SUPREME COURT

OF THE

STATE OF CONNECTICUT

S. C. NO. 16961

SUSAN NEIMAN,
Appellant

VS.

YALE UNIVERSITY
Appellee

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BRIEF OF THE APPELLANT SUSAN NEIMAN

****

TO BE ARGUED BY:
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STATEMENT OF ISSUE

(1) Whether the trial court erred in dismissing the complaint because Yale University's handbook does not implicate subject matter jurisdiction, unlike a collective bargaining agreement or an appeal from an administrative agency in a contested case……………………………………………p.21

(2) Whether the trial court erred by invading the province of the jury and determining as a matter of fact the intent of the parties to a contract and their compliance with the terms thereof, thereby depriving plaintiff of a trial by jury on these issues ………… ……………………………………..p.27

(3) Whether the trial court erred by not determining that an additional unfairness complaint would have been futile when the President and Provost of Yale had determined that the administration would not interfere with the decision to deny Susan Neiman a position at Yale in order to support rebuilding of the Philosophy Department……………………..p.32

NATURE OF THE PROCEEDINGS

Defendant Yale University denied tenure in the Philosophy Department to plaintiff Susan Neiman on January 22, 1996. Provost Alison Richard notified Susan Neiman the same day by email to Tel Aviv, Israel, where plaintiff was resident while on sabbatical. Plaintiff commenced this action alleging breach of contract, misrepresentation, and promissory estoppel on April 23, 1997. Defendant filed a Motion to Dismiss for lack of subject matter jurisdiction on January 25, 2001, claiming that plaintiff failed to "exhaust remedies provided in her employment contract," referring to a complaint procedure contained in the Yale University Faculty Handbook ("the handbook"). After conducting discovery limited to the issue of subject matter jurisdiction, plaintiff filed her objection on June 25, 2002.

In plaintiff's objection and in oral argument to the Honorable C. Ian McLachlan ("the trial court"), plaintiff asserted that defendant's Motion to Dismiss should be denied because: (1) it was not appropriate for the trial court to determine, as a matter of fact, the terms of the employment agreement between the parties; (2) there was no agreement that the complaint process set forth in the handbook was a mandatory precondition to asserting claims of breach of contract in a court of law; (3) defendant suspended handbook rules when it placed plaintiff's department in "receivership," therefore the complaint procedure did not apply to this tenure decision; (4) the complaint procedure in the handbook does not implicate subject matter jurisdiction, as a matter of law, because it does not constitute an agreement to exhaust an exclusive remedy in the nature of a grievance and arbitration proceeding; (5) even if the process were mandatory, plaintiff lodged complaints of unfairness with the Provost in substantial compliance with the intent of the handbook

complaint procedure; and (6) it would have been futile to file additional complaints of unfairness following the tenure decision because the Provost and President had stated there was nothing more to be done.

The trial court framed this issue of first impression in Connecticut as a question "of whether the exhaustion of remedies doctrine applies in an employment situation where there is neither a statute [n]or a collective bargaining agreement requiring or providing a grievance procedure" and issued a Memorandum of Decision ("Mem.") on September 17, 2002 (Mem. at 1.) The trial court explored "the rationale behind the exhaustion of remedies requirement" as set forth in *Johnson v. Statewide Grievance Committee,* 248 Conn. 87, 95-96 (1999) (Mem. at 6). The trial court relied upon the expressed public policy of fostering an orderly process of administrative adjudication and judicial review, during which the reviewing court has the benefit of agency findings and conclusions, in ruling that plaintiff was required to file a complaint of unfairness prior to seeking redress for breach of contract in court. The trial court saw no reason why the public policy underlying exhaustion of administrative remedies should not apply to the university setting and surmised that the filing of an additional unfairness complaint may have caused defendant to produce findings that may have assisted the trial court in its review of the tenure denial decision. Noting that courts in other jurisdictions, and in the District of Connecticut -- principally *Franco v. Yale University,* 161 F. Supp.2d 133 (D. Conn. 2001), *Brennan v. King*, 139 F.3d 258 (1st Cir. 1998), and *O'Brien v. New England Telephone & Telegraph Co.,* 664 N.E.2d 843 (Mass. 1996) -- had required employees to follow a "grievance procedure" prior to asserting a claim that relied upon the same handbook, the trial court ruled that unless there was a legally cognizable exception to "utilizing the Handbook's internal grievance process," Susan

Neiman "is barred from seeking redress in the court system because this court is deprived of subject matter jurisdiction" (Mem. at 7-8, 11).[1]

The trial court then considered and rejected plaintiff's arguments that the language in the handbook describing the complaint procedure was permissive and not mandatory, that the defendant had suspended the rules when it placed the Philosophy Department in "receivership," so there was no continuing requirement to file a complaint, and that the handbook complaint procedure did not implicate subject matter jurisdiction in the absence of language indicating that the parties had agreed it was the exclusive remedy (Mem. at 11-12). The trial court relied on *Franco, Brennan and O'Brien,* to conclude that the employment agreement's use of the word "may" only provided the option to file a complaint of unfairness, and in the absence of Yale's express repudiation of the complaint process, there was no reason to conclude the contractual remedy was not mandatory. Similarly, the trial court refused to credit plaintiff's claims that she had substantially complied with the process by bringing her complaints of unfairness to the Provost in April of 1995, prior to the tenure decision, and that further complaints would have been futile based on the statements made by the Provost and President of Yale University (Mem. at 12-14). The trial court posited that Yale may not have understood that Susan Neiman wanted to challenge the tenure decision. The trial court observed that the hand boo imposed a duty to reconsider her application in some way and that it was quite possible that a new

[1] The trial court was correct to note that plaintiff alleged breach of contract based upon the failure to apply the rules in the handbook requiring a vote by members of her department, but the court read plaintiff's complaint narrowly to exclude claims of breach of contract that did not rely solely upon the language of the handbook, contrary to the procedure for considering pleadings on a motion to dismiss. "Our Supreme Court has determined that when ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *Administrative and Residual Employees Union, Local 4200 v. State,* 77 Conn. App. 454, 457 (2002).

procedure satisfactory to plaintiff could have been put in place and the outcome could have been different. These possibilities were sufficient to defeat any claim that resort to the grievance procedure would have been futile. The trial court declared that because plaintiff "could have obtained the relief she now seeks by utilizing the internal grievance procedures set forth in the Handbook, but chose not to do so, [that choice] is fatal to her contractual claims" and "she has deprived [the] court of subject matter jurisdiction." [2] Therefore, trial court dismissed plaintiff's contract claims, but denied the motion as it applied to the claim for negligent misrepresentation.

After both parties filed Motions for Reconsideration, the trial court ruled from the bench on October 28, 2002 and then issued a second Memorandum of Decision on October 29, 2002. In the bench ruling, the trial court rejected plaintiff's argument that it was improper for the court to determine the terms of the employment agreement as a matter of fact, as well as plaintiff's claim that she had substantially complied with the complaint procedure. In the supplemental Memorandum of Decision ("Mem. II"), the trial court reasoned that the rationale for exhausting administrative remedies applied equally to tort and contract remedies and that a "party may not choose his administrative remedy through the framing of his complaint" (Mem. II at 2-3). The trial court then dismissed the negligent misrepresentation claim. This appeal followed.

[2] The trial court stated that Susan Neiman "chose to ignore" the "grievance process" in the handbook (Mem. 11, 14). Plaintiff's affidavit alleges that she was unaware of the complaint process prior to the deadline to file in April of 1996. She was not informed of the need to file a complaint within 45 days of the notification of tenure denial while on sabbatical in Tel Aviv, Israel (Neiman, P. App. A1, A4). In concluding that plaintiff ignored the "grievance process," the trial court did not view the evidence in the light most favorable to the plaintiff.

