IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FRANCISCA NORALES,	)	
	)	
Claimant,	)	
	)	
vs.	)	Claim No. 20080727
	)	
STATE OF TENNESSEE,	)	
	)	
Defendant.	)	

FILED
APR 21 2009
Tennessee Claims Commission
CLERK'S OFFICE

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an action for breach of a written contract under Tenn. Code Ann. § 9-8-307(a)(1)(L) arising from a settlement agreement executed by claimant, Francisca Norales, Ed. D. and Tennessee State University ("TSU"), her former employer. The agreement was executed in settlement of *Francisca Norales, Ph.D. v. Tennessee State University, et al.*, Davidson Chancery No. 06-2259-I, which alleged procedural errors with respect to Dr. Norales' tenure denial. Dr. Norales alleges that TSU has failed to comply with paragraph 1(b) of the settlement agreement, which provided for the supplementation of her tenure file with "an independent report of

teaching effectiveness," to be done by a professor chosen by Norales from a group of three TSU designees.

As relief, Dr. Norales requests that the Commission award "all earnings, wages and other benefits she would have received but for the breach of contract by the Defendant;" "reasonable front-pay and back-pay and compensation;" "incidental, consequential and compensatory damages;" "punitive damages for Defendant's intentional and reckless actions;" and "prejudgment interest, court costs, and discretionary costs."

The State has moved for summary judgment, arguing that the undisputed material facts demonstrate that TSU has complied with the settlement agreement. Dr. Norales has opposed the motion. For the reasons set forth below, the Commission finds that the motion should be granted.

FACTUAL BACKGROUND

The following facts are undisputed for the purposes of the defendant's motion for summary judgment, unless otherwise noted.

Francisca Norales, Ed.D, was appointed to a tenure track position in the Department of Business Information Systems at TSU in August of 2001.

In October of 2005, Dr. Norales applied for tenure, which was subsequently denied. Following the denial of her tenure application, Dr. Norales filed suit against TSU and Dr. James Ellzy, her department chairman, in the Davidson County Chancery Court, Case No. 06-2259-I.

I. The Settlement Agreement.

The parties to the Chancery Court action subsequently entered into a settlement agreement and release of liability on the following terms:

> WHEREAS, the Plaintiff is a professor at Tennessee State University (hereinafter "TSU"), and
>
> WHEREAS, in the course of her work at TSU, a dispute arose between the Plaintiff and the Defendants involving the Claims, and
>
> WHEREAS, the Plaintiff believes and has asserted that the Claims are serious and substantial; and
>
> WHEREAS, the Defendants deny any and all liability for the Claims, deeming them doubtful and disputed, and
>
> WHEREAS, the parties wish to avoid the uncertainties, costs, and expenses of protracted litigation regarding the Claims, and
>
> For and in consideration of TSU's promises below, the Plaintiff agrees to the following compromise and final settlement of the Claims.
>
> 1. **Agreement of Tennessee State University**. TSU will take the following actions, which will serve as full and fair consideration for, and for which the Plaintiff agrees to a full and final settlement of, this matter:
>
> (a) Dr. Norales will be allowed to submit a new written appeal to the Tenure Appeals Committee and will be allowed to supplement her appeals materials with materials produced before March 2006;

(b) Dr. Norales will select one professor from three chosen by TSU to conduct an independent report of teacher effectiveness, and that report will be placed in Dr. Norales' tenure file;

(c) The tenure appeals process would follow the procedures set forth in the 1989 TSU Faculty Handbook, pp. 68-69. The applicable paragraphs state as follows:

> 5. The tenure and Promotion Appeals Committee shall consider the candidate's appeals materials as well as the candidate's file, including the recommendations of all previous committees and administrators. This consideration shall result in a finding of 'no change in the recommendation' or 'change to positive recommendation.' This finding will be transmitted, in writing, to the Vice President for Academic Affairs. . . .
>
> 6. The Vice President for Academic Affairs will notify the candidate of the Appeals Committee's recommendation and will inform the candidate of whether or not the Vice President's recommendation has changed. . . .
>
> 7. The recommendation of the Tenure and Promotion Appeals Committee will be forwarded to the President along with the recommendation of the Vice President for Academic Affairs." The TSU President will have the final say regarding the appeal.

(d) The Tenure Appeals Committee will be appointed by TSU, will contain entirely different members than the 2006 committee, and will not contain any member from the Department of Business Information; and

(e) All terms of the compromise and settlement shall be confidential and shall not be disclosed by the Plaintiff or Defendants.

