

15-CI-01118
ENTERED
JUN 29 2018
FRANKLIN CIRCUIT COURT
AMY FELDMAN, CLERK

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II**

CIVIL ACTION No. 15-CI-01118

DR. VERNELL A. BENNETT

PLAINTIFF

vs.

**BOARD OF REGENTS OF KENTUCKY
STATE UNIVERSITY and
RAYMOND BURSE, in his individual capacity**

DEFENDANTS

ORDER

This matter is before the Court upon Plaintiff, Dr. Vernell A. Bennett's ("Bennett") *Motion for Partial Summary Judgment* and Defendants' *Motion for Summary Judgment*. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Bennett's *Motion* and **DENIES** Defendants' *Motion*.

STATEMENT OF FACTS

Bennett was first employed by Kentucky State University in August 1996 as an instructor of music in its College of Fine Arts. She was granted tenure in April 2003 when she became an Assistant Professor. In 2007, Bennett was promoted to the position of Associate Professor with tenure. Bennett later accepted the position of Assistant Vice President for Student Affairs, an administrative position, in December 2014. Bennett maintained her status as a tenured faculty member at Kentucky State University up to and including October 8, 2015. On October 1, 2015, Bennett wrote a letter stating that she was resigning from her post as Assistant Vice President for Student Affairs, effective October 2, 2015. In her letter she stated that she would "resume my role as Associate Professor." President Burse responded on October 5, 2015, and stated since it was the

middle of the school year, there were no “open faculty positions in the area of your expertise.” However, President Burse assigned her another position at the associate professor rank.

On October 8, 2015, Bennett was informed that her employment at Kentucky State University was terminated retroactive to October 2, 2015. This was done by way of email from Rayla Smoot, the human resources director for Kentucky State University, at the direction and instruction of President Burse. Bennett filed her Complaint with this Court on October 22, 2015 alleging (1) unlawful termination in violation of KRS 164.360; (2) sex discrimination in the terms and conditions of her employment; and (3) retaliation.

STANDARD OF REVIEW

Summary judgment is appropriate when the Court concludes that no genuine issue of material fact for which the law provides relief exists. CR 56.03. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, 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.” CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show the absence of a genuine issue of material fact. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011). The movant will only succeed by showing “with such clarity that there is no room left for controversy.” *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W. 2d 476, 482 (Ky. 1991). “The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light

most favorable to the non-moving party and resolves all doubts in its favor. The Court will only grant summary judgment when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W. 2d at 480.

The Court recognizes that the summary judgment is a device that should be used with caution and is not a substitute for trial. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Jones v. Abner*, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

ANALYSIS

I. ***Bennett’s Motion for Partial Summary Judgment***

Bennett requests that the Court grant her *Motion for Partial Summary Judgment* as to Count 1 of her Complaint, unlawful termination in violation of KRS 164.360. The section of KRS 164.360 relating to the removal of faculty, in effect in October 2015, states:

Each board may remove the president of the university or Kentucky Community and Technical College System, and upon the recommendation of the president may remove any faculty member or employees, but no president or faculty member shall be removed except for incompetency, neglect of or refusal to perform his duty, or for immoral conduct. A president or faculty member shall not be removed until after ten (10) days’ notice in writing, stating the nature of the charges preferred, and after an opportunity has been given him to make defense before the board by counsel or otherwise and to introduce testimony which shall be heard and determined by the board. Charges against a president shall be preferred by the chairperson of the board upon written information furnished to him, and charges against a faculty member shall be preferred in writing by the president unless the offense is committed in his presence.

Ky. Rev. Stat. Ann. § 164.360(3). Further, the Faculty Handbook for Kentucky State University, in effect in October 2015, provides:

A tenured or non-tenured faculty member or employee may be removed for cause as provided by KRS 164.360. Termination of appointment for adequate cause shall be related to the behavior and performance of the faculty in his/her professional capacity. This refers to such matters as unethical and immoral conduct, incompetence, failure to perform reasonable assignments, or for neglect of duty. Appeals of terminal or tenured faculty for adequate cause shall be made in accordance with University grievance procedures.

Kentucky State University, Faculty Handbook, 2.8.5.1, Termination, Discharge for Cause (2012).

Bennett argues that she was a tenured faculty member and was summarily terminated by President Burse contrary to the provisions of KRS 164.360 and the Kentucky State University Faculty Handbook. Bennett additionally claims that the Kentucky Court of Appeals ruling in *Board of Regents of Kentucky State University v. Gale*, 898 S.W.2d 517 (Ky. Ct. App. 1995), is applicable to the case at hand. In *Gale*, the Board of Regents of Kentucky State University attempted to terminate Gale's tenured faculty status by informing him that he would be deemed to have abandoned his tenured position if he did not sign a contract placing a time limit on his tenure. *Id.* at 520. Defendants' contend that *Gale* is not applicable to Bennett's situation because the sole legal issue was whether Gale had tenure in the newly created Endowed Chair in the Humanities. *Id.* at 517.

The Court finds that *Gale* is not applicable to the present case as the Kentucky Court of Appeals solely addressed section (1) and (2) of KRS 164.360 and Bennett's case involves the application and interpretation of section (3). Further, it is not disputed that Bennett had tenure as Defendants stipulated that Bennett maintained her status as a tenured faculty member at Kentucky State University up to and including October 8, 2015. Defendant Kentucky State University's

Responses to Plaintiff's Requests for Admissions, Interrogatories and Requests for Production of Documents, Response to Request for Admission No. 2.