STATEMENT OF FACTS

Yale University hired Susan Neiman as an Assistant Professor in the Department of Philosophy and plaintiff commenced employment on January 1, 1989, for a term to expire on June 30, 1992 (Harries, P. App. A191-92). The appointment letter from Acting Chair of the Philosophy Department, Karsten Harries, dated February 24, 1988, enclosed a copy of the handbook which "…contained important information concerning the terms and conditions of employment at Yale (Id. at A192)." Soon after plaintiff's appointment Yale University's administration placed the Philosophy Department in "receivership status," an unprecedented occurrence according to Professor Jonathan Lear, the former Chair of the Department and the architect of the receivership.[3] On September 28, 1990, Yale University President Benno C. Schmidt, Jr. announced to the faculty in the Philosophy Department that John A. Hartigan, Chairman of the Department of Statistics, would be appointed Chair. Several other senior professors from other departments at Yale University, including Richard Levin, then Professor and Chair of the Department of Economics, were appointed to the "Philosophy Advisory Committee" ("the Advisory Committee"). Under the receivership plan, employment recommendations for senior (tenured) appointments were to be made based on the expertise of an external committee of philosophers from other distinguished academic institutions. The internal Advisory Committee assumed the department's ministerial role to process employment recommendations.[4] The internal

[3] The "receivership" of the Department of Philosophy, which began in the 1990-91 academic year, lasted until the 1997-98 academic year.

[4] There were no rules in the handbook that governed the receivership process. According to Professor Lear, "There simply were no rules at Yale about what to do when one's promotion is decided by an *ad hoc* committee whose Chair is the Provost of the University." Defendant acknowledged that the receivership process resulted in making appointment decisions pursuant to procedures that were not spelled out in the handbook and that no substitute rules for conducting oversight of the department were published, including rules to require receipt and

Advisory Committee acted under the direct oversight of the Provost, who chaired that committee.[5] Thus, receivership status took away the authority to make employment decisions from the senior members of the Philosophy Department and fragmented that decision-making authority into ministerial functions to be performed by the Advisory Committee and substantive recommendations to be provided by experts at other institutions.[6] In theory, under this version of the receivership plan, Yale University would rebuild the department by offering tenure to a number of distinguished scholars and then, after a two year hiatus, the department could assume its traditional role of making employment recommendations on its own. This arrangement failed to produce one tenured appointment.

By the 1992-93 academic year, Yale abandoned consultation with the external committee of distinguished philosophers, and relied exclusively upon the internal Advisory Committee of non-philosophers as the group that would forward recommendations for appointment in place of the Philosophy Department. On August 6, 1992, Provost Judith Rodin advised Professor Allen Wagner, the new Chair of the Advisory Committee, that the Committee would now function as a search committee to locate a person to fill a senior

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dissemination of accurate information and rules to require deliberation as a group (Richard, P. App. A47-49, A86-87; Long, P. App. A128)

[5] A ten-page report on the Philosophy Department prepared by Professor Hartigan and dated November 29, 1990, described the dysfunctional relationships that precipitated implementation of the receivership. (Hartigan, P. App. A179-88)The initial receivership plan, and some concerns over the irregular process to be adopted, is described in "Chairman Extemporary" Hartigan's "Confidential" memorandum, entitled, "*Rebuilding the Department of Philosophy,"* and dated December 3, 1990. (Hartigan, P. App. 189). Professor Hartigan noted both the lack of precedent for making employment decisions that "do not originate in and are nowhere blessed by a department," and the possible resistance by the internal advisory committee for being "a conduit for a new and irregular procedure" (Hartigan, P. App. A190).

[6] President Schmidt also directed the internal advisory committee to look after the non-tenured faculty in the department "and see to it that they are treated with every procedural fairness and every collegial courtesy" (Schmidt, P. App. A178).

appointment as Chair of the Philosophy Department (Rodin, P. App. A176).[7] The new chair would then "work with the advisory committee and with the department to rebuild vigorously by making additional appointments while strongly considering the junior faculty as potential candidates for future slots (Ibid.)." The *ad hoc* rules for appointments during the receivership were modified as follows: "*The search committee will make its recommendation to the department, and the senior members of the department, augmented by the members of the search committee, will vote on that recommendation* (Ibid.)." The Advisory Committee recommended Robert Adams to be Chair of the Philosophy Department starting in 1993-94.

After Robert Adams assumed the position as Chair, and was appointed as the department's sole representative to the Advisory Committee, the process for making employment decisions changed dramatically. Under this new *ad hoc* arrangement, the power to make recommendations for appointment and tenure shifted from those with expertise in the specialty area of philosophy (the senior members of the department or the external committee of distinguished philosophers) to Robert Adams and those senior members from other departments without expertise in philosophy appointed to the internal Advisory Committee.[8] A more significant shift of power occurred in the department because Robert Adams was permitted to assert his prerogative to rebuild the department as an additional factor to be weighed in the appointment process for both senior and junior members, contrary to the expectation of plaintiff when she agreed to employment at Yale.

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[7] Professor Allen Wagner, continued to be a member of the Advisory Committee through the end of the receivership. He is the author of many of the handwritten notes that document the handling of Susan Neiman's case between February of 1995 and January of 1996 (Wagner, P. App. A173-174, A163-165, A157, A146-48).

[8] Professor Jonathan Lear documented the power shift in an email to Provost Richard, dated April 20, 1995, and in his letter of resignation, dated February 6. 1996 (Lear, P. App. A161 & A144).

Excluding a recommendation from a committee of experts constituted a major change to a key part of the "receivership plan" for the Philosophy Department and, significantly, there was no voice to counter the opinion of Robert Adams in the internal Advisory Committee.[9] The removal of the external committee as a source of information provided Adams with the unique ability to influence and control the decision-making process, because the internal Advisory Committee of non-philosophers lacked the expertise to make informed judgments on scholarship in the study of philosophy and so were inclined to side with Adams because the goal of rebuilding the department was paramount.[10] Using his power to influence the appointment process, Adams was able to offer immediate appointment to his candidate, Shelly Kagan, during the 1993-94 academic year, thereby further solidifying his control over the department's appointment process.[11] When Professor Kagan accepted a tenured appointment for the 1994-95 academic year, the senior members of the Philosophy Department then consisted of Professors Lear, Karsten, Adams and Kagan.

UNFAIRNESS AND SUSAN NEIMAN'S CASE FOR TENURE

Susan Neiman's research focused on the philosopher Immanuel Kant. After her first year at Yale University, Susan Neiman won the Ribicoff Prize for Teaching in the Humanities, an award given for teaching excellence. Following the 1992 publication of her award-winning, autobiographical book, *Slow Fire*, and just prior to the publication of *The Unity of Reason,* her book on Kant published by the Oxford University Press, the senior

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[9] Provost Richard admitted that Robert Adams was the only senior member to attend the Advisory Committee meetings in the absence of the other senior members of the department (Richard, P. App. A62).

[10] That considerations other than Susan Neiman's qualification for tenure, including the Advisory Committee's inclination to support Robert Adams as Chair with the privilege to shape the department, is indicated in an undated note, most likely authored by Allen Wagner, entitled, *"Conversation with Bob Adams re Phil[osophy] meeting."* "Bob placed the question as involving the institution's support for his rebuilding judgment" (Yale document #0976; P. App. A193).

[11] Professor Jonathan Lear's letter to Robert Adams, dated November 4, 1995, establishes that Adams had the power to get his way in the internal advisory committee (Lear, P. App. A149-153).

members of the Philosophy Department voted unanimously (3 present and voting), on or about April 8, 1993, to recommend her promotion to Associate Professor in Rank for a term of five years commencing July 1, 1993 and ending June 30, 1998.

