

Appeal No. 09-102775-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ANDREA S. NORRIS, PH.D

PLAINTIFF / APPELLANT

V.

UNIVERSITY OF KANSAS

AND

DAVID SHULENBURGER

DEFENDANTS / APPELLEES

FILED

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REPLY BRIEF OF APPELLANT

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

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ORAL ARGUMENT REQUESTED

I. INTRODUCTION

The trial court erred when it granted summary judgment on Plaintiff's claim for tortious interference with her prospective business expectancy because the evidence demonstrates that Defendant Shulenburger acted unlawfully, without authority, and with personal animus toward Plaintiff when he terminated her contrary to policy and the law. When an agent acts beyond his scope of authority, he can be held liable for tortious interference with a prospective employment relationship. It is a material fact that Plaintiff Norris possessed a reasonable expectation of continued employment because the law of the state and the regulations of the University mandated that she be provided notice of any termination before January 17 of each year, and Defendant interfered with that expectation. If Plaintiff has not established this fact outright, it certainly remains in dispute. Summary judgment was not proper in this case.

In the Brief of Appellees, Defendants recast facts and assume facts that are not in evidence to fit their arguments, with erroneous citations to the Record on Appeal. Defendants also raise immunity when this issue was never decided by the trial court. In this Reply, Plaintiff addresses Defendants' new arguments on the elements of her claim as well as countering Defendants' claim of immunity.

II. ARGUMENTS AND AUTHORITIES

A. At-Will Employees Have Enforceable Rights Under the Law.

Dr. Norris had a right to rely upon the University of Kansas ("University") regulations that guaranteed the University would notify employees of her classification

and length of service by January 17 if their term of employment will not be renewed. Defendant Shulenburger was not free to ignore such a clear, unambiguous regulation. The facts indicate that his action was unlawful and without authority.

Defendants acknowledge that this regulation exists. (Vol. V, pp. 434-436). However, Defendants justify Shulenburger's conduct by arguing the "at the pleasure of" phrase in the "Notice of Salary" document sent to Plaintiff, defined her rights. This justification of the violation of the regulation fails for several reasons.

Foremost, the University and its administrators are not above their own rules and regulations. As a general principle, rules adopted by an administrative board have the force and effect of law. *McMillan v. McKune*, 35 Kan.App.2d 654, 660, 135 P.3d 1258 (2006). Such regulations are issued for the benefit of both the agency and the public. *Id.* An agency must be held to the terms of its own regulations. *Id.* Where an agency fails to follow its own rules, its actions are unlawful. *Id.*

The University is a state agency. See *Little v. State*, 34 Kan. App. 2d 557,562 121 P.3d 990 (2005). The rule at the heart of this case – that Defendants owed Plaintiff a duty to notify her by January 17 prior to terminating her appointment – is a rule the Board of Regents is empowered to adopt. See K.S.A. 76-712 and K.S.A. 76-715. Moreover, Defendants acknowledge that the University's Handbook for Faculty and Other Unclassified Staff ("Handbook") contains the policy that governs Unclassified Staff such as Plaintiff. See Brief of Appellees, pp. 6-7. Under this policy and the Board of Regent's rules, Shulenburger simply had no authority to fire Plaintiff contrary to the notice rule.

Defendants have not cited a single statute or regulation empowering Defendant Shulenburg to negate long-standing regulations granting certain rights to Unclassified Staff. Furthermore, the Defendants have not shown that the University or Board of Regents engaged in any rule-making pursuant to K.S.A. 77-421 authorizing his action. Nonetheless, Defendants maintain that inclusion of the magic words “at the pleasure of” in the “Notice of Salary” letter allows Provost Shulenburg, with a letter, to rewrite applicable regulations with respect to Plaintiff, in spite of K.S.A. 77-421, and in spite of the expectations of an entire class of unclassified state employees. The Defendants are not free to violate their own regulations.

Second, Defendants’ contention that Board of Regents policy permits them to strip Dr. Norris of her rights as a member of the Unclassified Staff with the phrase “serve at the pleasure of the administrator to whom you report” is without merit. The “at the pleasure of” phrase cannot nullify the rules and regulations controlling the rights of Unclassified Staff because all Unclassified Staff are, by operation of law serving at the pleasure of the Chancellor, and the same law makes this status subject to the policies of the Board of Regents. K.S.A 76-715 provides:

The chief executive officer of each state educational institution shall appoint such employees as are authorized by the board of regents. Employees in the unclassified service shall serve at the pleasure of the chief executive officer of the state educational institution, subject to policies approved by the board of regents.

