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IN THE COURT OF APPEALS OF IOWA
CLERK, SUPREME COURT

ROLF ARNO LUMPERT,	)	
Appellant,	)	Filed April 14, 1977
vs.	)	
UNIVERSITY OF DUBUQUE,	)	$\frac{49}{2-57568}$
Appellee.	)	

Appeal from Dubuque District Court - Thomas H. Nelson,
Judge.

Plaintiff appeals judgment notwithstanding the verdict
granted in favor of Defendant in breach of contract action
for wrongful discharge from employment as tenured university
professor. - Affirmed.

James Reynolds, of Reynolds, Kenline, Breitbach,
McCarthy & Clemens, of Dubuque, for Appellant.

David L. Hammer & Howard O. Hagen, of O'Connor, Thomas,
Wright, Hammer, Bertsch & Norby, of Dubuque, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger
and Carter, JJ.

SNELL, J.

Plaintiff, Rolf Arno Lumpert, was a tenured faculty member of the language department at the University of Dubuque. From May, 1963 until June, 1973, he was employed teaching German Language and Literature. On February 28, 1972, plaintiff received a termination letter of employment from the president of the University stating that for reasons of financial exigency his employment was terminated at the conclusion of the academic year 1972-73; *i.e.*, on June 30, 1973. Plaintiff brought this action against the University of Dubuque stating that the termination was a violation of the terms of his contract of employment and sought damages in the amount of \$289,311.16.

The case was tried to a jury which was unable to reach a verdict. Defendant thereupon filed a Motion for Judgment notwithstanding the verdict renewing grounds urged earlier for directed verdict and urged additional grounds that entitled it to a judgment as a matter of law. The trial court granted two of the grounds urged by defendant and sustained the Motion for Judgment n.o.v. The grounds sustained were that plaintiff's cause failed due to a lack of consideration to support the contract and that by reason of financial exigency, defendant had adequate cause for the termination as a matter of law. Plaintiff appeals and asks for judgment in its favor as a matter of law or a new trial.

Plaintiff was initially hired by the University of Dubuque in May of 1963 as an instructor in the German department. After three years of employment, on February 28, 1966, plaintiff entered into a new contract with the University. Paragraph 4 of this contract provided that it did not need annual renewal. Any changes of title, responsibility or salary would be made by supplemental letter. Paragraph 5 of the contract provided: "Provisions relative to termination, sick leave, insurance, TIAA,

tenure, rank, etc., are stated in the University's Manual of Operation which is hereby made a part of this contract." The University's Manual of Operation set out the following provisions on college faculty tenure:

"After three years of satisfactory service, tenure may be recommended for a fulltime faculty member. If the fourth contract is not offered, the faculty member must be notified on or before December 1 of the third year of his employment. If the fourth contract is offered, and tenure is not established, the administration shall show cause for its action on or before December 1. After the expiration of the probationary period, continuous appointment shall be established and services are to be terminated only for adequate cause. It is understood that continuous appointment is based upon need for the services of the appointee and the financial ability of the institution to continue the appointment."

Defendant pleaded in defense that the termination was for reasons of financial exigency and that the continuous appointment of plaintiff was dependent upon the financial ability of the University to continue the appointment. The trial court in its jury instructions defines the terms as follows:

"1. Financial ability is defined as the quality or state of being able to provide the necessary funds in order to achieve the desired ends of the educational institution by rearranging the expenditure and income of funds in the institution in such a way as to provide necessary funds to meet the annual expenditures, with sufficient revenue to prevent a loss of funds. Financial ability is not synonymous with financial exigency since the need for rearrangement of funds does not have to be urgent, critical or pressing under the concept of financial ability.

2. Financial exigency is defined as the critical, pressing or urgent need on the part of the educational institution to reorder its monetary expenditures within the institution in such a way as to remedy and relieve the state or urgency within said institution created by the inability of the institution to meet its annual monetary expenditures, with sufficient revenue to prevent a sustained loss of funds."

Plaintiff alleges that the termination of employment was "without adequate cause as required for tenured professors." The claim is that plaintiff is damaged to the extent of the compensation and benefits he would have received had he contin-

ued in his employment to age 65.

Plaintiff claims that the contract also included the American Association of University Professors' Guidelines for the Termination of Tenured Faculty. An offer of proof was made. The president of the University testified that in terms of notification and benefits, the University scrupulously followed the AAUP Guidelines. However, in terms of the process by which a decision is arrived at, the AAUP Guidelines were never a part of the contract or the Manual of Operation. We find, as the trial court found, that plaintiff's contract consisted of the signed contract which incorporated the Manual of Operation, but did not include any guidelines or resolutions of AAUP.