During the 1994-95 academic year, Robert Adams initiated a process in concert with the Advisory Committee, not provided for in the handbook, which rated the prospects of the entire non-tenured faculty on tenure track. This *ad hoc* procedure lacked the formalities attending a reappointment decision in the penultimate year.[12] Adams convinced the non-philosophers on the Advisory Committee to follow his lead in recommending that Susan Neiman be encouraged to look elsewhere for employment.[13] At the same time, the University of Potsdam, Germany, offered a professorship with tenure to the plaintiff, a signal of international recognition of her scholarship. Susan Neiman then asked Robert Adams to bring her case for tenure to the Advisory Committee in April of 1995. Adams declined, advising Susan Neiman he was opposed to her receiving tenure and planned to pursue Allen Wood, a scholar in Neiman's area of scholarship, as "a target of opportunity" hire, a hiring process that would effectively prevent Neiman from being considered for the position.[14]

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[12] The Provost admitted that she had never seen such a group rating by a department (Richard, P. App. A61), and the Deputy Provost testified that the process was "not a common practice" (Long, P. App. A128).

[13] See notes of two meetings of the Advisory Committee, held on February 28, 1995 and April 3, 1995 (Notes, P. App. A163-A165, A173-174). Plaintiff later claimed that Adams used outdated information from the Associate Professor in Rank promotion review process in 1992-93 and that Adams also withheld important information regarding her recent scholarship and accomplishments.

[14] A "target of opportunity" appointment bypasses the national search and the need to seek comparative letters regarding the candidate because the person is considered to be of such eminence that comparison is unnecessary (Long, P. App. A123). The announcement that Wood was considered a "target of opportunity" would send a further negative signal to Susan Neiman (Richard, P. App. A69-70, A89).

After Robert Adams put off Susan Neiman's request to bring her case to the Advisory Committee, and upon discovering that Adams withheld favorable information from the committee and the department, plaintiff brought her complaint of unfairness to Deputy Provost Charles Long.[15] Deputy Provost Long arranged for Susan Neiman to meet with Provost Richard on April 12, 1995. Susan Neiman delivered a letter to the Provost at that meeting and advised the Provost of her complaints that Adams was biased against her continued employment, that he had unfairly prejudged her case for tenure and that he had withheld favorable information from those who were making decisions regarding her continued employment at Yale. Neiman further advised the Provost that Adams had refused to bring her case to the Advisory Committee for tenure consideration. Susan Neiman requested an investigation and close scrutiny by the Yale administration of the handling of her case for tenure (Neiman, P. App. A3-4).

Following Susan Neiman's meeting with the Provost, Professor Lear also complained about the Advisory Committee's handling of junior faculty appointments, on April 20, 1995, stating, "There has been serious mishandling of the cases of Paolo Mancosu [an Associate Professor who like Neiman received early promotion but chose to leave Yale] and Susan Neiman," in an email to Deputy Provost Charles Long, copied to

[15] This was not the first instance that Susan Neiman's unfairness complaint was brought to the attention of Yale University's senior managers. In March and April of 1995, upon discovering that Robert Adams had withheld important information from the department regarding Susan Neiman, Professor Harries wrote to the Provost on March 27, 1995 (Harries, P. App. A166-168). Professor Harries protested the recommendation that Susan Neiman be told her prospects at Yale were not encouraging, and stated, in part, *"…I now feel strongly that, by omission, the letter that was sent treated Susan Neiman unfairly."* Professor Lear also corresponded by email to Provost Richard and raised fairness in the context of gender discrimination, stating, "There ought to be recognition that our system of promotion has built into it factors which *unfairly discriminate* against this candidate because of her route through the world that involved being a mother as well as being an outstanding philosopher" (Lear, P. App. A171, emphasis added). President Levin was informed of the content on this email on March 1, 1995. Deputy Provost Long testified that he had been informed of Susan Neiman's unfairness complaint in April of 1995, *"Jonathan did express to me that he felt that her [Neiman's] case –that she had been treated unfairly"* (Long, P. App. A133).

Provost Alison Richard (Lear, P. App. A161-A162). Lear framed the unfairness complaint in reference to the appointments process as follows:

> One has to understand that the current structure of the "receivership" is a ruin. The original structure called for an outside body of philosophical experts, and an inside committee who, while overseeing Yale's interests, were not meant to have and were meant not to try to exercise any philosophical expertise (Lear, P. App. at A161).

Professor Lear then pointed to the fundamental flaw in the process: "It effectively rendered Yale blind and deaf to the flow of valuable, critical information. It left Yale without any responsible way to assess letters…" (Ibid.). Lear also made specific references to the discriminatory and unfair treatment of Susan Neiman by subjecting the evaluation of her scholarship to a group without expertise. Comparing the favorable treatment Professor Kagan received in the Advisory Committee (in the face of critical letters about his scholarship) to the blind acceptance of any criticism against the plaintiff, based on the influence of Robert Adams who supported Kagan and opposed Neiman, Lear made out Neiman's case of unfairness as centering on the lack of an unbiased, expert review of her scholarship.[16]

Provost Richard took prompt action to cause the Advisory Committee to take another look at Susan Neiman's case on May 2, 1995. Thereafter, the "target of

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[16]. Professor Lear complained that in the absence of a recommendation from a group of external experts, as envisioned in the original receivership plan, the Advisory Committee "[was] not capable of discriminating properly among negative letters" (Lear, P. App. A161). Adams' bias was reflected in the fact he opposed Susan Neiman's continued employment at Yale in February of 1995 before the process of considering Neiman's case for tenure had even begun and because he had withheld information regarding Neiman's accomplishments before the Advisory Committee (Richard at A65-67). Thus, contrary to the normal appointment process, when Susan Neiman's case progressed from the department to the Advisory Committee, there was no presumption of departmental support and the Chair did not present her case requesting favorable consideration (Richard at A80-81). Whereas Susan Neiman had been unanimously recommended for early promotion by her department in April 1993, two years earlier, once Adams became Chair, Neiman was essentially opposed by her department in the Advisory Committee's deliberations on the strength of his one vote.

opportunity" appointment for Adams' preferred candidate, Allen Wood, was cancelled and Yale initiated a national search for a position in the area of Kant and/or Nineteenth Century Philosophy.[17] The search process initiated by the Advisory Committee over the next six months followed a path similar to that employed prior to the receivership, but Adams, the Advisory Committee and the Provost made up the rules on an *ad hoc* basis as the process progressed from search to decision. Susan Neiman, on sabbatical in Tel Aviv, Israel, was not, however, aware of the process that was followed in her case. As in other tenure searches, the Advisory Committee solicited opinions from philosophers at other academic institutions identifying the most worthy candidates in the nation. The Advisory Committee met on July 31, 1995 to select five candidates who would appear on a short list of candidates, including Susan Neiman and Allen Wood. Adams then sent a letter to experts in the field and asked them to make a "comparative evaluation" of the candidates on the short list. Adams' letter, stated, *"Although we have not asked all of these individuals if they are willing to be considered, they represent the kind and quality of scholar we hope to appoint"* (Adams, P. App. A155-A156).

On November 3, 1995, the senior faculty of the Philosophy Department met informally to rank the candidates and to make a recommendation to the Advisory Committee (Minutes, P. App. A154). Professors Lear and Harries ranked Susan Neiman as the #1 candidate on the short list. Professors Adams and Kagan rated her last and Allen Wood as #1.[18] Minutes of the meeting indicate there was a possibility "of making offers

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[17] Provost Richard stated she was aware of the allegation that Susan Neiman's case had been mishandled and for that reason monitored Susan Neiman's case closely from April of 1995 to the decision in January 1996 (Richard, P. App. A67-68, A71-73).

