IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCELLA A. MCCLURE, PH.D.,
Appellant,
vs.
THE STATE OF NEVADA, EX REL. UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA,
Respondent.

No. 36435

FILED

MAR 29 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion for judgment on the pleadings.

Appellant Marcella A. McClure, Ph.D., an assistant professor at the University of Nevada, Las Vegas, applied for and was denied tenure in 1997. McClure sued the University and Community College System of Nevada ("the University"), seeking relief for: (1) breach of contract to grant tenure and promotion; (2) breach of the implied covenant of good faith and fair dealing; (3) wrongful termination; (4) intentional infliction of emotional distress; and (5) negligent infliction of emotional distress. Relying on this court's holdings in University of Nevada, Reno v. Stacey[1] and LaForge v. State, University System,[2] the district court granted the University's motion for judgment on the pleadings. On appeal, McClure argues that her action is distinguishable from Stacey because it involves tort and constitutional violations, not a contractual entitlement. Further, McClure argues that the University acted in bad faith in denying tenure.

[1]116 Nev. 428, 997 P.2d 812 (2000).

[2]116 Nev. 415, 997 P.2d 130 (2000).

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After reviewing the record on appeal, we conclude that the district court correctly applied Stacey and LaForge in its determination that the University's denial of tenure to McClure, as a matter of law, does not constitute bad faith. Therefore, we affirm the district court order granting the motion for judgment on the pleadings.

On February 8, 1993, UNLV offered McClure a position as an assistant professor in the Department of Biological Science in the College of Science and Mathematics. Under the terms of the employment contract, she was to receive annual evaluations, as well as a sub-tenure review after her third year of employment. The standards for tenure outlined in the University of Nevada System Code ("code") were incorporated into McClure's employment contract.

McClure's annual evaluations were based on three criteria from the code: (1) instruction, which included demonstrated teaching competence; (2) research, with the expectation of publication or comparable productivity; and (3) service, which was multi-faceted, including membership in professional organizations, the ability to work with faculty and students and participation on university committees. McClure, however, was the only tenure candidate to be evaluated by the separate category of collegiality for her sub-tenure review. The Personnel Committee in charge of sub-tenure evaluations defined collegiality as "more than academic collaboration with colleagues, but also contributing to a positive work environment."

Professor Penny Amy, the chair of McClure's department and also a member of the Personnel Committee, solicited letters from other faculty members as to their "experience or opinion" regarding McClure's collegiality. This solicitation letter was not normally a part of the

evaluation process. The letters received in response to the solicitation supplied the basis for McClure's poor sub-tenure review, and particularly her unsatisfactory mark in the category of service. The letters were subsequently placed in McClure's personnel file, although when McClure later requested to view her personnel file, the letters were removed.

In 1997, McClure applied for and was denied tenure at UNLV. She appealed this decision through normal university channels to the Faculty Senate Appeals Subcommittee. The Appeals Subcommittee recommended reversing the decision denying McClure tenure on the basis that the use of the category "collegiality" was unprecedented, and that the solicited letters were improper. The University president, who had final authority over the matter, denied McClure's appeal. The president also chose to strike the solicited letters from McClure's personnel file rather than permit access to the letters.

By the spring of 1998, McClure was in her "up or out" year, meaning that she either had to receive tenure or else she would be issued a nonrenewable one-year employment contract. Since her appeal from the denial of tenure was unsuccessful, she received a one-year nonrenewable contract in the spring of 1998 and completed her employment at UNLV in May 1999. On November 18, 1999, McClure sued the University for declaratory and injunctive relief or, in the alternative, damages.

On April 6, 2000, this court issued its opinion in Stacey, which held that a state university's grant or denial of tenure to a professor is a discretionary decision and that, based upon NRS 41.032, a state university is statutorily immune from a suit attacking the proper exercise of its

discretion.[3] Relying on Stacey, the University moved under NRCP 12(c)[4] to dismiss McClure's complaint on the pleadings. The district court granted the motion, basing its decision in part on Stacey, stating that McClure has no contractual right to tenure and promotion because they are matters of discretion for which the University enjoys immunity from suit. Relying as well on this court's holding in LaForge,[5] the district court determined that, as a non-tenured professor, McClure has no constitutionally protected due process interest in the procedures established by UNLV for making tenure decisions. Accordingly, the district court found that McClure's complaint did not state a cognizable cause of action against the University upon which relief may be granted.