(emphasis supplied). The word “shall” makes this “at the pleasure of” status mandatory. An appointment letter stating that Plaintiff serves “at the pleasure of” the chief executive

officer would be merely redundant to the law. Moreover, K.S.A. 76-715 does not allow an Unclassified Staff member serve in any capacity other than at the pleasure of the chief executive officer. The Defendants attempt to paint Dr. Norris as an exception – that because she serves “at the pleasure of” the provost, she shares in none of the rights enjoyed by Unclassified Staff. But she is no exception. Plaintiff stands in precisely the same stead as any other member of the Unclassified Staff pursuant to K.S.A. 76-715.

Furthermore, the “Notice of Salary” letter at issue in this case contravenes K.S.A. 76-715. The letters sent to Dr. Norris stated that she serves “at the pleasure of” her immediate supervisor, Provost Shulenburg, not the chief executive officer. (Vol. III, p. 294). The Provost is not the chief executive officer; the Chancellor is. (Vol. V, p. 567). K.S.A. 76-715 mandates that Unclassified Staff members serve at the pleasure of the chief executive officer, not somebody else. Provost Shulenburg is somebody else. Defendants cite no authority allowing them to defy K.S.A. 76-715 with the “Notice of Salary” letter, much less empower Shulenburg to terminate Dr. Norris.

However, assuming evidence exists that Plaintiff did serve at the pleasure of Defendant Shulenburg, that condition still requires consideration of Dr. Norris’ procedural rights, according to K.S.A. 76-715. Far from giving the University authority to ignore regulations protecting Unclassified Staff, the statute subordinates the “at the pleasure of” status of all Unclassified Staff to any policy adopted by the Board of Regents. See K.S.A. 76-715. Therefore, the statute mandates that while employees “serve at the pleasure of” the chancellor, they also must enjoy the rights provided them

by any lawfully issued policy. Under Kansas law, and the Board of Regents policy, Plaintiff serves the Chancellor at his pleasure and enjoys the rights to receive notice by January 17th if the Chancellor is terminating her.

Finally, Defendants argue that because Plaintiff served at the pleasure of “the administrator to whom you report,” she had no expectation of continued employment. This argument again does not comport with the Board of Regents policy governing Faculty and Staff appointments. (Vol. V, pp. 434, 491). The unambiguous language of the Board of Regents policy contradicts Defendants’ interpretation of the policy. Section (1) allows the Chancellor to designate someone else, such as the Provost, to approve appointments to unclassified staff positions. But Section (2) does not permit the Chancellor’s designee to terminate such appointments at the designee’s pleasure. Section (2) states that a staff position, besides Provosts, Vice Presidents, Vice Chancellors and Deans, may be designated as a position that serves “at the pleasure of the chief executive officer.” Section (2) is consistent with K.S.A. 76-715. Defendants’ view of this policy requires the Court to ignore the actual policy language and to construe the policy contrary to K.S.A. 76-715. Nothing in this policy or in K.S.A. 76-715 permits the Provost to unilaterally terminate anyone.

The Tenth Circuit addressed a similar situation in which an entity not empowered by statute or regulation to terminate the contract of a Kansas University administrator did so. In *Jackson v. Griffith*, 480 F.2d 261 (10th Cir. 1973), the plaintiff was appointed Assistant to the Dean of Men for Black Students at the University of Kansas. The Board

of Regents directed the University Chancellor to terminate the plaintiff. The plaintiff then sued the Chancellor and the University under Section 1983 alleging among other things that Defendants retaliated against him for exercising his right to free speech.

Reversing the trial court's award of summary judgment, the Tenth Circuit observed:

[E]mployment under the contract and the order directing such termination were made by the State Board of Regents of the University and not by the Chancellor. There is nothing in the record to show that it was the pleasure of the Chancellor to terminate [plaintiff's] employment as Assistant Dean of Men for Black Students.

Jackson, 480 F.2d at 267.