[18] When a department votes to make a recommendation for tenure, tie votes do not proceed to the next level of review, so neither candidate would proceed to the Advisory Committee level with a 2-2 tie vote in the department (Richard, P. App. A51; Long, P. App. A137). Therefore, neither Wood nor Neiman could be considered for tenure under the handbook.

simultaneously to two candidates" from the list.[19] The Advisory Committee was to consider the question of dual appointments on November 6, 1995. On November 4, 1995, in a letter written by Professor Lear to Adams and forwarded to Deputy Provost Long, Lear again referred to the *unfairness* in the process by declaring in the opening paragraph, "…[Neiman's] case raises serious issues about the fairness of the appointments procedures at Yale."[20] As he had done on April 20th, Lear raised the lack of expertise in the Advisory Committee and Adams' control over the process as flaws in the procedures followed in Susan Neiman's case by reference to the treatment Shelly Kagan received under similar circumstances.

> There was, as you know, some very serious criticism of Shelly's work by some very important people in the field. *That criticism was passed over by the internal advisory committee because you advised them to do so. It seems to me unfair that negative criticism should count only when you are against the candidate.* This is a residual inequity of the "receivership" structure, as it now exists; for there are no others on the advisory committee who are in a position to intelligently debate the value of positive and negative comments. (Lear, P. App. at A152, emphasis added)

On November 6, 1995, the Advisory Committee met to consider the appointment of Allen Wood and Susan Neiman, but no formal action was taken and the Advisory Committee agreed to meet the following week.[21] "In the end it was decided not to try to decide the matter by halves."[22]

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[19] It was not a routine occurrence at Yale University to open another slot in the middle of a search process (Richard, P. App. A108-A109). Nevertheless, "All four tenured members viewed this possibility with favor, in principle, provided the combination makes sense in terms of subfield interests and gender balance of the Department" (P. App. A154).

[20] Lear, P. App. A149-153. Professor Lear also observed, "It is obvious that with the chair's support, this case would go sailing through" (Id. at A153).

[21] Professor Allen Wagner's contemporaneous record of his conversation with Robert Adams noted, "One strategy that the professors recommend was making two appointments from the list. In the case of Wood would be one candidate acceptable to all. But the battle would still be over whether Neiman would be the other" (Wagner, P. App. A148). Professor Wagner's notes indicate there will be a follow up meeting the next Monday, with the professors of philosophy, to vote on

Meanwhile Adams and Provost Richard decided to withhold information from plaintiff and to change the process again by allowing Susan Neiman's chief competitor, Allen Wood, and another potential appointee, Alan Code – two individuals who were not appointed to the faculty at Yale – to weigh in on the appointment of Neiman to the second slot. Although the Advisory Committee was not disposed "to decide the matter by halves," Adams had a different agenda that was ultimately supported by the administration.[23] Wood was then offered a position and the Advisory Committee resolved to defer the issue of offering the second slot to Susan Neiman until Wood and Code could be canvassed. Meanwhile, Provost Richard inquired whether Susan Neiman, who was considering other job offers with tenure, could wait until January 1996, so that the Provost could make a last effort to "achieve a consensus" (Neiman, P. App. A5). In a November 15, 1995 email to Adams, Provost Richard confirms that she has withheld information regarding the recommendation to appoint Allen Wood and to canvass Wood and Code concerning her appointment from Susan Neiman (Richard, App. A194).[24] .

In the end, neither Wood nor Code provided meaningful input and the result was that the Chair's candidate, Allen Wood, received the position and Susan Neiman was left out in the cold. According to the Advisory Committee notes, twelve professors and administrators

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the question of recommending the promotion of Susan Neiman. That meeting did not take place until January.

[22] This statement reflected the advice of the Advisory Committee to "defer a decision until we were ready to make a decision about both" (Richard, P. App. A105).

[23] Professor Wagner noted on November 13, 1995, that Robert Adams successfully lobbied the Advisory Committee, in the absence of the other senior members of the Philosophy Department, to make an offer to Wood and to defer a decision on Neiman, thereby "decid[ing] the matter by halves" to the detriment of Susan Neiman, on an 8-0-1 vote (P. App. A147).

[24] Robert Adams stated his concerns in an email dated November 9, 1995 about this procedure and the need to hide from Susan Neiman that her case will not be decided until there are "more new hands to share the responsibility." Adams stated, "Specifically, it occurred to me that they may not want to be 'put on the spot,' particularly since, no matter how discreet we are with Susan, she will probably be able to figure out what changed if we aren't able to resolve her case now but can as soon as they are appointed" Provost Richard agreed. (Adams, P. App. A142-143).

decided Neiman's fate on January 22, 1996, including the four members of the Philosophy Department who voted 2-2 in November of 1995, and six senior faculty from other departments. Of the six of the members of the Advisory Committee who were senior faculty from other departments, one abstained. The other two listed meeting participants included Provost Richard and Deputy Provost Long. The vote was "6 no" and "4 yes. (P. App. A146). On January 22, 1996, Provost Richard sent an email to Susan Neiman in Tel Aviv, Israel, summarizing the proceedings as follows:

> After an hour and a quarter of very serious discussion this morning, the Philosophy Advisory Committee voted by a narrow margin not to forward your case to the senior appointments committee. *I have done my best, Susan, to make this as full and fair an evaluation as I could, and I believe I have in large measure succeeded* – albeit in the full knowledge that all systems of evaluation are imperfect and that the one in place here at Yale for Philosophy at this time is not what one would wish for. *But we/I can see no better alternative* (Richard, P. App. A145).

The email did not inform Susan Neiman of any further right to appeal.[25] Unaware of any requirement to file an appeal or complaint with the Provost within 45 days, or be at risk of forever relinquishing her right to claim breach of contract in a lawsuit against Yale, Susan Neiman believed she had no choice but to accept an offer of tenured employment elsewhere.

[25] Provost Richard chose not to refer the case to the Review Committee because the Provost "saw no grounds on which to do so." It is evident that the Provost exercised her discretion to end the processing of Susan Neiman's complaint of unfairness after the negative vote by the Philosophy Advisory Committee in January of 1996. Provost Richard also conceded that Susan Neiman had not been informed of the exact procedures followed in her case for tenure (Richard, P. App. A114), so it is not at all clear what more Susan Neiman could have complained about with the limited knowledge she possessed in February of 1996. Although the Provost stated it is not necessary to know the factual basis for filing a complaint of unfairness because the faculty member can file a complaint if he or she perceives there was an error (Richard, P. App. A54), Provost Richard did concede that a faculty member acting without knowledge of the facts surrounding a negative decision could perceive there was a fair process when knowledge of the true facts would have revealed the opposite (Richard, P. App. A115-116).

On February 6, 1995, Professor Lear resigned, citing the unfairness to Susan Neiman as the principal reason to leave the Philosophy Department.[26] In his more recent letter/affidavit, dated June 26, 2002, Professor Lear confirms he raised the solution to the problem of unfairness to the Deputy Provost, the Provost and the President of Yale.[27] Nevertheless, no one was willing overrule Adams' objection to this proposal and to Susan Neiman. Professor Lear affirms that he met with the Provost and the Deputy Provost on three occasions to ensure there was a full and fair review, neither one suggested there was any other procedure available to ensure fairness. Professor Lear, a close, personal friend of President Levin, discussed the Neiman case with him during Lear's nearly weekly dinners with the President.[28] Professor Lear stated that it is "inconceivable" that President Levin would have been aware of a possible grievance procedure that applied to the decision and not informed him. President Levin informed Professor Lear "on several occasions" that it was his intention to leave the matter of adjudication of Neiman's case in the hands of the Provost. According to Lear, "If [President Levin] had thought that it was time for Professor Neiman to write to him, he would have informed me" (Lear, P. App. A9).