In Stacey, we stated that the provisions of a professor's employment contract with the University regarding tenure require the "exercise of discretion and subjective decision making" on the part of the

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[3]116 Nev. at 432-35, 997 P.2d at 814-16.

[4] NRCP 12(c) states:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[5]116 Nev. 415, 997 P.2d 130.

university.[6] We further held that a university's decision to deny tenure is a discretionary act, and therefore, the decision does not constitute a breach of a university's contract with a professor.[7] In addition, we stated that a university has an inherent right to govern itself within constitutional limitations.[8] McClure does not have a protected property or liberty interest at stake here.[9] Notably, the code provisions setting forth the requirements for tenure in Stacey are identical to the code provisions regarding tenure in McClure's contract. We reaffirm the University's broad discretion in deciding tenure by determining that collegiality can be a basis for such a decision.

McClure had implicit notice when she was hired that she would be evaluated based on collegiality. First, collegiality is set out as an aspect of the code's service requirement. Service is defined in the code as being multi-faceted, including membership in professional organizations, the ability to work with faculty and students and participation on university committees. The meaning of collegiality is encompassed in "the ability to work with faculty and students." Second, applicants for university tenure expect subjectivity in the tenure review process. Again,

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[6]116 Nev. at 433, 997 P.2d at 815.

[7]Id.

[8]Id. at 434, 997 P.2d at 815-16.

[9]See Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 366 (9th Cir. 1976) (stating that a charge of incompetence or inability to get along with coworkers does not infringe upon a liberty interest); see also Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984) (providing that procedural requirements do not ordinarily transform a unilateral expectation of tenure into a constitutionally protected property interest).

"tenure is a multidimensional, subjective, decision-making process where numerous traits and work habits of a professor are considered."[10]

McClure also argues that the solicitation of letters regarding her collegiality, and the subsequent removal of the letters from her personnel file, support her claim of breach of the implied covenant of good faith and fair dealing. We find nothing inappropriate in the initial solicitation of comments from other faculty members regarding their assessment of McClure's collegiality. Their comments may be a vital resource in the University's decision to grant or deny tenure. Even if removing the letters from McClure's personnel file may have been inappropriate, we perceive no legal consequence to that act. The removal of the letters does not constitute an arbitrary or capricious act in bad faith on the University's part. Further, since McClure does not have a contractual entitlement to tenure, there can be no breach of the covenant of good faith and fair dealing.[11]

Judgment on the pleadings was proper as to the remainder of McClure's claims because the University is statutorily immune from suit. NRS 41.032(2) provides that state agencies performing discretionary acts are immune from suit. A discretionary act is "an act that requires a decision requiring personal deliberation and judgment."[12] Therefore, the

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[10]Stacey, 116 Nev. at 433, 997 P.2d at 815.

[11]K Mart Corp. v. Ponsock, 103 Nev. 39, 48, 732 P.2d 1364, 1370 (1987) (providing that "[t]he bad faith discharge case finds its origins in the so-called covenant of good faith and fair dealing implied in law in every contract").

[12]Stacey, 116 Nev. at 434, 997 P.2d at 816; see also Parker v. Mineral County, 102 Nev. 593, 595, 729 P.2d 491, 493 (1986) (stating that

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University is statutorily immune from suit because its decision to grant or deny tenure is a discretionary act.

We conclude that collegiality is a legitimate factor in a university's discretionary tenure decision. Accordingly, we affirm the district court's order granting the University's motion for judgment on the pleadings.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Gene T. Porter, District Judge
Gordon & Silver, Ltd.
Brooke A. Nielsen
Kwasi Nyamekye
James T. Richardson
Skinner, Sutton, Watson & Rounds/Reno
Clark County Clerk

. . . *continued*
"[p]ersonal deliberation, decision and judgment are requirements of a discretionary act").