2. **Agreement of the Employee.** In return, the plaintiff agrees to and hereby does completely release and discharge the Defendants, the State, its agencies, departments, agents, officers and employees, in either their official or individual capacities, from the Claims contained in Plaintiff's Complaint. Plaintiff will dismiss her lawsuit against the Defendants TSU and Dr. Ellzy with prejudice in Davidson County Chancery Court. In consideration of the above assurances, the State of Tennessee and TSU will take the actions itemized in paragraphs 1 above. The Plaintiff agrees to these terms, as well as to the following terms, in

full and final settlement of this matter, as well as settlement of all past or present claims.

3. **Other Terms.**

3.1. This Compromise and Settlement is not intended to be and shall not be construed as an admission of liability by the State, its agencies, departments, agents, officers or employees, nor as a waiver of the State's sovereign immunity or any employee's, official, absolute or qualified immunity. This settlement is a compromise of a doubtful or disputed claim and the State denies any liability therefore and merely intends to avoid further litigation.

3.2. The Plaintiff hereby covenants that she has not assigned or conveyed any right or action she may have against the parties described in the above paragraph 2.

3.3. The terms set forth herein are intended to be the full and complete settlement of this matter. No compensation is to be paid regarding damages, injuries to persons or property, interest, expenses, costs, or attorney's fees under any theory of law. There are no other agreements to this matter, whether oral, written, expressed or implied.

3.4. The undersigned declare that the terms of this Settlement Agreement have been completely read, are fully understood and accepted by them, and that the Plaintiff has had the benefit of counsel from her attorney in connection herewith. The undersigned further declare that these terms have been entered into voluntarily, and without any undue influence, coercion or improper motive.

3.5. All parties agree that all terms and conditions of this Settlement Agreement shall remain confidential from this date forward and not subject to public disclosure, unless otherwise required by law.

3.6. This agreement is contingent upon the written approval of the governor and comptroller of the treasury pursuant to Tenn. Code Ann. § 20-13-103.

II. Performance of the Contract

Dr. Beth Quick, one of three tenured faculty members designated by TSU pursuant to the settlement agreement, was chosen by Dr. Norales to conduct an independent report of teaching effectiveness. TSU maintains that Dr. Quick was asked to review Dr. Norales' tenure appeal binder and to write an independent assessment addressing claimant's teaching effectiveness. Dr. Norales does not dispute that Dr. Quick was asked to review the tenure appeal binder, but contends that Quick was asked to provide a written response and was not asked to conduct or write an independent teaching assessment.

TSU maintains that Dr. Quick reviewed Dr. Norales' teaching effectiveness as part of her review of the tenure appeal binder and submitted a report addressing Norales' teaching effectiveness on April 3, 2007. Dr. Norales admits that Dr. Quick reviewed her appeal binder and submitted a report containing a one sentence comment about her teaching effectiveness, but denies that Dr. Quick conducted an independent report of teaching effectiveness as required by the settlement agreement. Dr. Norales also contends that Dr. Quick's review of the appeal binder was not

called for in the settlement agreement and her comments relative to Dr. Norales' tenure application were prejudicial.

Dr. Quick's report is a two and a half page document titled "Review of Dr. Francisca O. Norales." In the last paragraph of the report, Dr. Quick states the following:

> While I have concerns about whether the research and service as documented in the tenure and promotion folio reflect that of full professor, teaching effectiveness does not seem to be an area of concern, but rather a perceived strength based on evidence provided (letters from students, letters of support, teaching evaluations, "excellent" administrative reviews.).

Quick was not informed of the lawsuit or settlement agreement prior to submitting her report. Dr. Quick's report was placed in Dr. Norales' tenure file prior to the date that the Tenure Appeals Committee met to consider pending tenure appeals and was considered as a part of her appeal dossier.

The TSU Tenure Appeals Committee met on April 23, 2007, to consider Tenure Appeals, including Dr. Norales.' The Committee voted unanimously for "no change" with respect to her application. On May 2, 2007, Dr. Norales received notification from TSU President Melvin N. Johnson that her appeal had been denied.

DISCUSSION

I. Summary Judgment

Tenn. R. Civ. P. 56.04 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *Byrd v. Hall,* 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as matter of law on the undisputed facts. *Anderson v. Standard Register Co.*, 857 S.W .2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991)(citing *Jones v. Home Indemnity Ins. Co.*, 651 S.W.2d 213, 214 (Tenn. 1983).

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *Blair v. West Town Mall,* 130 S.W.3d 761, 767 (Tenn. 2004); *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.

1997). If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. *Blair v. West Town Mall,* 130 S.W.3d at 767; *McCarley v. West Quality Food Serv.,* 960 S.W.2d at 588; *Robinson v. Omer,* 952 S .W.2d at 426.