[26] "We have talked about the issues, so I doubt you will be surprised by this decision or by my reasons for making it. For me, the central issue is that I have lost confidence in the receivership-process as it is now constituted. I am especially troubled by what I take to be the inability of the advisory committee to make responsible and informed evaluations of our junior faculty. *Responsible evaluation requires, I think, serious philosophical training. A majority of the members of the committee deciding the fate of these promising young philosophers lack such training. I believe that, in one way or another, Randall Havas, Ken Gemes, Paolo Mancosu and Susan Neiman did not receive a fair evaluation of their work. I find it troubling in the extreme.* I fully support the idea that Yale hold its junior faculty to the highest standards; but, reciprocally, Yale should hold its own evaluation-process to similarly high standards. It is not doing so right now. Though each of the participants in the receivership-process may have the best will in the world, the overall institutional effect, in my opinion, is that Yale is playing fast and loose with the careers of talented and dedicated faculty. It is not a process I want to be part of any longer, even as a dissenting voice" (Lear, P. App. A144, emphasis added).

[27] Lear states that when he suggested referral of Neiman's case to an *ad hoc* committee of experts, Robert Adams replied, "That would be Harvard's way of doing things." Provost Richard responded, "Well, just because it's Harvard's way of doing things doesn't necessarily mean it's wrong" (Lear, P. App. A9).

[28] President Levin was informed of the Neiman case from February 27, 1995 through the resignation of Professor Lear in February of 1996 (Richard, P. App. A108; Lear, P. App. A8).

In the absence of such a communication from President Levin, Professor Lear concluded that any further efforts on behalf of Susan Neiman would have been futile.[29]

THE YALE UNIVERSITY FACULTY HANDBOOK

The Yale University Faculty Handbook governs the process of faculty appointment, reappointment and promotion, and obligates defendant to provide notice to the faculty when the rules relating to the way in which such decisions are made are changed.[30] Faculty appointment procedure is governed by the handbook and by a "memorandum on appointments" that is "periodically circulated" to chairs of the Faculty of Arts and Sciences that "gives specific details on the appointment process."[31] The essence of the appointment and promotion process centers on review of the candidate by those with expertise in the same area of scholarship, both within Yale and at other distinguished academic institutions, followed by a vote and recommendation by the department to the Committee on Tenure Appointments.[32] All of the rules relating to review and voting by the department were

[29] The Review Committee's recommendation, if any, is advisory to the Provost and to the President (Richard, P. App. A57-58, A113-14). On the other hand, the appointment process allows recommendations to be brought to the Fellows of the Yale Corporation on either the Provost's or the President's agenda (Long, P. App. A122-123). Thus, President Levin always had the authority and discretion to recommend the promotion of Susan Neiman to the Fellows of the Yale Corporation.

[30] Faculty Handbook, P. App. A10-40. According to the following statement in the "*Introduction,"* such notice will be published or delivered directly to the faculty involved. "The policies included, as the University may modify them from time to time, form part of the essential employment understandings between the members of the faculty and the University…This edition supercedes all previous revisions. *Notice of changes and additions to University policy will generally be distributed to the faculty members affected or published in the Yale Weekly Bulletin and Calendar"* (P. App. A12, emphasis added).

[31] The Provost described the normal procedure concerning reappointment and promotion pursuant to the "memorandum on appointments" (Richard, P. App. A44-45, A78-79).

[32] "The normal procedure for appointment and promotion begins with the consideration by the department or school of its needs and with a request to the Provost for a defined position (P. App. A23). Once the position has been made available, "the department or school takes the initiative on the appointments process…" (Ibid.). "When a person is recommended for appointment *by the search and voting processes of a department,"* the recommendation is reviewed by the Committee on Tenure Appointments for the division in which the candidate is recommended (Id., emphasis added). With regard to voting, the handbook generally provides that the "permanent officers" of a department "may invite to attend, with vote, other members of their faculty who hold a rank equal or superior to that of the position to be filled" (P. App. A24). The more specific

suspended in the receivership process that resulted in the denial of tenure to Susan Neiman. Neiman was never informed of the rules that were followed in place of the handbook.

That portion of the handbook relied upon for the claim of "exhaustion of contractual remedies" by defendant, is entitled, "*Review Procedure Initiated by Faculty Members Concerning Decisions on Reappointment and Promotion.*" If a faculty member believes she has been treated in an "unfair or discriminatory manner in connection with a decision about reappointment or promotion" she should consult with the Dean of the Committee on Tenure Appointments. According to the handbook, "*the faculty member* ***may*** *request review of his or her complaint in accordance with the procedures specified below.*" If the Dean believes the complaint is "sufficiently serious," the Dean "**may**" recommend that the faculty member submit a "formal complaint to the Provost, who will review the matter."[33] While the Provost

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language relating to "Voting in Departments," and governing the Faculty of the Arts and Sciences, states as follows: "The permanent officers of a department normally have full and exclusive authority for all recommendations for appointments and promotions with the department" (P. App. A37). Further, "*All departmental actions on nominations for appointment and promotion should result from a majority of those present and voting*" (Id.). The handbook also describes the "Ladder Faculty Ranks" that lead to reappointment and tenure in a given case. Initial appointment to a term of not less than three years requires at least one, and possibly two or more reappointment/tenure decisions. Toward that end, departments are expected to "review thoroughly" each non-tenured members of the faculty whose term is three years or more during the "penultimate year of each appointment in the nontenure ranks" (P. App. A33-35). In the event of a penultimate review, the "individual faculty member should be notified in writing that such a review will take place and be given the opportunity to submit any relevant publications or works in progress" (Id at A33).

[33] The handbook states that the faculty member would normally submit a letter explaining the complaint to the Dean of the Appointments Committee that would have received the recommendation. "The letter should be received within 45 days of the final action giving rise to the complaint." (P. App. A26-30). The Dean will then undertake an investigation and submit written findings to the faculty member with 14 days. If the faculty member is not satisfied with the Dean's resolution, the faculty member may submit a letter to the Provost explaining the complaint and the redress sought within 45 days of the final action giving rise to the complaint or within two weeks of the dean's written response if a complaint letter was sent to the dean in the first instance. The Provost **may** choose to conduct a preliminary investigation and attempt to resolve the complaint, but no later than one month after the Provost's receipt of the complaint, "*the Provost will forward to a review committee those issues raised by the complaint which are not resolved, except for any which the Provost has concluded are not within the purview of the procedures or which are clearly without merit*" (P. App. A28, emphasis added). Thereafter, a Review Committee will perform its investigation in a non-adversarial manner, including a review of documents and the interview of the complainant and witnesses. The Review Committee then deliberates and issues a written "advisory" report to the Provost (or to the

is required to “review the matter,” the Provost is not required to forward the complaint for investigation. If the Provost does submit the matter to the Review Committee, that committee **may** make recommendations to the Provost concerning what action should be taken, if any. The Provost must accept the Committee’s findings of fact, but has the ultimate discretion to “accept, modify or reject the conclusions of the Committee and any of its recommendations.[34] “A decision by the Provost to sustain the decision not to reappoint or promote a member of the faculty shall be final.” Nowhere does the handbook use language that mandates the filing of a complaint by a faculty member who believes unfairness has infected the process. Similarly, there is no statement that the filing of an unfairness complaint represents the exclusive remedy for the resolution of faculty unfairness complaints, nor does the handbook provide for arbitration of disputes by an impartial third party.