The Tenth Circuit next observed that the provision that "employees in unclassified service shall serve at the pleasure of the chief executive officer" found in K.S.A. 76-715, was expressly subject to the "policies approved by the board of regents." *Id.* Based on unanswered questions, such as "Why did the Board of Regents order termination of [plaintiff's] employment instead of the Chancellor?" and "Was it the pleasure of the Chancellor that on July 27, 1970, [plaintiff's] appointment as Assistant Dean should be terminated immediately?" the Tenth Circuit found that answers to these questions were "undetermined material facts" precluding summary judgment. *Id.*

In the present case, Defendants failed to meet their burden of showing an absence of material facts in dispute with respect to very similar questions: Why did Defendant Shulenburger order termination of Plaintiff's employment instead of the Chancellor? Was it the pleasure of the Chancellor that Plaintiff should be terminated? Additionally, no facts show that Shulenburger's abrupt acts fall within any exception to the University

policy, which directs the Chancellor to notify employees such as Plaintiff by the Chancellor by January 17 of non-reappointment, consistent with the clear language of K.S.A. 76-715.

Defendants offer no facts in answer. However, the law does: As required by K.S.A. 76-715 and recognized in *Kansas Bd. of Regents v. Pittsburg State University Chapter of Kansas-National Educ. Assn.*, 667 P.2d 306, 233 Kan. 801 (Kan., 1983), employees in unclassified service serve at the pleasure of the chief executive officer, subject to policies approved by the Board of Regents. The chief executive officer is the Chancellor, not the Provost. (Vol. V, pp. 434, 491). No evidence exists in the record that the Chancellor delegated his authority to anyone. Shulenburger exceeded his authority and by doing so, tortiously interfered with Norris' employment expectancy. Defendants' failure to provide evidence of the Chancellor's pleasure or of the Provost's authority leaves material facts undecided. Summary judgment was therefore not proper.

B. Plaintiff Norris possessed a valid prospective business relationship with the University after January 17.

Plaintiff's valid business expectancy was established when January 17, 2004 passed and Defendants did not notify her of non-reappointment. Defendants do not dispute that they failed to provide Plaintiff the required notice. Defendants instead argue because Plaintiff was an at-will employee she could not expect continued employment. Plaintiff's "at-will" status is immaterial and Defendants' argument fails for these reasons:

First, Defendants' case-law on "at-will" status is inapposite because it is

concerned with wrongful termination. This is not a wrongful termination case. Plaintiff does not contend the Chancellor did not have a right to terminate her. Instead, Plaintiff argues that, under the policies that defined and governed her employment, notice must be given by January 17 if she was not to be reappointed. Because no notice was given, Dr. Norris reasonably expected continued employment for another term under University policy. Defendant Shulenburger knew Plaintiff possessed this reasonable expectation, but decided to terminate her anyway. (Vol. III, pp. 267, 388-389; Vol. V, pp. 440-442).

Second, at-will status does not mean that employees cannot carry reasonable expectations of continued employment. Parties in an employment at-will relationship have a valid interest in the integrity and security of their employment. *Truax v. Raich*, 239 U.S. 33, 38 (1915). While a party to an at-will contract may have a right to terminate the contract, “[u]ntil he has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it.” Restatement (Second) Torts § 766 comment g (1979). Kansas law recognizes that “at-will” employment relationships may have terms that must be honored. For example, an employee who is being paid \$10 an hour has enforceable right to expect and collect \$10 for every hour she has worked even if her employer decides to fire her. See e.g. *Coma Corporation v. Kansas*, 283 Kan. 625, 630 154 P.3d 1080 (1007)(Pursuant to K.S.A. 44-314(a), “an employer is required to pay *all* wages due to an employee at least once a month” even to an undocumented worker). As stated in *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976), a case cited by Defendants, the terms and conditions of a person’s employment or its

duration may be “determined by circumstances in each particular case, ... from their written or oral negotiations, the usages of business, the situation and object of the parties, the nature of the employment, and all the circumstances surrounding the transaction.” *Id.* at 54-55, citing 53 Am. Jur.2d, Master and Servant, § 27.

Under the circumstances of this particular case, the nature of the employment relationship between Dr. Norris and the University was colored by years of reappointments, as well as the statutory and regulatory framework that controlled her employment. Unlike the plaintiffs in *Morris v. Coleman*, 241 Kan. 501, 738 P.2d 841 (1987) and *Johnson, supra*, Dr. Norris and the University were bound by rules and regulations issued by the Board of Regents and the University, as well as statutes, such as K.S.A. 76-715. In addition to the regulations, fifteen years of Dr. Norris receiving yearly reappointments created expectations in this employment relationship. Therefore, given her status as Unclassified Staff, the controlling statutes, regulations and policies governing that classification, as well as the course of dealing between the parties culminating in year-after-year reappointments, Dr. Norris had a reasonable expectation of continued employment, for another term at least, once the January 17 deadline passed.

