
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

KAREN ROGERS,
Appellant,

v.

TACOMA COMMUNITY COLLEGE,
Respondent.

No. 38041-2-II

REPLY BRIEF

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INTRODUCTION

The College attempts to justify the discharge of a tenured instructor by diverting attention away from her particular situation and away from the department whose classes she taught—a department that experienced no declines in enrollment. Moreover, the College refuses to acknowledge or discuss in any manner its most demonstrable breach of contract—the hiring of part-time instructors who between them, during the next academic year, assumed the full-time teaching duties previously held by the tenured instructor.

RESTATEMENT OF THE CASE

Before hiring Rogers, the College circulated a “recruitment announcement” that described her position simply as “History Instructor.” The announcement went on to specify that her “Basic Assignment” would be a generalist who would “prepare and teach courses in history and support the ongoing programs at Tacoma Community College.” (CP 114–115)

Although the announcement did make a secondary reference to “courses in European History, Western

Civilization and 1 area of history outside of Europe and the North America,” this reference soon lost its relevance because Rogers—during her second quarter at the College—began to teach courses on the history of Canada and the British Isles as well as the entire sequence of United States history courses. (AR 46) (See list of United States history courses taught by Rogers at AR 110)

Rogers—as a consequence of her graduate-level course work, master’s thesis, and doctoral dissertation research—had better credentials to teach United States history than any other specialty in her field. (testimony, AR 44–45) (curriculum vitae, CP 43–48)

Data produced by the College (AR 87) confirmed testimony given by Rogers herself (AR 37) that enrollments in United States history classes taught by the College remained stable from 2004 through 2006.

In its brief, the College chose not to controvert evidence produced by Rogers that the number of full-time equivalent positions (FTEs) in the History Department remained constant from 2006–2007 to 2007–2008. Likewise, the College chose not to controvert evidence that part-time instructors Almquist and Brumbach, between them, taught one FTE within the History Department during 2007–2008, the year immediately following the Rogers discharge.

ARGUMENT

A. CURTAILMENT OF WORK ELSEWHERE DOES NOT IMPLY A RIGHT TO REPLACE A TENURED INSTRUCTOR IN THE HISTORY DEPARTMENT

Course work at the College is distributed among subdivisions known as “departments” and “programs.” Rogers concedes that a reduction in force can be justified with respect to a subdivision with declining enrollments; but she nevertheless reasserts that a tenured instructor cannot be discharged, consistently with the contract, within a subdivision with constant or increasing enrollments. That is because the discharged instructor in the latter situation would have to be replaced by another. There would be no “curtailment of work” and no “lack of funds” if the salary of one instructor merely replaced the salary of another. The contract criteria (Sec. 14.21) (AR 192) for reduction in force would simply not be triggered. If a discharge nevertheless took place, there would be an implication of pretext and opportunism.

There is, moreover, contrary to what the College suggests, no recognized subdiscipline known as “Western Civilization.” Rogers was qualified to teach, and did teach, History classes on every general subject, with the exception of Asian history.

Rogers therefore respectfully requests that this review focus upon her individually and consider as its appropriate unit of analysis the History Department—a department from which the College decided to remove her, even though there was no “curtailment of work,” and replace her with part-time instructors.

B. SILENCE ON THE ISSUE OF PART-TIME INSTRUCTORS IMPLIES THAT THE COLLEGE DOES RELY UPON A PROCEDURAL TRAP

Rogers argued in her opening brief (at 16–17) that contract section 14.23 unambiguously forbids the College from replacing her with part-time instructors. At the time of the predeprivation hearing, Rogers foresaw the likelihood of her being replaced but could not, due to the rapid conclusion of the administrative process, submit any nonspeculative evidence on that issue. However, prior to the Superior Court completing its review, the College did indeed award part-time instructors Almquist and Brumbach contracts to teach History classes during the 2007–2008 academic year. The College has never denied doing this and would be hard-pressed to do so. Instead, it simply urges that the evidence be suppressed.

The failure of the College to justify its apparent breach of contract with any substantive argument suggests rather persuasively that it relies wholly upon a procedural defense, that being a putative right under the Administrative Procedure Act to object to newly discovered evidence. If the College succeeds, then it will have availed itself of a license to breach contract section 14.23 simply by concluding a predeprivation hearing during the summer, before it hires part-time replacement instructors for the next academic year. The unfairness of this strategy should be immediately apparent. If the Administrative Procedure Act is not construed to allow new evidence in this particular situation, then the Act, as applied, will have denied Rogers her right to due process.

C. SCIENTER DEMONSTRATED BY COLLEGE ADMINISTRATORS JUSTIFIES AN AWARD OF ATTORNEY'S FEES

The reliance by the College on a procedural trap to avoid the consequences of section 14.23 amounts, at the very least, to quasi-fraudulent behavior on the part of its administrators. It cannot reasonably be questioned that, when the predeprivation hearing took place in June of 2007, those administrators had already formulated an intention

to hire part-time History instructors for the 2007-2008 academic year. Despite the unambiguous priority that section 14.23 gives Rogers over the part-time instructors, these administrators concealed their intention from the review committee and the board of trustees.

If the statute cited by Rogers in support of her request for attorney's fees allows for the exercise of discretion by the court, the proper exercise of that discretion, under these circumstances, would be to award the fees.

CONCLUSION

For the reasons stated here and in your appellant's opening brief, this case should be remanded to the Superior Court for reinstatement of Rogers to her position at the College and for entry of judgment for economic-loss damages and attorney's fees.

RESPECTFULLY SUBMITTED this 7th day of February 2009.



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**DECLARATION OF MAILING
OF REPLY BRIEF**

Thomas Cline, attorney for appellant, declares that he mailed a copy of the Brief of Appellant and this declaration to Anne O. Shaw, Assistant Attorney General, at P.O. Box 40100, Olympia, WA 98504-0100, postage prepaid, on February 7, 2009.

DATED this 7th day of February 2009.



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