ARGUMENT

Standard of Review: Plenary. A motion to dismiss tests whether, on the face of the record, the superior court is without jurisdiction to entertain a cause of action. Subject matter jurisdiction affects the trial court’s power to hear the case. Because the determination regarding a trial court's subject matter jurisdiction is a question of law, appellate review is plenary. *Milford Power Co., LLC v. Alstom Power, Inc.,* 263 Conn. 616, 624 (2003); *Bailey v. Medical Examining Board for State Employee Disability Retirement*, 75 Conn. App. 215, 219 (2003).

President if the Provost has been “significantly involved in the matters under dispute”) stating findings of fact and conclusions within 60 days (P. App. A29).

[34] The Provost declared that conferring tenure would be “a very inappropriate recommendation” for the Review Committee to make to the President, because the Committee is “created to look at procedural errors, not at the substance of the merits of the case…”(Richard, P. App. A114).

Trial Court Erred in Dismissing Plaintiff's Complaint Because the Faculty Handbook Does Not Implicate Subject Matter Jurisdiction Unlike a Collective Bargaining Agreement Or an Appeal from a Decision by an Administrative Agency in a Contested Case

Defendant's Motion to Dismiss does not implicate subject matter jurisdiction under the "exhaustion doctrine" as previously defined by this Court. The handbook complaint procedure does not give rise to an exhaustion of remedies claim because the procedure offered as "a contractual remedy" sufficient to oust the jurisdiction of the court is not coextensive to the contractual remedy agreed upon in a typical collective bargaining agreement. Although the trial court relied upon the public policy supporting exhaustion of *administrative remedies,* defendant Yale University is not an administrative agency, and the "contractual remedy" lacks the due process protection and process available to administrative appeals. Therefore, the predicate for establishing the exhaustion doctrine in the employment contract setting does not exist in this case. Defendant did not prove that there was an employment agreement that *requires* exhaustion of an exclusive remedy, most commonly represented by a grievance and arbitration procedure, before seeking redress in a court of law. There is no precedent in Connecticut for the application of the exhaustion doctrine to an employment agreement outside the collective bargaining arena.[35] Because a private employment agreement does not incorporate the public policy considerations and safeguards applicable to either the labor-relations setting or to an administrative agency hearing a contested case, this Court should not extend the

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[35] The United States Supreme Court has enforced agreements to arbitrate claims arising in the employment setting even in the absence of a collective bargaining agreement, but the specific agreement to select binding *arbitration* as the *exclusive* remedy was a predicate to the waiver of the right to seek access the court system. *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (employee signed employment application that included a provision that employee would "settle" all claims "*exclusively* by final and binding *arbitration* before a neutral arbitrator.")

exhaustion doctrine to all handbook employment agreements without a full consideration of the policy considerations that apply to established exhaustion cases.

Two lines of authority allow a defendant to raise the exhaustion doctrine as an issue of subject matter jurisdiction in Connecticut. One strand of cases involves mandatory prior submission of a claim to an administrative agency before resorting to a court of law, such as potential license deprivation claims, *Johnson v. Statewide Grievance Committee,* 248 Conn. 87 (1999); *Pet v. Department of Health Services,* 207 Conn. 346 (1988) and dismissal claims brought under the Teacher Tenure Act, Connecticut General Statutes § 10-151(b), *LaCroix v. Board of Education,* 199 Conn. 70 (1986). These cases resolve employment issues by applying statutorily mandated procedures that are subject to constitutional due process review. This precedent is not on point. The facts here do not support extension of the exhaustion of administrative remedies doctrine to handbook employment agreements.

Although the trial court found it would be desirable to review a case after a record had been developed, as in the case of an agency conducting a hearing, the parties did not agree to treat the tenure decision like an agency appeal. Unlike the handbook procedure in this case, property rights claims arising in the administrative agency setting are provided with due process safeguards to protect the basic rights of the participant in a contested case. *Connecticut Uniform Administrative Procedure Act*, § 4-166, *et. seq.* Connecticut administrative law provides basic due process rights, such as notice, the opportunity to be heard before an impartial decision-maker, assistance of counsel, compulsory document production and the opportunity for cross-examine witnesses. Connecticut General Statutes § 4-177 through § 4-181a. In the administrative agency setting, the route to the trial court is

often through an appeal and the standard of review is deferential to the agency based on the assurance of due process prior to appeal. Connecticut General Statutes § 4-183 (j). Unlike the administrative agency setting, there is no appeal from the decision of the Provost. Indeed, the handbook states her decision will be final.

Little analysis is required to conclude that the handbook does not provide the minimum due process this Court requires in the public employment setting prior to dismissal. *Bartlett v. Krause,* 209 Conn. 352, 380-81 (1988). Yale's handbook does not provide for basic due process in the development of a record. Furthermore, the development of a record at Yale is not crucial to the subsequent jury trial for breach of contract, a *de novo* review that does not depend on a record created in an agency hearing. There is no deferential standard of review and, in any case, the trial will not be premised on a record. The trial itself will be preceded by the full discovery allowed by the Connecticut Practice Book. The constitutional right to access the courts of our state far outweighs the value of the potential for the creation of a record between two private parties to be reviewed at a subsequent jury trial. Connecticut Constitution, Article First, Section 19.

Acceptance of a claim of agency-like status and deferential treatment for a university's decision to terminate a professor is bad public policy and was rejected in the well-reasoned decision in *McConnell v. Howard University*, 818 F.2d 58, 68-69 (D.C. Cir. 1987) ("It would make no sense for a court to blindly defer to a university's interpretation of a tenure contract to which it is an interested party"). Thus, the policy behind the orderly administration of claims in the agency setting does not support the extension of the exhaustion doctrine to handbook employment agreements.

The other line of authority for the exhaustion doctrine involves collective bargaining agreements and invokes the public policy underlying labor-management-relations law, an area regulated by statute in the public and private setting under state and federal law. *Hunt v. Prior,* 236 Conn. 421 (1996*); Labbe v. Pension Com'n of City of Hartford,* 229 Conn. 801 (1994); *School Administrators v. Dow,* 200 Conn. 376 (1986). Collective bargaining agreements typically provide for a grievance-arbitration procedure to resolve disputes arising under the agreement. In most cases, the grievance-arbitration procedure is agreed upon as the exclusive remedy to resolve such disputes. In *School Administrators v. Dow*, this Court invoked the public policy relating to collective bargaining when requiring exhaustion of an exclusive remedy in an employment agreement.[36] "Under federal law, 'it is settled that the employee must at least attempt to exhaust **exclusive grievance and arbitration** procedures established by the bargaining agreement' before resorting to the courts." *School Administrators v. Dow*, 200 Conn. at 381, *quoting and citing, Vaca v. Sipes,* 386 U.S. 171 (1967) and *Republic Steel Corporation v. Maddox,* 379 U.S. 650 (1965) (emphasis added); *Rapaport and Benedict, P.C. v. City of Stamford,* 39 Conn. App. 492, 500 (1995). After noting that the Unites States Supreme Court relied on Congress' express approval of contract grievance procedures for settling disputes in the area of labor-management relations, and that the State of Connecticut followed a similar path, *see* Connecticut General Statutes § 31-101 through §31-111b (the *Connecticut Labor Relations Act*), Connecticut General Statutes § 10-153a through § 10-153n (the *Teacher Negotiation Act*) and Connecticut General Statutes § 52-408 through § 52-424, (the *Connecticut*

[36] The failure to exhaust a grievance-arbitration procedure will not bar suit alleging statutory and constitutional claims, even in the collective bargaining setting. Connecticut General Statutes § 31-51bb. It would be an anomaly if an employment agreement premised on a handbook grievance procedure could be construed to prevent claims that could be brought in the collective bargaining agreement arena without exhaustion.

