ACADEMIC AND PROFESSIONAL CONTRACTS:
LEGAL ISSUES AFFECTING ADJUNCT FACULTY

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I. INTRODUCTION

William Kaplan and Barbara Lee, in their invaluable LAW OF HIGHER EDUCATION (3rd Ed. 1995) provide the rationale for this outline. They observe, on p. 161, that part-time faculty members, in 1988, comprised approximately 38% of faculty. They state: “Differences by institutional type are striking; 17% of the faculty in research universities are part-time, while approximately 52% of the total faculty at community colleges were part-time in 1988. Compared with their representation in full-time positions (27%), women tend to be over-represented among part-time faculty (42%) and African-Americans are twice as likely to teach part-time as whites. Legal issues concerning this large and important faculty group are likely to demand special attention.” Those legal issues span the spectrum from selection to termination and from applicability of civil rights laws to unemployment and worker’s compensation.

II. APPOINTMENT

A. Applicability of Civil Rights Laws

The federal civil rights laws (Title VII, ADEA, ADA, etc.) prohibit various types of discrimination. Applicability of these laws, and their state counterparts, is generally governed by the size of the employer, not the status of the individual employee. The prohibitions contained in the civil rights laws are applicable to all employees and not those in full-time status. Concurrently, the civil rights laws protect students and other employees from discriminatory acts by the part-time employees of the institution.

Provided no discrimination exists, colleges and universities maintain considerable latitude in the selection of faculty. In the context of a faculty dispute, the United States Court of Appeal for the Fifth Circuit stated:
C. When the parties agree that the person authorized to issue employment contracts has not formally done so, an action for implied contract will not exist. Campbell v. State, 551 N.Y. S.2d 100 (N.Y. App. Div. 1990).

D. Another example of the rejection of an implied contract occurred in Zadrozny v. City Colleges of Chicago, 581 N.E.2d 44 (Ill. App. 1991) in which a junior college instructor did not demonstrate an implied contract with the college to hire him to teach summer school based on his response to a questionnaire in which he desired to teach during the summer session or based on a contract between the faculty member and the college which covered only the regular academic year.

E. In Caldwell v. Linker, a contract did not result when an instructor, in response to a contract offered by the college including performance criteria, attempted to modify the conditions of that agreement. Her attempted modification to a material term of the contract constituted a counteroffer and no contract was formed. Basic contract law requires a meeting of the minds as to material terms for the contract to be formed. But a contract can be accepted even though an expression of hope or suggestion as to terms have been added to the original offer. Caldwell v. Linker, 901 F. Supp. 1010 (M.D. N.C. 1995).

V. CLASSIFICATION OF EMPLOYEES

State statutes, regulations and, for private institutions, faculty handbooks should define the status of part-time employees. That status generally will be non-tenured. However, if the part-time faculty member can establish that they are performing the same amount of work as employees in higher classifications, or tenure track faculty, they may be successful in improving their status. See, for example, Rooney v. San Diego Comm. College Dist., 181 Cal. Rptr. 464 (Cal. App. 1982), Professor Rooney was able to establish that, during one semester, he taught more than the hours prescribed by state statute for certain part-time employees and, therefore, was able to obtain a better classification and additional salary. However, the court denied him compensation for time spent on voluntary tasks, including attending meetings and counseling students.

VI. NEGLIGENT SUPERVISION

This tort (civil wrong) and others may be asserted against part-time, as well as full-time, faculty members. Generally, this claim is most frequently asserted as a result of injuries occurring in athletic, recreational or clinical activities. It is probable that, in many instances, the faculty, coaches or leaders may be adjuncts. The elements of the tort, and the athletic context, are "allowing a student with a known propensity towards violence to play or allowing a team to play when there is a total absence of management." E.g., Brown v. Day, 588 N.E.2d 973 (Ohio App. 1990).
Potential § 1983 liability exists for “failure to train”: From time to time, plaintiffs have been successful in proceeding under a “failure to train” theory as established by the City of Canton v. Harris, 489 U.S. 378 (1989). The Supreme Court in City of Canton adopted a "deliberate and indifferent" standard for failure to train allegations. To establish that a defendant exhibited a deliberate indifference by their failure to train, a plaintiff must prove that the defendants “had notice that their procedures were inadequate and likely to result in a violation of constitutional rights.”

