it may lawfully take. *May v. Santa Fe Transportation Co.*, 189 Kan. 419, 370 P.2d 390 (1962)

In *May*, the at-will plaintiff employee claimed that he had been unlawfully discharged when the defendant corporation and its supervisors stated that he had voluntarily quit after he went home from work sick one day and was ill the following day before returning to work. *Id.* Plaintiff alleged that the defendants had conspired to terminate his employment in response to his complaints about work conditions. *Id.* The Supreme Court rejected plaintiff's claim holding:

There is no way that the corporate defendant can be guilty of inducing itself, or 'conspiring' with itself to take a course of action that it may lawfully take concerning its own contract. [Citation omitted.] . . . Where, as here, the individual defendants are named and described as officials of the corporate defendant in the petition, with no allegations that these defendants acted other than in their official capacities on behalf of the corporate defendant, and no allegation remotely indicates that they were pursuing their course as individuals or for individual advantage, the acts of the individual defendants must be regarded as the acts of the corporation, and when so acting they cannot conspire with the corporation of which they are a part. [Citation omitted.] . . . While it is true that an action will lie for unjustifiably inducing a breach of contract by a party thereto, the inducement must be wrongful and not privileged. Under circumstances similar to those alleged herein, even a breach of contract induced by one

who is in a confidential relationship with a party to the contract is privileged. Thus, a servant may induce his master to breach a contract with a third person. [Citation omitted.] . . . A fortiori, the officers and agents of a corporation, acting for and on behalf of their corporation would not be liable for inducing action by the corporation which it could lawfully undertake to do under a contract of employment. . . . Inasmuch as the petition has alleged no unlawful act of the corporate defendant terminating the appellant's employment with the corporation, and the conduct of the officials of the corporation was privileged, the trial court did not err in sustaining the demurrer to the appellant's petition.

*Id.* 189 Kan. 419, 424-425, 370 P.2d 390, 395 (emphasis added).

Although May was an unlawful discharge case, it does not negate the impact of the holding that an employer and the employer's agent, as a matter of legal principle, cannot be held liable to the plaintiff for taking action with respect to the contract to which they are a party and are legally entitled to act.

In Diedrich v. Yarnevich, 40 Kan.App.2d 801, 196 P.3d 411 (2008), this Court answered "no" to the specific question whether a party to a contract can tortiously interfere with its own contract. *Id.* 196 P.3d at 417. Diedrich was a lawyer and shareholder in his firm's professional corporation when he was dismissed after he altered time records to claim time for work he did not do. *Id.* 196 P.3d at 416. Diedrich sued his former partners alleging tortious interference with contract. *Id.* The Court affirmed summary judgment for the partners holding:

The logic employed by the district court on this point was impeccable. The district court found that corporate officers cannot interfere with an employment contract involving one of the corporation's employees. Thus, directors and officers of a corporation cannot be liable for tortious interference with an employment contract that they have legal authority to cancel.

*Id.* 196 P.3d at 417 (emphasis added). This Court went on to note that the district court's grant of summary judgment and its holding affirming that judgment was consistent with and built on prior caselaw, stating:

Nonetheless, it is clear that the district court in its ruling on this point stands on firm ground. In *Clevenger v. Catholic Social Service of Archdiocese of Kansas City*, 21 Kan.App.2d 521, 526-527, 901 P.2d 529 (1995), the court held an official of a corporation, acting for the corporation, and within the scope of his or her representation of the corporation, cannot be liable for tortious interference with a contract the corporation could legally act on. In *Clevenger*, this court determined that corporate directors could not be held liable for inducing the corporation to terminate employment that the corporation could legally terminate. This is reasonable. When conducting business on behalf of a corporation, the corporate officers and directors are acting on the corporation's behalf, and one cannot tortiously interfere with a contract unless he or she is a third party unrelated to the contract.

*Id.* 196 P.3d at 418 (citation omitted) (emphasis added).

In *Fletcher v. Wesley Medical Center*, a secretary at the medical center alleged she was fired by her supervisor in violation of the ADEA and also alleged tortious interference with her employment contract. In affirming summary judgment for the defendant medical center and supervisor, the court held:

It is well settled that an employer cannot be brought to task for interfering with its own relations vis-à-vis its employees [citations omitted], and it just does not make sense to view Mrs. Loosen's act in firing Miss Fletcher as other than the act of Wesley Medical Center, Inc., since the corporation authorized, or at the very least ratified, her behavior.