Arbitration Act), this Court adopted the above quoted rule. However, in doing so, this Court emphasized the plaintiff's action would not be barred, "*if the agreement did not make the grievance-arbitration process the exclusive remedy for the parties*." *Dow*, 200 Conn. at 383 n. 5, *citing Republic Steel Corporation v. Maddox,* 379 U.S. at 657-58 emphasis added). "If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted." *Vaca v. Sipes,* 386 U.S. at 184 n. 9. Therefore, the mere existence of a complaint procedure in the handbook would not necessarily require exhaustion. The parties must intend that the complaint procedure is the exclusive remedy in order to oust the jurisdiction of the court.

In this case there is no evidence to support the contention that Susan Neiman agreed to make the complaint procedure in the handbook the exclusive remedy to resolve her common law claims following the denial of tenure. Furthermore, the complaint procedure does not compare favorably to the grievance-arbitration procedure in the collective bargaining agreement that underlies the exhaustion doctrine. Although the handbook and the typical collective bargaining agreement provide for progressive steps to resolve a complaint or grievance, the grievance procedure in the collective bargaining context usually provides for arbitration or, in some cases, a hearing before the state labor-relations board, a significant right that is lacking in the handbook process. While the due process safeguards built into arbitration are similar to the due process safeguards found in the administrative agency setting, as noted above, due process is absent in the handbook. In arbitration, notice of a claim, representation by counsel, discovery, compulsory attendance and cross-examination of witnesses and an impartial decision-maker is

routinely available. As in the case of an appeal from an agency ruling, the award from an arbitrator is enforceable by petition to the court and there is a deferential standard of judicial review. *See Connecticut General Statutes §* 52-408 *et. seq*. "Arbitration is a creature of contract and without a contractual agreement to arbitrate there can be no arbitration. … No one can be directed to arbitrate a dispute who has not previously agreed to do so." *Scinto v. Sosin,* 51 Conn. App. 222, 227, *cert. denied,* 247 Conn. 963 (1999).

The legislative oversight driving the public policy consideration for exhaustion in the administrative agency and collective bargaining agreement settings is lacking in this case. Furthermore, the policy that favors a grievance-arbitration procedure to resolve disputes in the collective bargaining agreement setting does not easily translate to the single employee agreement that does not compel alternate dispute resolution by a neutral arbitrator. Here, there is a handbook drafted by the employer. The employee has had no role in negotiating the terms of the handbook, resulting in a contract of adhesion. "A contract of adhesion is one whose terms are not subject to the normal bargaining processes of ordinary contracts." *Dainty Rubbish Service, Inc. v. Beacon Hill Association, Inc.*, 32 Conn. App. 530, 535 (1993). The employer has the right to make the final decision. The complaint process is phrased in discretionary terms for the faculty member as well as the Provost. There is no right to an adversarial hearing, to representation by counsel, to compulsory attendance of witnesses or for production of documents. The employer has complete discretion to modify the rules, albeit there is a requirement to provide notice. Therefore, the exhaustion doctrine should not be extended to a discretionary process in a handbook that neither comports with due process nor compels submission to a neutral arbitrator.

Defendant's Motion to Dismiss should be denied as a matter of law because the predicate to oust the jurisdiction of the court is lacking, there is no administrative agency involved and the handbook does not provide for an exclusive agreement to submit claims to a grievance and arbitration process.

Trial Court Erred By Inappropriately Invading the Province of the Jury By Deciding the Terms of Employment Agreement And the Parties' Compliance Therewith When Reviewing the Decision to Deny Tenure to Susan Neiman

The trial court should not have attempted to make findings of fact related to the disputed terms of the employment agreement and the extent to which the parties complied with the terms of that agreement. Reviewing the facts in the light most favorable to the plaintiff, the record established that defendant had suspended the rules governing the appointment process when it placed the Philosophy Department into receivership status. The handbook's language relating to the filing of a complaint was permissive in nature and susceptible to more than one interpretation. Unlike a collective bargaining agreement, where there is no dispute regarding the terms of the agreement and interpretation of contract language is a matter of law for the court, *Rapaport and Benedict, P.C. v. City of Stamford,* 39 Conn. App. 492, 497-98 (1995), the handbook's ongoing role in the employment relationship raised questions of fact for the jury to decide. "Absent a statutory warranty or definitive contract language, the determination of what the parties intended to encompass in their contractual commitments is a question of intention of the parties, and an inference of fact." *Coelho v. Posi-Seal International, Inc.,* 208 Conn. 106, 112-13 (1987). "Because it is an inference of fact, determining the intent of the parties is within the province of the jury: it is the raison d'etre of the jury system.'" *Gaudio v. Griffin Health Services Corp.,* 249 Conn. 523, 533 (1999). While there is no question that faculty

handbooks may give rise to enforceable employment contract claims, "[i]nterpretation of the written terms of a contract and the degree of compliance by the parties are questions of fact to be determined by the jury." *Craine v. Trinity College,* 259 Conn. 625, 654-56 (2002). Therefore, it was improper for the trial court to determine, as a matter of fact, the terms of plaintiff's employment contract and the degree of compliance with those terms by the parties. For this reason alone, the decision to dismiss plaintiff's complaint must be reversed. Otherwise, trial courts will deprive plaintiffs of the right to a jury trial every time an employer claims that a complaint process in a handbook constitutes the exclusive remedy for resolving employment disputes.

Even if it were permissible for the trial court to determine the intent of the parties, given the circumstances of plaintiff's employment and the terms of the handbook, this Court's review of the record must be that there was no agreement to exhaust an exclusive remedy and the contrary finding of fact by the trial court was clearly erroneous in light of what a reasonable juror would be permitted to find. *Henriquez v. Allegre*, 68 Conn. App. 238, 242 (2002) (finding of fact made in support of motion to dismiss will not be overturned unless clearly erroneous). A reasonable juror could find there was no expressed agreement to require processing an unfairness complaint as an exclusive remedy. The handbook does not indicate that the unfairness complaint process provides the exclusive remedy for reappointment disputes. The language referring to the filing of a complaint is permissive in nature.[37] Indeed, both plaintiff and defendant could exercise discretion on the

[37] While plaintiff is aware that *Muth v. Board of Regents,* 887 S.W.2d 744 (Mo. 1994), states that "may" means that the employee may choose to file a grievance or not, but must file a grievance if a later resort to court is contemplated, that holding is contrary to the requirement in Connecticut that there must be an agreement to follow an exclusive grievance-arbitration procedure. Furthermore, the Faculty Handbook rules did not limit the issues that could be considered in the process and the rules there were considered "review procedures" governed by the Missouri Administrative Procedures Act. *Id*. at 747.

initial decision to file or process a complaint.[38] The Provost is provided with unlimited discretion to forward complaints to the Review Committee. To the extent the defendant now claims that the only reasonable interpretation of the handbook mandates the unfairness complaint procedure as the exclusive method of dispute resolution, that attempt must fail since it is reasonable to interpret the language in the handbook regarding filing complaints as permissive in nature. As noted, the terms of the handbook were not negotiated with the plaintiff. The handbook is properly characterized as a contract of adhesion. Yale University must accept the reasonable interpretation of the language that favors the plaintiff. "It is a general rule of construction that whenever two interpretations of a contract seem equally possible, the language will be construed against the party responsible for its inclusion." *Mongillo v. Commissioner of Transp.*, 214 Conn. 225, 231, (1990). If Yale meant to say the unfairness complaint process would be the exclusive remedy for disputes related to promotion and reappointment, then Yale should have stated so specifically and clearly.