The tort of negligent retention is related to negligent supervision and negligent hiring. Negligent retention occurs when the employer becomes aware (or should have become aware) of problems with an employee that suggests unfitness and the employer fails to take further action such as investigation, discharge, or reassignment. E.g. Jackson v. Kimel, 992 F.2d 1318 (4th Cir. 1993); Perkins v. Spivey, 911 F.2d 22 (8th Cir. 1990); Cook v. Greyhound Lines, Inc., 847 F. Supp. 725 (D. Minn. 1994).

VII. AT-WILL EMPLOYMENT

An at-will employee is one who may be terminated for any non-discriminatory reason.

A. Part-time Employees

If a carefully worded appointment document is used, at-will employment will not be an issue for part-time or adjunct faculty. Their letter of appointment will have a fixed beginning and fixed end, and be of short duration. Provided other conditions of employment are met, the college or university will be obliged to pay the part-time employee for the period of his or her contract. Having a fixed contract term, as we will see, will be useful in defeating unemployment compensation claims.

B. Appointment Letters

Appointment letters, used promiscuously by colleges and universities, create the potential for changing what was intended to be an at-will relationship into one for a fixed term, usually the academic year. This can be particularly problematic for staff appointments. If appointment letters are to be used, a recent decision provides guidance on language that can be incorporated in a letter without removing the appointment from at-will status.

A university staff employee received the following letter:

"I am pleased to inform you that as Manager, Contract Administration and Project Management, your compensation for the Year 1991-1992, effective July 1991, computed at an annual rate will be: Salary $47,600, annuity contribution - $5,474."
Your first monthly salary payment based on this rate will be made on July 31, 1991."

In November of 1991, the employee was terminated and he sued, claiming his letter of employment constituted a contract for the academic year. A trial court dismissed the claim and the dismissal was upheld by the Missouri Court of Appeals in Clark v. Washington Univ., 906 S.W.2d 789 (Mo. App. 1995). A copy of that decision is attached. The appointment letter lacked a specific duration of employment or limitation on the reasons for which an employee may be discharged. Therefore, the letter in question did not alter Clark's at-will status.

Public university and college employees holding an at-will position lack a protected property interest in their employment and, therefore, are not entitled to due process protections when terminated. E.g., Holland v. Bd. of Trustees of the Univ. of the Dist. of Columbia, 794 F. Supp. 420 (D.D.C. 1992).

C. Effective Employee Handbooks

Whether an employee handbook, containing provisions that arguably limit the at-will status of employees, constitutes a modification to the at-will doctrine varies from state to state and from handbook to handbook. A delineation of all the issues relevant to handbooks is beyond the scope of this presentation. However, a case illustrating relevant issues is Anderson v. Haverford College, 851 F. Supp. 179 (E.D. Pa. 1994) which emphasized the strong Pennsylvania presumption for at-will status and, after reviewing the college’s handbook, concluded that the terms of the college’s policy were not offered as binding terms of employment so as to become part of the contract of employment and alter at-will status.

VIII. BENEFITS

Part-time employees are generally not eligible for benefits, such as medical coverage and pension plans. To be eligible for "welfare" benefit plans, generally one must work at least 50 percent of a full-time employee, or 1,000 hours per year. Internal Revenue Code § 410(a) establishes minimum age and service requirements for pension plans. The minimum age requirement is age 21 and the maximum service requirement that a qualified plan may impose is one year of service. For participation purposes, a plan must credit an employee with a "year of service" for any applicable twelve consecutive month period in which the employee earns 1,000 or more hours of service. An institution may, at its option, impose less rigorous standards for participation in welfare and pension programs.

Pension benefits were awarded to the estate of a part-time faculty member in Estate of Hagel v. Board of Trustees, 543 A.2d 1010 (N.J. Super. 1988). The court in Hagel appeared inclined to award benefits because of the long history of teaching, even on a part-
time basis, by Professor Hagel and the failure of the college to notify him of the possible lapse of existing benefits when he was unable to teach due to medical problems.

