

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-2002

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LEE DECUIR,

Plaintiff-Appellant,

v.

FREDDIE RICHARDS, Dr.,  
Individually and Officially as  
Director of International Agribusiness Studies, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA-H-90-2448)

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(April 11, 1994)

Before JONES, DeMOSS, Circuit Judges and District Judge Schwartz.\*

EDITH H. JONES, Circuit Judge:\*\*

A discharged university employee brought a wrongful termination suit against his supervisors under Texas common law for breach of contract and under 42 U.S.C. § 1983 for violation of due process. A magistrate judge held after trial that the former

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\* District Judge of the Eastern District of Louisiana, sitting by designation.

\*\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

employee had no contract to breach and no property interest entitling him to due process. We affirm.

Counsel for appellant, although duly notified, failed to appear for oral argument in New Orleans. His client did appear. This failure represents a breach of trust toward both the client and this court. No reasonable excuse has been presented for counsel's failure. Should counsel ever be so remiss in his professional responsibilities in this court again, he will be subject to disbarment from the court. Despite counsel's lapse, we have reviewed the record carefully in order to prepare this opinion.

#### **BACKGROUND**

Unless otherwise noted, the following facts are undisputed.

Lee DeCuir was hired on a temporary basis by Prairie View A&M University on November 1, 1986, as a program specialist in the Institute for International Agribusiness Studies (IIAS). In March, 1987, he was appointed to a permanent position of Assistant Director of IIAS. His duties included assisting and representing the director of IIAS for various client groups, maintaining liaisons with government, corporate, and industry groups, and developing new program initiatives. In neither his initial hiring nor in his subsequent promotion did DeCuir enter into a written employment contract with the university.

The IIAS program was a rather small operation involving four staff employees. Its funding was heavily dependent on federal

grants through the United States Agency for International Development (USAID) and grants from the Texas A&M University system. The USAID grant was awarded pursuant to a joint memorandum of understanding which governed the application and use of the grant monies. In 1987, USAID repeatedly expressed concerns regarding the university's improper application of the grant monies, which had been used to pay salaries in excess of the amounts specified by the joint memorandum of understanding.<sup>1</sup> In December 1987, Richards, the director of IASS, notified the staff of IIAS, including DeCuir, that because of the improper use of grant monies to pay salaries in excess of the amounts specified by the joint memorandum of understanding, there might be staff reductions in the future.

In February, 1988, USAID sent Richards a letter again expressing concern that too high a proportion of the USAID grant monies was being spent on administrative salaries. In reviewing the joint memorandum of understanding, the director determined that as there were no other funding sources on the horizon, he would have to terminate some IIAS employees to reduce administrative salaries. On March 4, 1988, DeCuir and the entire staff of IIAS received a letter from Richards indicating that their employment would be terminated in six months, on August 31, 1988. Richards stated in the letter that DeCuir would be terminated because the part of the funding which paid DeCuir's salary, as well as the

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<sup>1</sup> DeCuir contests this factual finding by the magistrate judge. As we discuss below, we do not find it clearly erroneous.

salaries of the remainder of IIAS staff, would no longer be available because they depended on the USAID grant. On March 5, 1988, DeCuir received a second letter very similar to the first, in which Dr. Richards added that this action "is considered a reduction in force." The second letter, with its reference to reduction in force, was prompted by the concern of affected employees that the first letter might be construed to be a termination for cause, jeopardizing their employment prospects within the university system and elsewhere. DeCuir protested his termination several times through various channels. He was given a pretermination hearing two days before his employment with IIAS ended.

The magistrate judge concluded that DeCuir was an at-will employee and could be terminated at any time without cause. He found that there was no statute, local ordinance, nor express or implied contract which created a property interest in DeCuir's continued employment. He thus found for the defendants on all claims.