Finally, Defendants’ position must be rejected to protect the state’s public policy interest in the integrity of an agency’s rules and regulations. *McMillan*, 35 Kan.App.2d at 660 (“regulations are issued for the benefit of both the agency and the public.”). An entire class of Kansas University employees, the Unclassified Staff, have relied on the belief that K.S.A. 76-715 means something – that they serve at the pleasure of the chief

executive officer, and not of someone else; that their employment status is subject to the policies of the Board of Regents and the universities they work for; and that they will be notified by January 17 if they are not going to be reappointed to their position for the next year. Affirming summary judgment will cast in doubt whether the regulations and policies governing University employees create any meaningful rights for them.

C. Evidence of Third Party Interference is Not Required for a Claim Under Restatement (Second) of Torts § 766B claim.

Restatement (Second) of Torts § 766B(b) supports Plaintiff's cause of action for tortious interference with prospective employment relation. It states: "one" who interferes with "another's prospective contractual relation" may be liable to "the other" when the interference consists of preventing "the other" from continuing the prospective relation. In *Breslin v. Vornado, Inc.*, 559 F. Supp. 187 (E.D.Pa. 1983), the court rejected the Defendant's contention of a third party requirement under § 766B when it held "neither the language of nor the comments to § 766B ... supports defendant's theory of substantive law. In fact, § 766B(b) speaks specifically to actions directed toward plaintiff, not a third party." *Id.* at 191-192. The Sixth Circuit Court of Appeals made a similar finding in *Lucas v. Monroe County*, 203 F.3d 964 (6th Cir. 2000):

[T]here is no requirement that the tortfeasor's wrongful conduct take the form of inducing a third party not to enter a contract with the plaintiff; indeed, ... § 766B expressly states that a defendant is liable for intentional interference with prospective contractual relations "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 [plaintiff] from acquiring or continuing the prospective relation." Restatement Second of Torts § 766B.

Id. at 979.

No cases Defendants cite address the language of § 766B(b) or Plaintiff's theory of liability for tortious interference with prospective business relationship. However, all cases Defendants cite recognize that an agent who acts outside his scope of authority or official capacity, or with motives not attributable to the corporation, may be held liable for interference. *May v. Santa Fe Transportation Co.*, 189 Kan. 419, 370 P.2d 390 (1962) (plaintiffs failed to bring evidence that the corporate officers "acted other than in their official capacities on behalf of the corporate defendant"); *Diedrich v. Yarnevich*, 40 Kan.App.2d 801, 809-10, 196 P.3d 411 (2008) (corporate officer acting outside of his scope of representation could be liable for tortious interference of a contract); *Fletcher v. Wesley Medical Center*, 585 F.Supp. 1260, 1262 (D.Kan. 1984)(corporate agent may be liable where his motives or acts are not legally attributable to the corporation); *Jones v. City of Topeka*, 764 F.Supp. 1423, 1433 (D.Kan. 1991). See Brief of Appellees, p. 20. Contrary to Defendants' assertion in this case, Plaintiff has shown that Defendant Shulenburg acted outside the scope of his authority when he intentionally fired Plaintiff without authority and contrary to policy. (Vol. III, pp. 272-274, 308-309, 319, 324-327, 330-332, 334-335, 340).

D. No Evidence Exists that Shulenburg Acted in the Course and Scope of his Employment and Issues of Fact Exist as to Shulenburg's Intent.

Shulenburg acted as an agent outside of his scope of authority when he

terminated Plaintiff's appointment contrary to applicable policies and Kansas law. An allegation that Shulenburger was the University's agent does not equate to an admission that he was acting within the course and scope of his employment. See Section C, above.

Defendants confuse two concepts in their discussion of the "intentional misconduct" element of Plaintiff's claim. Kansas law does not require a showing of malice for this tort. Judge Lungstrum of the U.S. District Court of Kansas noted recently in *Mediware Information Systems, Inc. v. McKesson Inf. Solu.*, Case No. 06-2391-JWL. (Kan. 3-26-2007) that the distinct element of "malice" mentioned in *Turner v. Halliburton Co.*, 240 Kan. 1, 12, 722 P.2d 1106 (1986) has been dropped in later Supreme Court of Kansas decisions. See *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 424-425, 77 P.3d 130 (2003). To show interference with a prospective business relationship, a plaintiff must prove "intentional misconduct" by the defendant as one of the elements. *Id.* Furthermore, unlike in an interference with contract claim, there is no element, or burden on the part of the plaintiff to demonstrate a "lack of justification" in a claim for interference with prospective business relationship. *Id.* The *Turner* decision, on which the Defendants rely, characterizes "justification" as an affirmative defense. *Turner*, 240 Kan. at 12. Furthermore, this is an affirmative defense available only in specific situations where the claim for tortious interference "is based upon alleged defamatory statements." *Id.* at 14. As this case involves no defamatory statements, this affirmative defense is not available to the Defendants. Even if available, the Defendants have marshaled no facts showing they would prevail at trial on this affirmative defense.