Academic personnel must be considered "full-time" to be within the coverage of the Family and Medical Leave Act. To attain full-time status for FMLA purposes, one must teach 1250 hours in one year.

IX. TERMINATION

Many part-time faculty need no notice of termination. Their appointment is for a particular course or semester only. The notice of employment also, then, contains the notice of termination.

For adjunct faculty that teach on a regular basis, issues do arise as to whether they have a continued expectation of employment. The following contract language was held sufficient to defeat any concept of continuing employment: "It is understood and agreed that acceptance of this contract confers no right on the part-time faculty member at tenure, credit towards tenure, or any other permanent faculty status." Talley v. Flathead Valley Community College, 857 P.2d 701 (Mont. 1993). The court, at 705, indicated that the contract wording "clearly indicates that any expectation of permanent status cannot be grounded in the term-by-term contracts which Talley has signed." Employment contracts containing an express expiration date defeat any property interest claim for pre-termination due process. Campbell v. Board of Regents for the State of Kansas, 770 F.Supp. 1479 (D. Kan. 1991). Similarly, an administrator with an at-will appointment in a public institution has no constitutionally cognizable property interest in continued employment. Holland v. Board of Trustees of the Univ. of Dist. of Columbia, 794 F.Supp. 420 (D. D.C. 1992). In termination situations, care must be taken to follow carefully procedures for providing notice. Courts will strictly interpret notice of non-renewal provisions against colleges and universities. E.g. Zuehlendorf v. University of Alaska, 794 P.2d 932 (Alaska 1990).

X. UNEMPLOYMENT COMPENSATION

By using a contract with a clear termination date for the part-time faculty member services one can, in many jurisdictions, successfully argue that an individual has voluntarily consented to their termination at the end of their appointment. However, where the part-time faculty member is used on a "regular" basis, and can establish a continuing expectation of employment, unemployment compensation benefits may be granted. Despite the large number of part-time employees utilized by institutions of higher education, potential liability may be disproportionately low because, generally, an employee is not entitled to benefits unless he or she is suffering total unemployment. Many part-time faculty members hold other jobs.
In a decision awarding unemployment compensation to a former assistant professor appointed for a regular academic year, and notified of termination in accordance with the terms of the faculty handbook, the court expressly recognized the ability of institutions of higher education and their faculty to contract for fixed terms without incurring employment compensation liability. *Cardinal Newman College v. Labor and Industrial Relations Comm'n*, 624 S.W.2d 532, 535 (Mo. App. 1981).

**XI. WORKERS' COMPENSATION**

Like unemployment compensation, eligibility for workers' compensation benefits is governed by provisions of state law. First, the statutory definition of an employee must be met for eligibility for benefits. Common law employee tests are rejected. *E.g., Mesa County Valley School Dist. No. 51 v. Goletz*, 81 P.2d 785 (Colo. 1991). Status as an employee, rather than an independent contractor, is critical for eligibility for workers' compensation benefits.

In some jurisdictions, employment for a single job, as adjunct faculty may perform, is excluded from coverage under workers' compensation statutes. Other statutes exclude workers serving charitable, religious or educational institutions. 82 AM. JUR. 2d, Workers' Compensation §§ 121-126.
[Date]

[Adjunct Faculty Member's address]

Dear [Adjunct Faculty Member]:

Based upon your credentials and upon the recommendation of [insert academic officer], I am pleased to offer you an appointment as [rank] of [discipline] for the period _______ to ________ to teach the following course(s) at the times noted: ____________________________

Your compensation will be a salary of _______ dollars ($_______), payable in ___ equal installments beginning [date], with checks mailed to your home or as you direct. Fringe benefits are not included in your compensation. Your final salary payment will be paid after your course grades and any other obligations to the Institution have been completed.

Please note that this appointment is contingent upon sufficient class enrollment and upon Institution commitments to the full-time members of the faculty, and it terminates without further notice to you at the end of the period stated above. You are specifically appointed without tenure and without eligibility for tenure. Summer session salaries are based on the salaries for the preceding regular academic year.