*Id.* 585 F.Supp. 1260, 1262 (D.Kan. 1984) (emphasis added).

In *Jones v. City of Topeka*, the fired city attorney sued the city and the mayor and chief administrative officer for various claims including tortious interference with contract. In affirming summary judgment for the defendants, the court held that:

[P]laintiff's tortious interference with contract claim cannot be maintained because plaintiff has failed to allege third party interference with his

employment contract with the City of Topeka. . . . In this case, it is undisputed that defendants Wright and Felker were acting within the scope of their respective employments . . . when they made the decisions . . . to terminate plaintiff's employment.

*Id.* 764 F.Supp. 1423, 1433 (D.Kan. 1991) (emphasis added).

If a corporation and the officers and directors acting on behalf of the corporation cannot tortiously interfere with the corporation's own existing contract, then why would a prospective contract or business relation be any different? There is no reasonable explanation for why the two circumstances should be treated differently. In fact, one would assume that public policy and law would extend greater protection to an existing contract than a prospective contract or business relation given the definiteness of that existing relationship when compared to the speculative nature of a prospective contract or business relation. The holdings in *Diedrich* and *Clevenger*, therefore, should be read to require evidence of third party interference in order to state a claim for tortious interference with a prospective contract or business relation.

Dr. Norris' acknowledges that she cannot show any third-party interference in the alleged prospective contract or business relation for continued employment with the University. Dr. Norris' tortious interference claim, therefore, fails as a matter of law, and the District Court did not err in granting summary judgment to the defendants.

**6. Intentional Misconduct required to prove Intentional Interference with a Prospective Contract or Business Relation cannot result from a Supervisor effecting a Personnel Decision in his Supervisory Capacity for the Employer.**

In Section C of the argument in her brief, Dr. Norris argues that the District Court erred in finding that there was no allegation that Defendant Shulenburger acted outside the scope of his employment when he dismissed Dr. Norris from employment. *See* Applt. Br. pp. 34. In rejecting plaintiff's argument that a supervisor can be liable for tortious

interference with the employer's contractual relation with the plaintiff employee, the District Court held:

In the few cases where the courts have allowed a plaintiff to proceed against the agent to the party, there has been some egregious action on the part of that agent. Reading the pleadings in a light most favorable to the plaintiff, there is no allegation that Provost Shulenburg was acting in his own interest or that he was motivated by improper personal reasons or that he was looking to profit himself. In fact, his actions were affirmed and ratified by the University.

(R. Vol. VI, pp. 657-658).

A claim for intentional interference with a prospective contract or business relationship requires proof of intentional misconduct by the alleged tortfeasor. *Burcham v. Unison Bancorp, Inc.* 276 Kan. at 423. Thus, the claim is predicated on malicious conduct by the defendant. *Turner v. Halliburton Co.*, 240 Kan. 1, 12, 722 P.2d 1106 (1986). Legal malice is defined in PIK 4<sup>th</sup> 103.05 as "a state of mind characterized by an intent to do a harmful act without a reasonable justification or excuse."

The Court in *Turner* observed that justification has not been susceptible to precise definition. *Turner*, 240 Kan. at 12-13. Instead, "it is employed to denote the presence of exceptional circumstances which show that no tort has been in fact committed and to connote lawful excuse which excludes actual or legal malice." *Id.* (citation omitted).

In determining whether a defendant's conduct is improper, the following factors should be considered:

- (1) the nature of the defendant's conduct;
- (2) the defendant's motive;
- (3) the interests of the other with which the defendant's conduct interferes;
- (4) the interests sought to be advanced by the defendant;
- (5) the social interests in protecting the freedom of action of the defendant and the contractual interests of the other;
- (6) the proximity or remoteness of the defendant's conduct to the interference; and
- (7) the relations of the parties.

*Reebles, Inc. v. Bank of America, N.A.*, 29 Kan.App.2d 205, 211, 25 P.3d 871 (2001).