Trial courts ruling on summary judgment motions must construe the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer,* 952 S.W.2d at 426; *Byrd v. Hall,* 847 S.W.2d 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder,* 913 S.W.2d 150, 153 (Tenn. 1995): *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn. 1995).

II. TSU's Alleged Breach of the Settlement Agreement

A settlement agreement is a contract enforceable under contract law principles. *Environmental Abatement, Inc. v. Astrum R.E. Corp.,* 27 S.W.3d 530, 539 (Tenn.Ct.App. 2000). The essential elements of a breach of

contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of that contract, and (3) damages caused by the breach of the contract. *Ingram v. Cendant Mobility Financial Corp.*, 215 S.W.3d 367, 374 (Tenn.Ct.App. 2006). The Tennessee Supreme Court discussed the elements of an enforceable contract in *Jane Doe, et al. v. HCA Health Services of Tennessee, Inc., d/b/a HCA Donelson Hospital,* 46 S.W.3d 191, 196 (Tenn. 2001), stating:

> A contract "'must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced.'" *Higgins v. Oil, Chem., and Atomic Workers Int'l Union, Local* # 3-677, 811 S.W.2d 875, 879 (Tenn.1991)(quoting *Johnson v. Central Nat'l Ins. Co. of Omaha,* 210 Tenn. 24, 34-35, 356 S.W.2d 277, 281 (Tenn.1962)(citations omitted)). Indefiniteness regarding an essential element of a contract "may prevent the creation of an enforceable contract." *Jamestowne On Signal, Inc. v. First Fed. Sav. & Loan Ass'n,* 807 S.W.2d 559, 565 (Tenn.Ct.App.1990) (citing *Hansen v. Snell,* 11 Utah 2d 64, 354 P.2d 1070 (1960)). A contract "'must be of sufficient explicitness so that a court can perceive what are the respective obligations of the parties.'" *Higgins,* 811 S.W.2d at 880 (quoting *Soar v. National Football League Players' Ass'n,* 550 F.2d 1287, 1290 (1st Cir.1977); *see also Restatement (Second) of Contracts* § 33(2) (1981) ("The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.")

46 S.W.3d at 196. The interpretation of unambiguous agreements is a question of law for the courts. *Malone & Hyde Food Services, v. Parson*, 642 S.W.2d 157, 159 (Tenn.App.1982). A contract, however, is not rendered ambiguous simply because the parties disagree as to the interpretation of one or more of its provisions. *See Warren v. Metropolitan Gov't of Nashville and Davidson County*, 955 S.W.2d 618, 623 (Tenn.Ct.App.1997); *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.*, 884 S.W.2d 458, 462 (Tenn.Ct.App.1994). Rather, a contract is ambiguous only if its meaning is uncertain and is susceptible to more than one reasonable interpretation. *Simonton v. Huff*, 60 S.W.3d 820, 825 (Tenn.Ct.App. 2000).

The cardinal rule for interpretation of contracts is to ascertain the intention of the parties from the contract as a whole and to give effect to that intention consistent with legal principles. *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975); *Winfree v. Educators Credit Union,* 900 S.W.2d 285, 289 (Tenn.App. 1995). In resolving disputes concerning contract interpretation the court's task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language. *Guiliano v. Cleo, Inc.,* 995 S.W.2d 88,

95 (Tenn. 1999). If the language of a written instrument is clear and unambiguous, the court must interpret it as written, rather than according to the unexpressed intention of one of the parties. *Malone & Hyde Food Services, v. Parson*, 642 S.W.2d 157, 159 (Tenn.App. 1982).

Further, under Tennessee law, it is presumed that a written contract contains the entire agreement between the parties. *Simonton v. Huff*, 60 S.W.3d 820, 826 -827 (Tenn.Ct.App. 2000)

TSU argues that the undisputed material facts demonstrate that it fully complied with the settlement agreement which called for the designation of three faculty members, one of whom Dr. Norales could pick to "conduct an independent report of teacher effectiveness." As provided for by the agreement, Dr. Norales was permitted to submit a new appeal, in which the report was included.

Dr. Norales contests TSU's position and argues that Dr. Quick did not do an independent report of teaching effectiveness, that she never personally observed Dr. Norales in the classroom, and that she only reviewed materials in the tenure binder. Further Dr. Norales contends that comments in Dr. Quick's report concerning her tenure binder were

prejudicial and negatively influenced the decision-making of the Tenure Appeals Committee.