Your acceptance of this appointment signifies your readiness to fulfill the following responsibilities: (1) submit your class syllabi and class book list to the [identify relevant academic office] at least _____ weeks prior to the first day of class, (2) teach all your classes...
at the assigned times as set forth on the attached list; (3) maintain ____ office hours per week; (4) submit final grades no later than ____ weeks after the end of each term; (5) regularly check your mailbox located at ______________ for campus mail; (6) advise the Department secretary or Chair at your earliest possibility if you are unable to teach a class; and (7) comply with all the Institution’s academic policies and practices, including the responsibilities described in the attached [Faculty Manual].

You are further agreeing to achieve the goals and objectives of your assigned courses, bearing in mind the Institution’s commitment to treating students with respect and to fostering their maximum personal and academic development.

Absence from teaching for more than ____ weeks or failure to abide by the Institution’s policies, procedures, and requirements, may at the discretion of the Institution, subject you to disciplinary action, including suspension or termination [with your salary prorated].

This letter, including the attached [Faculty Manual] represents your entire agreement with the Institution and it shall take precedence over any other prior policies, manuals, handbooks, other documents, practices, or oral statements, whether of individual or general application. This agreement can be renewed or changed only by a written statement signed both by you and by the [insert academic official’s title] of the Institution.

If you have any questions about the terms of this appointment, please ask [insert relevant academic official]. If this appointment and these conditions are acceptable to you, please sign and date both copies of this Agreement and return them to me within ____ days. This Contract shall be in effect upon your signature and validation and countersignature by the Institution’s [insert official’s name].
FACULTY
Form 4 Employment Letter for Adjunct Faculty not Eligible for Tenure

[Date]

[Adjunct Faculty Member’s address]

Dear [Adjunct Faculty Member]:

Based upon your credentials and upon the recommendation of [insert academic officer], I am pleased to offer you an appointment as [rank] of [discipline] for the period ________ to ________ to teach the following course(s) at the times noted: ______________________

Your compensation will be a salary of ______ dollars ($ ______), payable in ___ equal installments beginning [date], with checks mailed to your home or as you direct. Fringe benefits are not included in your compensation. Your final salary payment will be paid after your course grades and any other obligations to the Institution have been completed.

Please note that this appointment is contingent upon sufficient class enrollment and upon Institution commitments to the full-time members of the faculty, and it terminates without further notice to you at the end of the period stated above. You are specifically appointed without tenure and without eligibility for tenure. Summer session salaries are based on the salaries for the preceding regular academic year.

Your acceptance of this appointment signifies your readiness to fulfill the following responsibilities: (1) submit your class syllabi and class book list to the [identify relevant academic office] at least _____ weeks prior to the first day of class, (2) teach all your classes

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at the assigned times as set forth on the attached list; (3) maintain ____ office hours per week; (4) submit final grades no later than ____ weeks after the end of each term; (5) regularly check your mailbox located at __________ for campus mail; (6) advise the Department secretary or Chair at your earliest possibility if you are unable to teach a class; and (7) comply with all the Institution’s academic policies and practices, including the responsibilities described in the attached [Faculty Manual].

You are further agreeing to achieve the goals and objectives of your assigned courses, bearing in mind the Institution’s commitment to treating students with respect and to fostering their maximum personal and academic development.

Absence from teaching for more than ____ weeks or failure to abide by the Institution’s policies, procedures, and requirements, may at the discretion of the Institution, subject you to disciplinary action, including suspension or termination [with your salary prorated].

This letter, including the attached [Faculty Manual] represents your entire agreement with the Institution and it shall take precedence over any other prior policies, manuals, handbooks, other documents, practices, or oral statements, whether of individual or general application. This agreement can be renewed or changed only by a written statement signed both by you and by the [insert academic official’s title] of the Institution.

If you have any questions about the terms of this appointment, please ask [insert relevant academic official]. If this appointment and these conditions are acceptable to you, please sign and date both copies of this Agreement and return them to me within ____ days. This Contract shall be in effect upon your signature and validation and countersignature by the Institution’s [insert official’s name].