The *Turner* Court recognized that the analysis of the factors regarding justification will depend on the circumstances in each particular case. *Turner*, 240 Kan.

at 13. The Court, however, as a general rule stated:

Generally, a circumstance is effective as a justification if the defendant acts in the exercise of a right equal or superior to that of the plaintiff, or in the pursuit of some lawful interest or purpose, but only if the right is as broad as the act and covers not only the motive and purpose but also the means used.

*Id.*

Applying the factors used to analyze justification, Dr. Norris' Petition stated that "Defendant Provost David Shulenburg . . . is and was at all times relevant to this action an agent of the University of Kansas . . . The Provost is the chief academic and chief operating officer of the University of Kansas, Lawrence campus." (R. Vol. I, pp. 8). By pleading that Provost Shulenburg's actions at all times relevant to the action were as an agent of the University of Kansas, Dr. Norris has conceded that his action in dismissing her from employment was done in the course and scope of his employment as Provost.

The written "Salary Notice" provided to and signed by Dr. Norris' stated that her appointment as Director of the Spencer Museum of Art was an "at the pleasure of appointment." Provost Shulenburg was the supervisor to whom she reported directly. Thus, it was at Provost Shulenburg's pleasure to determine whether Dr. Norris employment should be continued.

When the interests of the University's freedom as an employer to make appropriate personnel decisions regarding an at-will employee are balanced against Dr. Norris' at-will employment interest, the balance must tip heavily in favor of the

University. The same is true when balancing Dr. Shulenburger's interest in being able to carry out his duties as Provost and effectively administer the Lawrence campus and its personnel.

In this case, the only evidence that Dr. Norris has to support her claim that Provost Shulenbuger acted without justification is her disagreement with the decision to dismiss her and her criticism of the manner in which it was effected. It is well settled, however, that it is not the plaintiff's perception of her qualifications that matters in determining whether a plaintiff's rights have been violated, and such evidence is not sufficient to create a material factual dispute as to the employer's reasons for termination. *See Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10<sup>th</sup> Cir. 1996); *See also Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1329 (10<sup>th</sup> Cir. 1999) (Employee's own opinions about his qualifications do not give rise to a material factual dispute.).

When assessing the employer's motivation for an employment decision, the Court must examine the facts as they appeared to the person making the employment decision. *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1261 (10<sup>th</sup> Cir. 2001). In this case, the evidence before the Court outlines what information was available to Provost Shulenburger as a result of the 2003 five-year review of Dr. Norris' performance, and his reasons for taking the action he did in dismissing Dr. Norris from her employment. (R. Vol. V., pp. 573-595; R. Vol. II, pp. 215-216).

In a case like this, a court does not sit as a super personnel department second guessing the decision of the employer. *See Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10<sup>th</sup> Cir. 2003). Even if it could be concluded that others presented with the same facts

as Provost Shulenburger might have made a different decision than he did or handled the dismissal in a different manner, such a conclusion is not sufficient to create a material dispute of fact regarding evidence of intentional or malicious misconduct. The District Court, therefore, did not err in concluding that there was insufficient evidence to raise a genuine issue of material fact regarding whether Provost Shulenburger acted with the required wrongful intent to support a claim for tortious interference.

**7. Defendants are Immune from Liability based on the Discretionary Function Exception in K.S.A. 75-6104(e).**

Governmental immunity from tort liability in Kansas is governed by the KTCA, and liability is the rule, not the exception. *Dougan v. Rossville Drainage Dist.*, 243 Kan. 315, 318, 757 P.2d 272 (1988). In order to avoid tort liability, a qualified government entity must prove that one of the exceptions in 75-6104 applies. *Jackson v. U.S.D.* 259, 268 Kan. 319, 322, 995 P.2d 844 (2000). A governmental entity claiming immunity bears the burden of showing it fits within one of the exceptions to liability. *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 364, 819 P.2d 587 (1991).

The discretionary function exception under the Kansas Tort Claims Act provides immunity for:

(e) any claim based upon the exercise or performance or failure to perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved.

K.S.A. § 75-6104(e).

In *Hopkins v. State*, 237 Kan. 601, 610, 702 P.2d 311 (1985), the Supreme Court said:

Discretion implies the exercise of discriminating judgment within the bounds of reason. [Citation omitted.] It involves the choice of exercising of the will, of determination made between competing and sometimes conflicting considerations. Discretion imparts that a choice of action is determined, and that action should be taken with reason and good conscience in the interest of protecting the rights of all parties and serving the ends of justice.