In addition to the parties' briefs, this court has received and considered Amicus Curiae Briefs filed with permission of court by the American Association of University Professors. An Amicus Curiae Brief of the Iowa State Education Association has also been filed with permission and considered.

The trial court instructed that the burden of proving proposition 3 of plaintiff's case was on plaintiff, that the termination was without adequate cause. It is generally true that the burden of pleading and proving an issue go together. The party who is required to plead an issue has the burden of proving that issue. *Fortgang Bros., Inc. v. Cowles*, 249 Iowa 73, 85 N.W.2d 916 (1957); rule 344(f)(5), Rules of Civil Procedure. This rule is not affected by the fact that a negative declaration is sought. In *General Casualty Co. v. Hines*, 261 Iowa 738, 156 N.W.2d 118 (1968), plaintiff-insurer sought to avoid liability in a declaratory judgment action to determine the meaning of the policy. The court stated: "To ascertain on which party the burden of proof lies the pleadings should be consulted, and the question is which of the parties would suffer an adverse judgment if no evidence was received and when that matter was determined, that party has the burden of proof." 261 Iowa at

742, 156 N.W.2d at 121. Thus, the burden was on plaintiff in the instant case to show that termination was without cause.

In *Merrick v. Delavan Eng'r. Co.*, 243 Iowa 39, 47; 50 N.W.2d 586 (1951), plaintiff failed to present any substantial proof that he was discharged without justifiable cause. The supreme court held that the order of the trial court directing the verdict against plaintiff on this issue was correct.

In the instant case, we find very little evidence introduced by plaintiff that his discharge was without cause. Defendant's evidence of financial exigency, so far as the validity of the figures was concerned, was not disputed by plaintiff. Plaintiff did contest the legal effect and the seriousness of the financial problems. He also claimed that the foreign language department was self-supporting and that the real reason for his termination was a decline in enrollment in foreign languages. Although slight, we believe the evidence was sufficient to shift the burden to defendant of showing adequate cause. See 56 C.J.S. *Master and Servant*, § 53 at 454-55.

In Instruction 11, the trial court stated that the burden of proof was on the defendant to establish the defense that the contract was terminated because of financial exigency.

The trial court, in finding for defendant on the ground that plaintiff had failed to show consideration, relied on the case of *Stauter v. Walnut Grove Products*, 188 N.W.2d 305 (Iowa 1971). The court stated: "Absent any consideration beyond the employee's promise to perform, a contract for permanent or lifetime employment is to be construed to be for an indefinite time, terminable at the will of either party." 188 N.W.2d at 311. The court found that Lumpert's contract was for an indefinite term and terminable at the will of either party.

In *Collins v. Parsons College*, 203 N.W.2d 594 (Iowa 1973),

the court found that additional consideration had been provided by Professor Collins in giving up a permanent employment with tenure at another institution to take the job with Parsons College, and was done with the knowledge of Parsons. The supreme court recently emphasized the rule in *Laird v. Eagle Iron Works*, 249 N.W.2d 646 (Iowa 1977). However, in *Laird* the court failed to find independent consideration that would support the plaintiff's contract. On page 647, the court stated:

"To be enforceable a promise by an employer to provide permanent employment requires consideration, and when the employee does not make a reciprocal promise but merely serves as long as he desires, no promise for a promise exists to provide the necessary consideration. In that situation the law requires some independent consideration before the employer's promise is enforceable."

The trial court recognized that the pleadings raised no issue on whether the contract was invalid for lack of consideration. Although sporadic forays were made by the parties on the issue of consideration, the case basically was not tried on that issue. For these reasons we hold the court's judgment n.o.v. on the ground of lack of consideration is not supported by the record.

On the issue of financial exigency, evidence was presented by the University of deficits for a four-year period prior to plaintiff's termination of employment. The undisputed evidence on this issue shows that the University had the following yearly deficits; 1. Fiscal 1970, \$62,676; Fiscal 1971, \$147,093; Fiscal 1972, \$121,464; Fiscal 1973, \$235,898. In addition, the University owed approximately \$200,000 to the federal government for construction of buildings. Because of the poor financial situation of the University, the federal government allowed the University in 1972 and 1973 to waive payments of \$180,000 to an escrow account. This amount is not reflected in the afore-said deficits. In order to meet these deficits, the University

used money from unrestricted endowments from the period June 1970 to June 1973. In 1970 this endowment fund amounted to \$170,000. By June 1973, it was down to \$114. None of these figures was challenged by plaintiff for accuracy. Plaintiff claimed that the deficit was primarily chargeable to the seminary part of the University rather than to the college. Although this was undoubtedly true, the evidence also showed deficits in the college financing.

