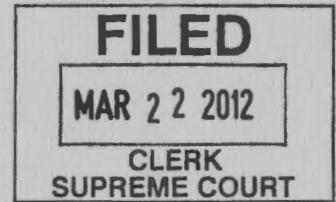


SUPREME COURT OF KENTUCKY
2010-SC-000782



JAMES E. NEWTON, JR.

APPELLANT

v.

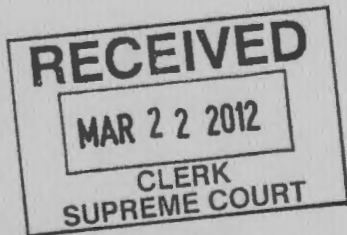
APPELLANT'S REPLY BRIEF

UNIVERSITY OF LOUISVILLE

APPELLEE

APPEAL FROM COURT OF APPEALS OF KENTUCKY
2009-CA-002197

Submitted by:



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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed this 21st day of March 2012 to Donna King Perry and Jeremy Stuart Rogers, Dinsmore & Shohl LLP, 110 S. Fifth Street, Ste. 2500, Louisville, KY 40202; Hon. Olu Stevens, Jefferson Circuit Court, Division 6, 700 West Jefferson Street, Louisville, KY 40202; and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. I further certify that the record on appeal was not withdrawn by the party filing this brief.

Counsel for Appellant

I. MR. NEWTON¹ HAD A WRITTEN CONTRACT

From the inception of this litigation the University has refused to recognize that Mr. Newton's claims were for both wrongful termination **and** for its failure to properly process his application for long-term disability benefits. It attempts to minimize his claims by stating that the Redbook language as to his rights to long-term disability benefits is "precatory." This is certainly not the case. As the Court of Appeals made clear in its opinion below, the Redbook's language as to the long-term disability benefits available to Mr. Newton was clear and unequivocal. Slip Opinion at 8. Further, the Court of Appeals also held that the Redbook's language pertaining to dismissal of an employee was specific, and that an employee could only be dismissed for cause. Slip Opinion at 7-8.

The Model Procurement Code waives sovereign immunity for any person or entity that has a "lawfully authorized written contract with the Commonwealth" and provides that suit may be brought against the Commonwealth on the contract. KRS 45A.245(1). The Code also defines the terms "written" and "contract."

"Writing" or "written" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

KRS 45A.030(29).

"Contract" means all types of state agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and insurance contracts except as provided in KRS 45A.022. It includes

¹ Mr. Newton has been incorrectly identified as James A. Newton on the Court's docket. He should be identified as James E. Newton, Jr.

supplemental agreements with respect to any of the foregoing[.]

KRS 45A.030(7).

There can be no doubt that Mr. Newton's contract with the University was written per the definition found at KRS 45A.030(30). Thus, the debate must center on whether his contract was one contemplated by or by necessary implication included in the Code's definition.

While the University argues that implied contracts are not covered by the Code, the Code explicitly lists implied contracts in its definition found at KRS 45A.030(7). For example, a purchase order is a type of implied contract. When a purchase order is issued, it is nothing more than an offer made by the Commonwealth to purchase goods or services at a specific price. No contract is formed until the vendor acts and supplies the goods or services per the purchase order. Thus, the purchase order is an implied contract that depends upon the subsequent act of a vendor pursuant to its terms.

This is precisely the same situation with the Redbook's personnel policies. The policies are written and provided to the employee via a hard copy of the Redbook or online via the University's web site. No contract is formed until the employee provides the services specified in his/her job description. When the employee begins to work under the specific terms of the Redbook, however, a contract is formed just as when a vendor acts and provides goods or services pursuant to a purchase order.

The University falsely states that Mr. Newton's wages or hours are not specified in the Redbook when, in fact, the Redbook provides detailed polices as to the wages paid for each employment level and the hours required of the employee. Mr. Newton was a "groundskeeper," and the duties of this position were fully explicated in the Redbook as

was the range of the rate of pay for his position.

Accordingly, Mr. Newton had a written contract with the University sufficient to meet the requirements of KRS 45A.245(1).

II. THE UNIVERSITY'S RELIANCE ON STATHIS V. UNIV. OF KY. IS MISPLACED

In its brief the University cites to the case of Stathis v. Univ. of Ky., 2005 Ky. App. Unpub. LEXIS 886 (Ky.App. 2005). Appellant Brief at 8. The University argues that the Court of Appeals in Stathis held that the Model Procurement Code has never been interpreted as a waiver of sovereign immunity for implied contract claims, but this was not the holding of in that case. In fact, the Court of Appeals held that the written documents, e.g., course catalogs, discipline polices, course syllabi, etc., actually formed a contract between students and the University of Kentucky and reversed an award of summary judgment in favor of the University and remanded the case to the trial court for proceedings on Mr. Stathis' contract claims. *Id.* at *24-28.

III. EMPLOYMENT CONTRACTS WITH THE COMMONWEALTH ARE ACTIONABLE UNDER KRS 45A.245(1)

This Court in Commonwealth of Kentucky, Tourism Development Cabinet, Department of Parks, et al. v. Whitworth, et al., 74 S.W.3d 695 (Ky. 2002) made clear that written employment contracts with the Commonwealth are actionable pursuant to KRS 45A.245(1). Although the University contends that professors with tenure could bring suit against the Commonwealth pursuant to KRS 164.830(1)(b) for wrongful termination, they could only do so because of the waiver of sovereign immunity in KRS 45A.245(1) because KRS 164.830(1)(b) has no provision waiving sovereign immunity under which a wrongfully terminated tenured professor could bring suit against the

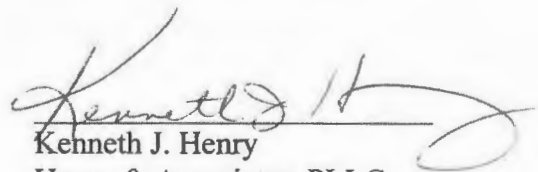
Commonwealth.

Further, professorial contracts are often letter contracts (identified in the definition of contract at KRS 45A.030(7)). As such these contracts are also implied contracts because the formation of the contract is dependent upon the professor providing services to the employing university pursuant to the terms of the letter agreement. *See Ashley v. Univ. of Louisville, et al.*, 723 S.W.2d 866 (Ky.App. 1986). No court in this jurisdiction has held that a tenured professor could not bring suit against a state university for wrongful termination because of sovereign immunity.

IV. CONCLUSION

Because Mr. Newton's contract with the University met the definition of a "lawfully authorized written contract" set forth in KRS 45A.245(1), sovereign immunity is waived, and therefore, his cause of action for wrongful termination and for the University's failure to properly process his application for long-term disability benefits must survive, and this Court must remand this matter to the Jefferson Circuit Court for trial on the merits.

Respectfully submitted,



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