In deciding whether the discretionary function exception applies, it is the nature and quality of the discretion exercised which should be the focus rather than the status of the employee exercising the judgment. *Robertson v. City of Topeka*, 231 Kan. 358, 361-62, 644 P.2d 458 (1982) “The test is whether the judgment of the governmental employee is of the nature and quality which the legislature intended to put beyond judicial review.” *Id.* “The more a judgment involves the making of policy the more it is of a ‘nature and quality’ to be recognized as inappropriate for judicial review.” *Kansas State Bank & Tr. Co.*, 249 Kan. at 365, 819 P.2d 587.

In this case, the University acting through the Provost, made the decision to terminate Dr. Norris’ employment with the University. As Provost Shulenburger stated in the March 2, 2004 letter to Dr. Norris, he determined that termination of Dr. Norris’ employment was in the best interest of the University. (R. Vol. II, pp. 215-216).

Provost Shulenburger’s decision is exactly the type of decision that is shielded by the discretionary function exception. “Decisions regarding employment and termination are inherently discretionary . . . Such sensitive decisions are precisely the types of administrative action the discretionary function exception seeks to shield from judicial second-guessing.” *Richman v. Straley*, 48 F.3d 1139, 1146-1147 (10<sup>th</sup> Cir. 1995).

In *Sydney v. U.S.*, terminated employees of a government contractor brought claims that they were unlawfully retaliated against for reporting security violations. In

affirming summary judgment for the defendants, the court explained its holding that the discretionary function exception barred their claims stating:

[E]mployment and termination decisions are, as a class, the kind of matters requiring consideration of a wide range of policy factors including ‘budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience and employer intuition. [citation omitted] . . . [U]ltimately deciding whether a particular individual with a certain skill-set and temperament will help an agency fulfill its mission all involve sensitive policy judgments, and an employer or supervisor must decide which blend of skills will best aid the agency in performing its legally-prescribed duties.

*Id.* 523 F.3d 1179, 1186 (10<sup>th</sup> Cir. 2008).

As the *Straley* and *Syndes* decisions make clear, there are many factors which go into making an employment decision. Such decisions necessarily involve consideration of a multitude of factors, and ultimately, a determination of what is in the best interest of the employer. Dr. Shulenburg’s testimony confirms that his decision to terminate Dr. Norris’ appointment involved such an exercise of discretion as he weighed what was in the best interest of the University’s Spencer Museum of Art. The *Straley* and *Syndes* decisions establish, as a matter of law, that this is exactly the type of decision the discretionary function exception was codified to protect from second-guessing in litigation. Defendants, therefore, are immune from suit based on the discretionary function exception in K.S.A. 75-6104(e).

## V. CONCLUSION

To summarize, at-will employment that can be terminated at any time with or without reason, cannot, as a matter of law, establish a reasonable expectation of continued employment sufficient to support a claim for tortious interference with a prospective contract or business relation.

Dr. Norris' tortious interference claim fails legally because the claim requires interference in the prospective contract or business relation by a third party. The University and Provost Shulenburg were not, as a matter of law, third parties to the prospective contract or employment relation between the University and Dr. Norris.

The undisputed facts also show that Provost Shulenburg, as an agent of the University, made the decision to dismiss Dr. Norris in the best interests of the University. This was a decision made in the course and scope of his employment as Provost. Plaintiff, therefore, failed to present a genuine issue of material fact sufficient to show that the decision to dismiss her was not legally justified.

Finally, employment decisions such as the dismissal decision in this case inherently involve the consideration of many factors and the exercise of discretion. For this reason, such decisions fall squarely within the discretionary function immunity under the Kansas Tort Claims Act, and defendants should be immune from liability based on that exception.

Based on the foregoing, the District Court did not err in granting summary judgment to the University and Provost Shulenburg.

Respectfully submitted,



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**Certificate of Service**

The undersigned counsel certifies that two copies of the foregoing were served,  
via first-class mail, postage prepaid, this 16<sup>th</sup> day of November 2009 on:

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