The termination of Lumpert's employment was part of the administration's attempt to remedy its consistent deficit financial situation. Lumpert was one of two professors of foreign language whose contracts were terminated. Other foreign language professors had been terminated in earlier years. The entire department of foreign languages was discontinued. The administration pointed out that it was a member of a tri-college agreement with Loras College and Clarke College where language departments were available. Under this arrangement, a student from one of the colleges could take courses at the other two. Thus, no student at the University of Dubuque would be deprived of the opportunity to take foreign languages. The administration had also made considerable reduction in staff in the seminary for financial reasons.

Both parties agree that Professor Lumpert had tenure at the University of Dubuque, but disagree as to its meaning. Although tenure has been a fixture of higher education for many years, its exact legal status has not been often spelled out. Its basic purpose was set forth by the United States Court of Appeals in *Browzin v. Catholic University of America*, 527 F.2d 843, 846 (D.C. Cir. 1975):

"The real concern is with arbitrary or retaliatory dismissal based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting."

If a professor had no protection against such actions, he might well be deterred from pursuing his studies or his teaching in the paths that seem to him to be best.

The tenure system, as embodied in the 1968 regulations and in previous efforts by the AAUP and others, is designed to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits. It is designed to foster our society's interest in the unfettered process of research and learning by protecting the profession's freedom of inquiry and instruction. In many cases, it is conditioned upon an exception that allows termination "for cause." Among the causes, not infrequently, is financial exigency or program discontinuance. This is to allow a university some flexibility to respond to a drastic reduction in funds, or to the need for a change in curriculum. How restricted is the university's flexibility, of course, depends on the contract language used in regard to tenure. See *Browzin, supra*, where the parties stipulated to a bona fide financial exigency and the case was tried on other grounds. See also *Collins v. Parsons College*, 203 N.W.2d 594, 597-98 (Iowa 1973).

"Financial exigency" appears to be a term little defined. The court in *American Assoc. of Univ. Professors, Bloomfield College Chapter v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd partially on other grounds*, 136 N.J. Super. 442, 346 A.2d 615 (App. Div. 1975), observed:

"Its applicable register of meaning is to be found somewhere between the understanding offered by the chairman of the college's board of trustees as 'an urgent financial situation about which something had to be done in order to stay in business' and that propounded by the Princeton Professor of Economics who advocated that financial exigency exists 'when taking into account all assets, potential assets, sources of funding, income and all alternative courses of action, the continued viability of the institution becomes impossible without abrogating tenure.'" 322 A.2d at 854.

* * *

The very concept of 'exigency' changes before our eyes. Its meaning varies with the light of surrounding circumstances. To say that it connotes a state of pressing urgency, a time of crisis or immediate need, is meaningless without knowing the nature of the particular need, its relationship to the purposes of the institution, and what will be sacrificed by its nonfulfillment. One must cross the long gradient between starvation and appetite, between illness and discontent, between need and desire, and determine where one ends and the other begins. It is a process which involves a sequence of changing value judgments based upon altering proportions between costs and objectives. In this sense, the only definition of exigency which suits our needs is that offered by Webster as 'such need or necessity as belongs to the occasion'. . . .

The test best suited to effectuate the intent of the parties on judicial review of the college's action, therefore, is whether the action taken followed from the board's demonstrably bona fide belief, under honestly formulated standards, in the existence of a financial exigency and extraordinary attendant circumstances, and in the necessity for terminating tenured faculty members as a means of relieving the exigent condition. Interrelated therewith is the question of whether sufficient credible evidence of "exigency" and "extraordinary circumstances" exists as to provide a basis for the conclusions reached in the exercise of a reasonable and prudent judgment." 322 A.2d at 855.

In *Levitt v. Board of Trustees of Nebraska State Colleges*, 376 F. Supp. 945 (D.C. Neb. 1974), the court upheld the dismissal of college faculty members on the ground that a financial need existed to terminate faculty positions. Although tenure was not involved, the court examined the proceedings to determine if contract or constitutional rights had been violated. It was found that plaintiffs had not carried the burden of proving that the selection process for termination of positions was either arbitrary or capricious. Neither was there any action taken by the university that might have placed the good name, reputation, honor or integrity of plaintiffs at stake. Such is the case here. The evidence is unrefuted that the university in no way questioned Professor Lumpert's abilities, morals,

competency or injected any other matters that would jeopardize his career.