Under *Burcham, supra*, Plaintiff must show, with regard to the intentional conduct element, that Defendant's conduct was improper. *Burcham* at 425. There is no separate element of malice. *Id.* The *Burcham* court stated that the following facts should be considered in determining whether conduct is improper: (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 between the parties. *Burcham* at 425.

Plaintiff has shown that Defendant Shulenburger acted intentionally and improperly. (Vol. III, pp. 272-274, 308-309, 319, 324-327, 330-332, 334-335, 340). Shulenburger's abrupt decision to terminate the Plaintiff was motivated by ill-will and his conduct interfered with Plaintiff's codified right to notice of non-reappointment and her reliance on that requirement. The social interest in protecting the regulatory rights of Unclassified Staff greatly outweighs any interest Defendants had in disregarding the rules and procedures. Shulenburger's intentional conduct, which was unlawful, unauthorized, and motivated by personal animus toward Plaintiff, constitutes misconduct. Moreover, although Plaintiff need not demonstrate malice, the evidence adduced in response summary judgment is certainly sufficient to create a jury question regarding malice. *Burcham* at 425 (The presence or absence of malice is typically a question for the jury).

E. The District Court Did Not Address the Issue of Discretionary Function Immunity and Such Immunity Does Not Exist in This Case.

The district court did not address this issue when deciding summary judgment. Plaintiff fully briefed this issue in the summary judgment opposition. (Vol. III, pp. 286-291). In a nutshell, discretionary immunity does not protect defendants in this case for two reasons, either of which is sufficient to defeat the affirmative defense.

First, this is a claim for intentional interference, not wrongful termination. There is no discretion, and thus no immunity, for intentional or malicious acts. *Hopkins v. State*, 237 Kan. 601, 612, 710 P.2d 311 (1985); *Barrett v. U.S.D. No. 259*, 272 Kan. 250, 32 P.3d 1156 (2001); *Moran v. State*, 267 Kan. 583, 599, 985 P.2d 127 (1999). (Vol. III, pp. 286-288). Second, a defendant has no discretion, and thus no immunity, to violate a mandatory duty under statute, case law, regulations or policies. “If there is a clearly defined mandatory duty or guideline, the discretionary function exception is not applicable.” *Nero v. Kansas State University*, 253 Kan. 567, 585, 861 P.2d 768 (1993); *Lindenman v. Umscheid*, 255 Kan. 610, 875 P.2d 964 (1994); *Moran, supra*. (Vol. III, pp. 288-290). Plaintiff’s mandatory rights under the policies established for non-reappointment were disregarded. Plaintiff’s appointment was subject to “the applicable laws, regulations, policies, minutes, and resolutions of the State of Kansas, the Board of Regents and the University of Kansas.” (Vol. III, p. 297). Defendants had no discretion to ignore these provisions.


Defendants characterize this case as a simple discretionary employment decision. Defendants cite cases applying discretionary immunity under the Federal Tort Claims Act on wrongful termination or retaliatory discharge claims. *Richman v. Straley*, 48 F.3d 1139, 1146

(10th Cir. 1995); *Sydney v. United States*, 523 F.3d 1179, 1184 (10th Cir. 2008). In these cases, the Tenth Circuit found that the discretionary exception does not apply if there is “a federal statute, regulation, or policy [that] specifically prescribes a course of action for an employee to follow.” A duty is not discretionary if “it involves enforcement or administration of a mandatory duty at the operational level.” *Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979). Defendants are not entitled to discretionary immunity in this case.

III. CONCLUSION

The district court erred when it granted summary judgment. Plaintiff respectfully requests that the district’s court order be reversed and this case remanded for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel certifies that two copies of the foregoing Reply Brief of Appellant were served, via first-class mail, postage prepaid, this 11th day of December, 2009, on:

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