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We look forward to having you as part of the faculty of the Institution.

Sincerely,

[Relevant Academic Official]

Enclosures

Accepted: ___________________________ Date: ___________________________

Validated by: ________________________________________________________

(Name and Title of Institution Official)

Date: ___________________________

DOWD, Judge.

Lawrence B. Clark appeals from the trial court's judgment dismissing his claim against his former employer Washington University (University) for wrongful discharge. We affirm.

In October 1981, University hired Clark as its Manager for Contract Administration and Project Management. In April 1991, Clark received a letter from Richard E. Anderson, University's Vice Chancellor for Administration and Finance, which stated:

I am pleased to inform you that as Manager, Contract Administration & Project Management your compensation for the year 1991-92, effective July 1991, computed at an annual rate, will be:

Salary $47,600.00
Annuity Contribution $ 5,474.00

Your first monthly salary payment based on this rate will be made on July 31, 1991.

In previous years, Clark had received letters which stated, "This is to confirm your reappointment and compensation for the year...." In August 1991, he received written notice of termination of his employment effective as of November 16, 1991.

On November 1, 1993, Clark filed a two-count petition against University alleging he was wrongfully terminated on November 16, 1991. In Count I, he alleged that the 1991 letter constituted a contract of employment for a year's term and that the University breached the contract by terminating him. In Count II, he alleged a claim for promissory estoppel arguing the letter constituted a promise of employment for one year and he reasonably relied on the letter.

In response, University filed a motion to dismiss alleging Clark's petition failed to state a claim upon which relief could be granted. On October 8, 1994, the trial court entered its order dismissing both counts of Clark's petition and Clark appealed.

University alleges Clark's brief does not preserve any issues for this court's review because it fails to comply with Rule 84.04. In his sole point relied on, Clark states:

THE TRIAL COURT ERRED IN GRANTING RESPONDENT WASHINGTON UNIVERSITY'S MOTION TO DISMISS, BECAUSE APPELLANT'S PETITION STATED A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED.

Clark's point is insufficient because it fails to state "wherein and why" the trial court erred. A point relied on should contain (1) a concise statement of the challenged ruling of the trial court, (2) the rule of law which the trial court should have applied, and (3) the evidentiary basis upon which the asserted rule is applicable. Thummel v. King, 570 S.W.2d 679, 685-86 (Mo. banc 1978); Jefferson v. Bick, 872 S.W.2d 115, 118[2] (Mo.App. 1994). Clark's point fails to state what rule the trial court should have applied and the evidentiary basis for that ruling. Further, Clark's promissory estoppel claim is not discussed at all in the argument portion of his brief; all of these allegations are impermissibly raised for the first time in his reply brief. Sea, In re Estate of Caldwell, 784 S.W.2d 267, 268[1] (Mo.App.1990).

Although Clark's brief fails to comply with Rule 84.04, we review his claims ex gratia for plain error. In reviewing the trial court's judgment of dismissal for failure to
state a claim, all facts properly pleaded are taken as true and given every reasonable intendment as a valid statement of a claim. 

Luedtke v. Long John Silver’s, Inc., 841 S.W.2d 682, 684[1](Mo.App.1992). If the allegations contained in the petition invoke principles of substantive law which, if proved would entitle the pleader to relief, the petition suffices and may not be dismissed. Id. The letter Clark received from University in April 1991 is insufficient to establish a contract. Clark argues that a similar letter was found to be an employment contract in Luedtke v. Washington University, 294 S.W.2d 169 (Mo. banc 1956). However, the Luedtke case is distinguishable for two reasons. First, the letter Luedtke received stated, “This is to confirm your reappointment (our emphasis)... with compensation at the following rate,” rather than merely stating what his salary would be for that year. Id. at 170. In Luedtke, the supreme court stated that a statement of duration is an essential element of an employment contract. Id. at 172. Other Missouri cases have held that a valid employment contract must either specify the duration of employment or limit the reasons for which the employee may be discharged. Kaszkowicz v. Commerce Magazine, Inc., 793 S.W.2d 628, 631[3] (Mo. App.1990); Krasney v. Curators of University of Mo., 705 S.W.2d 640, 65[10] (Mo.App. 1989). “[A]n indefinite hiring at so much per day, or per month, or per year, is a hiring at will, and may be terminated by either party at any time.” Kaszkowicz, 793 S.W.2d at 631[3].