In reviewing the judgment n.o.v., the question must be determined whether the existence of a financial exigency is a question of law for the court, or a jury question. The general rule is that what constitutes a good and sufficient ground for discharge of an employee is a question of law for the court. The reasonableness of the ground is for the court. 56 C.J.S., *Master and Servant*, § 54 at 460, 462. The Iowa law follows the general rule.

"Usually, what constituted good and sufficient ground for discharge is a question for the court under the facts and circumstances revealed."

LaFontaine v. Developers & Bldrs., Inc., 261 Iowa 1177, 156 N.W.2d 651, 658 (1968). See *General Casualty Co. v. Hines*, 261 Iowa 738, 156 N.W.2d 118, 123 (1968) (if terms of a contract do not involve disputed fact issues, its meaning is determinable by the court.)

In *Stauter v. Walnut Grove Products*, 188 N.W.2d 305 (Iowa 1971), the court noted a distinction between cases involving termination of employment for reasons of incompetency and those involving employer dissatisfaction. The court quoted from 56 C.J.S., *Master and Servant*, § 54(b) at 462, that the question whether the services were satisfactorily performed is a question to be determined by the employer and not the jury. However, the question whether the asserted dissatisfaction as a ground for discharge is in good faith or is feined, is for the jury, where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction. The distinction is apparently based on the subjective aspects in dissatisfaction whereas incompetency partakes more of objective factors.

The question whether a financial exigency existed is primarily a matter of subjective judgment to be exercised by the University officials charged with the responsibility of operating the University. We do not believe it is a question of fact to be determined by a jury. Moreover, we do not believe it is a matter for the substitution of the court's judgment or the juror's judgment for that of the administrative body.

"Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body."

Levitt v. Board of Trustees of Neb. St. Colleges, 376 F. Supp. 945, 950 (D.C. Neb. 1974).

This does not mean, however, that a university has an absolute right to terminate tenured professorships. Each case is subject to its own contractual provisions. Further, a jury question is presented when evidence of bad faith exists. The question whether the asserted ground for a discharge is the true reason is a jury question where there is evidence tending to show that the discharge was not in good faith. 56 C.J.S., *Master and Servant*, § 54(c), at 462. In *Vallejo v. Jamestown College*, 244 N.W.2d 753 (N.D. 1976), a jury question was present whether the discharge was due to low enrollment in the college and financial exigencies, or whether, as plaintiff claimed, the true reason was because plaintiff had clashed with the president of the college and his sister and had refused to give a passing grade to a student whose parents had influence with the college.

There is no evidence of bad faith or of reasons other than financial exigency for plaintiff's termination to create a jury

question in the case at bar.

We hold that the defense of financial exigency was proved as a matter of law and that the trial court's judgment for defendant n.o.v. on that ground is substantiated by the record. Judgment affirmed.

Allbee, C.J. and Donielson, J. concur.

Oxberger and Carter, JJ. dissent.

CARTER, J. (dissenting)

The parties did not plead nor try this matter on the issue of consideration. Moreover, I share the view of our Supreme Court that "we have considerable doubt that an agreement for tenure. . . requires mutuality in any event *as to duration of employment.*" *Collins v. Parsons College*, 203 N.W.2d 594, 598 (Iowa 1973).

As to the other issues in the case I believe the majority accords too much discretion to the university administration. In today's world those who are entrusted with the administration of colleges and universities face serious financial problems on a regular basis. It would be an unusual situation if there were not various alternatives available for dealing with these impending financial exigencies. If the concept of academic tenure is to retain any vitality in this atmosphere it must be recognized as limiting to some extent the right of the administration to act with complete freedom of choice in choosing among such alternatives. I believe that the majority opinion fails to recognize this and to apply proper standards for determining whether the administration ignored such limitations in terminating the plaintiff.

This does not mean that a bonafide financial exigency is never a valid ground for termination of a tenured academician. But it should mean that before this drastic remedy is attempted other available alternatives must be fully and fairly considered with an eye toward avoiding such a result. Whether this was done in the present case is, on the record before us, an issue as to which reasonable minds could differ. It therefore was not properly decided as a matter of law, and should have been retried to a jury.

The court said in *McCauill v. Universal Mfg. Co.*, 218 N.W.2d 592, 593, 594 (Iowa 1974), "Only rarely may a verdict be directed

in favor of one who has the burden of proof. . . . Even when facts are not in dispute or contradicted as jury question is presented if reasonable minds might draw different inferences from them."

OXBERGER, J, joins this dissent.