The settlement agreement, by its explicit terms, obligated TSU to do four things:

1. *Allow Dr. Norales to submit a new written appeal to the Tenure Committee and to supplement her appeal material with material produced before 2006.*

2. *Choose three professors from whom Dr. Norales could select one to conduct an independent report and teaching effectiveness to be placed in her tenure file.*

3. *Consider Dr. Norales' new tenure appeal following the procedures set forth in the 1989 TSU Faculty Handbook, pp. 68-6, which provides:*

> - Tenure Committee must consider the candidates appeals materials as well as the candidate's file, including the recommendations of all previous committees and administrators. Tenure Committee issues a recommendation of no change or change to positive recommendation and transmits recommendation in writing to Vice President for Academic.

- Vice President for Academic Affairs notifies candidate of Appeals Committee's recommendation and informs candidate of whether the recommendation has changed.

- Recommendation of Tenure Committee and recommendation of Vice President for Academic Affairs is forwarded to President.

- TSU President makes final decision on tenure.

4. *Keep settlement confidential.*

The settlement agreement permits Dr. Norales to select a professor "to conduct an independent report of teaching effectiveness." This phrase is undefined in the agreement and there is nothing in the record here to indicate that it is a term of art or has any meaning that is peculiar to the educational field. The agreement contains no requirements as to the contents of such a report or the manner in which it is to be made. There is nothing in the agreement indicating that Dr. Quick was required to personally observe Dr. Norales' classroom performance. In fact, although the agreement provided that the report itself was to be independent, the agreement does not require that first-hand information be utilized. The contract is also silent as to the manner in which the designee is to be

informed of the task of creating a teaching effectiveness report and contains no direction as to any instruction to be offered.

Dr. Norales argues that the contract was breached because Dr. Quick did not personally observe and evaluate her in the classroom. Although certainly the parties could have agreed that the report would be premised upon such an evaluation, there is nothing in either the agreement itself or the deposition excerpts offered by the parties to suggest that it was the parties' intent that Dr. Quick be required to base the report upon first hand observations of Dr. Norales in the classroom. Nor does it appear to the Commission that this would be the only way in which teacher effectiveness could be assessed. Other conceivable alternatives are student evaluations, student test scores, and review of course material and syllabi.

Similarly, Dr. Norales' complaint that Dr. Quick was required to take initiative to review her classroom organization, major methods in teaching or instructional materials is also not addressed in the terms of the agreement, which the Commission concludes does not create any expectation about the contents of the report beyond the fact that it would address teaching effectiveness.

Dr. Norales also maintains that no reasonable person could construe Dr. Quick's submission as a "report" because teaching effectiveness was only addressed in one sentence at the end of the document. Webster's Revised Unabridged Dictionary defines a "report" as "[a]n account or statement of the results of examination or inquiry made by request or direction." Webster's Revised Unabridged Dictionary (1913). The Commission does not agree that either the terms of the agreement or the usual and ordinary meaning ascribed to the term "report" impose any limitations on the length or depth of work to be provided by Dr. Quick.

Dr. Quick concluded that teaching effectiveness was an area of strength for Dr. Norales based on the material reviewed, namely, "letters from students, letters of support, teaching evaluations, [and] 'excellent' administrative reviews." The undisputed facts demonstrate that the settlement agreement required only that a "report" of teacher effectiveness be submitted and did not place any substantive limitations either quantitatively or qualitatively on the contents of the report or on the data upon which the report was to be based. The Commission therefore concludes that neither Dr. Quick's review of Dr. Norales' tenure binder nor

the length to which she addressed teaching effectiveness breached TSU's obligations under the settlement agreement.

Dr. Norales also argues that Dr. Quick's comments relative to her tenure appeal were not called for in the settlement agreement and prejudiced her appeal. In order to survive summary judgment, she must demonstrate that there are disputed issues of material fact relative to whether Dr. Quick's report constituted a breach of the contract by TSU. Although Dr. Quick was employed by the TSU, she was not a party to the settlement and apparently had no knowledge of its existence at the point she was performing her report. Dr. Norales does not contend that TSU dictated or controlled the contents of Dr. Quick's report. She has not cited any contract provision which limited the comments permitted Dr. Quick in her report.

Because the Commission finds that Dr. Norales has not created a genuine issue of material fact for trial as to TSU's breach of the contract, the motion for summary judgment is granted.

It is so **ORDERED** this 21st day of April, 2009.

STEPHANIE R. REEVERS
Claims Commissioner

CERTIFICATE OF SERVICE

This is to certify that I have mailed a true and correct copy of the foregoing document to the following parties:

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This 21 of Apr, 2009.

Marsha Richeson, Administrative Clerk
Tennessee Claims Commission