Second, Luedtke is distinguishable because Luedtke eventually conceded he had an employment contract with Washington University. Also, the supreme court found, even absent this concession, Luedtke was estopped from arguing there was no contract because he received and accepted payment for the entire period covered by the letter. Luedtke, at 170 n. 1. Here, University did not continue paying Clark or accepting his performance.

Clark also argues that in all of the years prior to 1991, he received a letter from University confirming his reappointment and compensation for the next year. He argues this created a pattern of yearly hiring; and since the 1991-92 letter did not state otherwise, he presumed that he and University had renewed their one-year contract. Clark relies on 83 Am. Jur.2d, Master and Servant, Section 23 (1970), which states:

[Upon the expiration of a contract of employment for a definite term, the employee continues to render the same services as he rendered during the term of the contract without explicitly entering into any new agreement, it will be presumed prima facie that he is serving under a new contract having the same terms and conditions as the original one. This presumption applies to both the duration of, and the remuneration for, the continued employment. It may be rebutted by evidence showing a change of the terms of the contract, or by proof of facts and circumstances showing that the parties understood that the terms of the old contract were not to apply to the new contract under which the employee continues to serve.]

See also, Vogel v. Washington Metro. Area Transit Authority, 638 F.2d 13, 16[1] (D.C.Cir.1976) (where parties enter into a contract of employment for a term of one year, and then agree to continue the relationship without a new agreement, they are presumed to have renewed the original contract for one year).

[7] Assuming argendo that the letters Clark received from University in prior years formed series of one-year contracts, Clark’s continuing to work for University after the 1990-91 contract expired still fails to raise the presumption that another one-year contract was formed because University sent him a letter covering the 1991-92 period. University would not have sent Clark a letter covering the 1991-92 period if it intended for the terms of the previous letters to apply. We find University purposely excluded the language “reappointing” Clark to his position for another year so there would be no question he was an at-will employee. Any previous contract Clark had with University had expired by the time he was discharged, and which, at the time, arguably recognized a public policy exception for at-will employees.

University was not under any obligation to Clark. An employer may discharge an employee who is not subject to an employment contract for a definite term at any time with or without cause provided no statutory provision is violated. Pletcher v. Crane Co., 835 S.W.2d 514, 515[3] (Mo.App.1992).

Clark also failed to state a claim for promissory estoppel. The essential elements of a claim of promissory estoppel are: a promise, detrimental reliance on the promise in a way in which the promisor should have or did foresee, and an injustice which can only be avoided by enforcement of the promise. Thomas v. Jerome L. House, Inc., 862 S.W.2d 359, 360[4] (Mo.App.1993). An employee must prove his employer made a promise in a contractual sense and may not use promissory estoppel to recover against a former employer where an employment contract could not be proven. Mayer v. King Cola Mid-America, Inc., 669 S.W.2d 746, 746[6], 71 (Mo.App.1984); Donella Southwest, Inc. v. Southwestern Bell Telephone Co., 775 F.Supp. 1227, aff’d 978 F.2d 1263.

In arguing Clark failed to state a claim for promissory estoppel, University relies on Walker v. Modern Realty of Missouri, Inc., 675 F.2d 1002 (8th Cir.1982). In Walker, the court found there was no contract to employ Walker for a certain amount of time even though the agreement fixed his salary at “$40,000 per year,” because the agreement stated it would continue in effect “so long as it is mutually satisfactory to both parties.” Id. at 1003[1]. The court also found Walker could not bring a promissory estoppel claim even though he moved from Texas in reliance on defendant’s representations he would have a job because defendant did not break any promise by discharging Walker. Id. at 1004[3].

We find University did not make a promise to Clark sufficient to support a claim of promissory estoppel. Judgment affirmed.

CRANE, P.J., and CRANDALL, J., concur.