#### **DISCUSSION**

We review the magistrate judge's factual findings under the clearly erroneous standard. Fed. R. Civ. Proc. 52(a). The parties agree that DeCuir must have a protected property interest in employment before a constitutional interest in procedural due process is implicated. Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 2705 (1972). A protected property interest in employment exists only where the employee has an

express or implied right to continued employment. White v. Mississippi State Oil & Gas Board, 650 F.2d 540, 541 (5th Cir. 1981). The source of such right can be a state statute, a local ordinance, or an express or implied contract. Whatever the source, the sufficiency of the claim of entitlement must be decided by reference to state law. Id. If DeCuir could be legally terminated at will by the University, he did not have a property interest in his employment. Id.

DeCuir's bases his argument on appeal almost entirely on the legitimacy of his expectation of continued employment. The magistrate judge found that the facts presented at trial did not establish a mutually explicit understanding of a permanent for-cause employment contract. As stated above, a mere expectation of continued employment is not enough; the expectation must be confirmed by an independent source, such as a state statute, rule, or policy. Roth, 408 U.S. at 577, 92 S. Ct. at 2709. DeCuir testified at trial that there was an explicit mutual understanding that he would stay for the duration of the IIAS program and that he would not be discharged except for just cause. He testified that a former director of the program, Dr. Freeman, gave him these assurances when he hired DeCuir. DeCuir buttresses his expectation argument by citing the university's administrative policy which, he argues, limited discharge of nonprobationary employees to discharge

for adequate cause.<sup>2</sup> Finally, DeCuir asserts that appellees' conduct established DeCuir's right to continued employment.

In considering Mr. DeCuir's arguments on appeal, we have carefully read not only the parties' briefs and record excerpts, but also reviewed the trial transcript. Our review persuades us that the significant factual findings entered by the magistrate judge are not clearly erroneous. In the first place, there was no evidence other than Mr. DeCuir's testimony that his employment could be terminated only for just cause. On the other hand, there was ample evidence introduced that his employment was contingent on the program's continued funding. There was also ample evidence to conclude that USAID repeatedly expressed concerns regarding improper application of its grant monies to pay IIAS staff salaries in excess of the amounts specified by the joint memorandum of understanding. Although there was little documented evidence offered at trial that the USAID grant expired in October 1988, see Finding of Fact Nos. 8, it nevertheless happened that grant monies were dramatically reduced in October 1988, necessitating the termination of IIAS employees. Finding of Fact No. 17. The policy provision DeCuir cites is an excerpt which was never introduced into evidence and is clearly a nonexclusive list of reasons for

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<sup>2</sup> Paragraph 3.2 of the university's administrative policy reads:

An employee of the university may be subject to disciplinary action, including termination, when adequate cause is established by demonstration of inability to perform assigned duties in a satisfactory manner, incompetence, misconduct, neglect of assigned responsibilities, insubordination, absenteeism, failure to abide by rules and regulations of the university and/or Texas A&M University system or upon a showing that other adequate causes exist.

which an employee could be terminated. Its existence does not forfeit the University's right to discharge without cause. Henderson v. Sotelo, 761 F.2d 1093, 1098-99 (5th Cir. 1985). Finally, even if University policies were violated, this cannot create a property interest where none existed. Henderson, 761 F.2d at 1097-98. We therefore affirm the magistrate judge's factual findings which compel a finding of no property interest.

Even on the basis of the unchallenged factual findings, Mr. DeCuir could not recover. The lower court found that DeCuir never had a written employment agreement. DeCuir's testimony that Dr. Freeman orally promised him that "he would stay during the duration of the program and that he would not be discharged except for cause" is an oral promise for employment beyond a year. Under Texas law, such promises are unenforceable under the statute of frauds and thus, insufficient to destroy the employer's right to terminate his employees at will. Webber v. M. W. Kellogg Co., 720 S.W.2d 124, 127 (Tex. App. Hou. [14th Dist] 1986, writ ref'd n.r.e.) (statute of frauds precludes enforcement of an election promise of "permanent" employment without a written contract). Thus under established Texas law DeCuir was an employee at will with no property interest in his continued employment. Without a property interest, his constitutional claims must fail. We thus do not reach DeCuir's policy and procedure arguments. Because DeCuir was an employee at-will, and because there was no written employment agreement, his claims for breach of contract must similarly fail.

For the foregoing reasons, the judgment of the district court is therefore **AFFIRMED**.