Despite the inapplicability of *Gale*, KRS 164.360(3) and the Kentucky State University Handbook are clear as to the procedures required for terminating a faculty member. Here, there was no preferment of charges against Bennett to the Kentucky State University Board, there was no hearing before the Kentucky State University Board, and there was no action by the Kentucky State University Board regarding the termination of Bennett's employment as a tenured faculty member. Karen Bearden, then Chair of the Kentucky State University Board of Regents and current Board member, confirmed the lack of Board action in her deposition. Bearden depo. at 10-11. Therefore, the Court finds that the summary termination of Bennett's employment violated KRS 164.360(3). Bennett requests that the Court reinstate her to her tenured position as an Associate Professor at Kentucky State University. The Court finds that such action is not appropriate at this time and therefore denies Bennett's request to reinstate her as an Associate Professor at Kentucky State University.

II. Defendants' *Motion for Summary Judgment*.

Defendants' *Motion for Summary Judgment* requests that the Court dismiss all claims against the Defendants and grant summary judgment in favor of the Defendants. For the reasons set forth below, the Court denies Defendants' *Motions*.

First, as discussed above, the Court granted partial summary judgment in favor of Bennett concerning Count 1 of her Complaint, unlawful termination in violation of KRS 164.360. Therefore, the Court will not discuss the denial of Defendants' *Motion* in regard to Count 1. Defendants' further assert that they are entitled to summary judgment on Count 2 in Bennett's Complaint regarding sex discrimination because there is no evidence of sex discrimination and

that Bennett knowingly accepted the Vice President for Student Affairs position knowing that she would receive a lower salary than her male predecessor. The Court finds that there are disputed issues of material fact that preclude summary judgment regarding Bennett's sex discrimination claim in Count 2 of her complaint. Moreover, Defendants' believe that they are entitled to summary judgment regarding Bennett's retaliation claim in Count 3 of her Complaint. Again, the Court finds that summary judgment is not appropriate at this time because there are disputed issues of material fact that remain on Bennett's retaliation claim.

Defendants assert that that Bennett's discrimination claim under Count 2 and her retaliation claim under Count 3 should be dismissed under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a plaintiff must establish a *prima facie* case of discrimination and retaliation. To prove either Bennett must show (1) that she engaged in a protected activity; (2) the defendant employer knew she had done so; (3) the employer subsequently took an adverse employment action against her; and (4) the existence of a casual connection between the protected activity and the adverse employment action. *Id.* The Court finds that, as stated above, disputed issues of material fact remain regarding Counts 2 and 3 and therefore, summary judgment is not appropriate at this time.

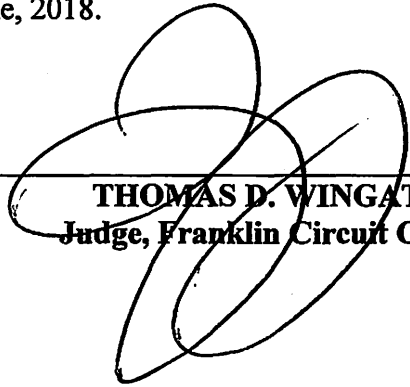
The Defendants' argue that the intracorporate conspiracy doctrine because President Burse and Kentucky State University are members of the same collective entity and thus under *Cowing v. Commare*, 499 S.W.3d 291 (Ky. Ct. App. 2016), the claims against President Burse should be dismissed. Bennett contends that *Cowing* does not apply to this case because this case does not include a claim that President Burse aided and abetted or conspired with anyone or anything to cause Bennett's termination. *Cowing* held that the intracorporate conspiracy doctrine barred liability for an individual supervisor for aiding and abetting unlawful discrimination on actions

taken within the scope of his agency. In this case Bennett is alleging that President Burse acted in violation of KRS 164.360 and outside of the scope of his agency in terminating her. Further, Bennett's claim against President Purse is for retaliation in violation of KRS 344.280 and in her Complaint she named President Burse as the "person" within the meaning of KRS 344.280. Therefore, the intracorporate conspiracy doctrine does not apply to this case.

Finally, Defendants' claim that President Burse is entitled to qualified immunity. Defendants reason that as president of Kentucky State University, President Burse found the actions of Bennett to justify her termination as an employee and that he had the right to start the termination process, thus he is entitled to qualified governmental immunity. Bennett states that President Burse is not entitled to qualified immunity because in his individual capacity he enjoys "only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). "Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment; (2) in good faith; and (3) within the scope of the employee's authority." *Id.* (internal citations omitted). There is no indication that President Burse acted in a legally uncertain environment. Rather, KRS 164.360 and the Faculty Handbook of Kentucky State University provided clear guidelines for him. There is also a dispute regarding the reason that Bennett did not report for work on October 8, 2015, and whether it was known that she had taken a sick day to have a root canal. Therefore, the Court finds this argument unwarranted at this time as material issues of fact exist as to the issue of qualified immunity for President Burse.


WHEREFORE, the Court hereby **GRANTS** Bennett's *Motion for Partial Summary Judgment* and **DENIES** Defendants' *Motion for Summary Judgment*.

SO ORDERED, this 26th day of June, 2018.




THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

 I hereby certify that a true and correct copy of the foregoing Order was mailed, this day of June, 2018, to the following:

Hon. William E. Johnson
Hon. W. Eric Branco
326 West Main Street
Frankfort, Kentucky 40601

Hon. Robert L. Abell
120 North Upper Street
Lexington, Kentucky 40507



Amy Feldman, Franklin County Circuit Court Clerk