Even if it were permissible for the trial court to attempt to determine the extent to which the parties complied with the terms of the contract, this Court must conclude that a reasonable fact finder would be able to consider the suspension of the rules in the handbook following the placement of the Philosophy Department into receivership as an act nullifying the complaint procedure, especially when the Provost and the Chair agreed to hide the *ad hoc* procedures adopted by the Advisory Committee from plaintiff, contrary to

[38] In a case involving this same defendant, the employee handbook for the Yale University School of Medicine "encouraged" employees to use the grievance procedure and the employees were told that they "may do so without fear…" The court declined to find the handbook required exhaustion of this remedy. "'Encouraged' and 'may' are not words of compulsion. Rather, they suggest an option, and to construe their intent to be mandatory, rather than permissive, would be a subversion of their clear meaning." *Mayo v. Yale University,* 2002 WL 241503 *3 (Conn. Super.) (conclusion that the procedure is optional is reinforced by the fact the procedure is not binding).

the handbook requirement to provide plaintiff with notice of changes to the rules. The trial court stated plaintiff cannot rely on one portion of the handbook to make a claim and then ignore the complaint procedure in the same handbook. (Mem. at 14). Plaintiff counters that the defendant should not be able to hide the process it followed and then require the plaintiff to complain about the failure to follow rules that have never been communicated to her. Throughout plaintiff's employment at Yale, defendant decided to change the way by which decisions would be made solely to further Yale's interest in rebuilding the Philosophy Department. Plaintiff's interest in having a fair review process based on the recommendation of experts in her field was a secondary consideration subordinated to rebuilding the department. Having repudiated the agreement, Yale must be estopped from raising the complaint process as a bar to plaintiff's suit. *Vaca v. Sipes,* 386 U.S. at 185 (employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action). *See Dogherra v. Safeway Stores, Inc.,* 484 F. Supp. 396 (N.D. Cal. 1980) (employer's lying to union's agent in investigation interfered with the proper functioning of the contractual grievance procedure and amounted to repudiation). Yale materially breached the agreement by suspending the rules and failing to notify plaintiff of the procedures to be substituted in lieu of the handbook. A reasonable juror could decide that defendant was estopped from claiming that the handbook mandated the filing of an unfairness complaint within 45 days of the vote to deny plaintiff tenure.

Furthermore, it is clear that plaintiff and her supporters, Professors Lear and Harries, raised issues of fundamental unfairness in connection with the process leading to the decision to deny tenure to Susan Neiman in substantial compliance with the handbook.

Fundamental unfairness in Neiman's case involved two key points: (1) Robert Adams had prejudged Susan Neiman's case for tenure in a negative way and used his position as Chair to influence a negative result and (2) Yale failed to substitute a committee of scholars with expertise in philosophy for the department as part of the decision-making process. The record before the trial court established that Susan Neiman and her supporters raised both of these points as complaints of unfairness to the Provost and the President beginning in the spring of 1995. Complaints of unfairness over the handling of Susan Neiman's case continued through the resignation of Professor Lear on February 6, 1996, fifteen days after the 6-4 vote in the Advisory Committee against Susan Neiman. Yet, despite knowledge of her complaint of unfairness, defendant rejected the one proposal advanced by Professor Lear that would have remedied the unfair process by refusing to send Susan Neiman's record of scholarship to a committee of external philosophers to make a recommendation to the internal Advisory Committee, as originally intended in the design of the receivership process. A reasonable fact finder could decide that while Susan Neiman was unaware of the exact procedure being followed to decide her case, Professor Lear proposed a process to resolve the complaint of unfairness, but that proposal was refused by the Provost. *Owens v. New Britain General Hosp.* 229 Conn. 592, 604, 643 A.2d 233 (1994) (substantial compliance test is the proper test by which to measure whether a hospital has sufficiently complied with its bylaws in terminating a physician's medical staff privileges).

The trial court improperly invaded the province of the jury by determining, as a matter of fact, the intent of the parties and the extent to which the parties complied with their obligations under the contract. Even if it were permissible for the trial court to engage in such fact finding, the trial court's findings were clearly erroneous because a reasonable

jury could have found that the handbook language was permissive, that defendant should be estopped from raising the defense of an alleged failure to follow the complaint procedure and that plaintiff had substantially complied with the complaint procedure.

Trial Court Erred By Failing to Determine It Would Have Been Futile to File Another Unfairness Complaint Where the President and Provost of Yale had Determined They Would Not Interfere With the Decision to Deny Susan Neiman Tenure to Support Rebuilding the Philosophy Department

Even if there were a requirement that Susan Neiman write another letter complaining of unfairness to the Provost, or to the President, within 45 days of notice that she had been denied tenure, without knowing the process that led to this result, any further effort to obtain tenure would have been futile, and the handbook remedy is inadequate, because it does not allow for appeal to an impartial decision-maker on the final decision to grant tenure and does not allow for the consideration of claims for damages.[39] "One of the limited exceptions to the exhaustion rule arises when recourse to the administrative remedy would be demonstrably futile or inadequate." *Hunt v. Prior,* 236 Conn. at 432; *O'Halloran v. Charlotte Hungerford Hospital,* 63 Conn. App. 460, 464-65 (2001) (hospital bylaws inadequate to provide relief for financial damages caused by injury to reputation.); *Stavena v. Sun International Hotels, Ltd.,* 2000 WL 994884 (Conn. Super.) (employer's motion to dismiss based on the failure to follow a grievance process in an employment manual denied over failure to address remedy for damage claims).

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[39] Futility and inadequacy of the administrative remedy does not readily apply to handbook because Yale is not an administrative agency and the handbook does not provide for a remedy. The handbook provides for a limited complaint process. Because Yale is a private employer, one exception to the exhaustion doctrine that applies in the administrative agency arena involves a constitutional challenge to the procedures followed by the agency. *Pet v. Department of Health Services,* 207 Conn. 346, 353, (1988), *LaCroix v. Board of Education,* 199 Conn. 70, 79 (1986). Although due process is not constitutionally required, It seems reasonable to consider the adequacy of the process when considering whether the remedy is inadequate. Unlike the grievance-arbitration process that is commonly resorted to in the collective bargaining agreement setting, the handbook does not provide even minimal due process protections.

The record before the trial court established that both the President and Provost were well aware of Susan Neiman's complaint of unfairness and did everything that Yale's current administration was willing to do. From April 12, 1995 until January 22, 1996, the Provost was intimately involved in providing a "fair process" to the plaintiff. The process invoked by the Provost to address the fundamental problems of unfairness represented by the bias of Robert Adams and the lack of expertise in the Advisory Committee he controlled, failed to provide an adequate remedy for Susan Neiman. Despite the unprecedented offer of a second slot to the Philosophy Department to allow Adams to offer employment to the candidate of his choice and tenure to Susan Neiman, Adams steadfastly maintained his opposition to Neiman's tenure. Neither the President nor the Provost was disposed to challenge Adams' ability to influence and control that decision. The Provost could have required the internal Advisory Committee to obtain a recommendation from an external committee of experts, as originally planned for the receivership, and such a recommendation would have eliminated Adams' ability to influence the Advisory Committee's decision. Additionally, since the Advisory Committee's recommendation is merely advisory, the Provost and the President had the discretionary authority to move Susan Neiman's case forward, yet both chose to remain on the sidelines. Writing another complaint letter to the Provost after the tenure denial would have been a futile act. Provost Richard declared that she had done everything possible to make the evaluation a fair one and she failed to refer the matter to the Review Committee. Based on the affidavit of Professor Lear, plaintiff presented strong evidence from which a reasonable fact finder could find that the process for considering and reconsidering the fairness of Yale's treatment of Susan Neiman had been thoroughly exhausted and further complaints would

have been futile. The President chose to allow the Provost to exercise her discretion in adjudicating the matter, despite knowing it was likely that the denial of tenure to Susan Neiman would result in Professor Lear's resignation in protest over the use of a review process that was unfair to Susan Neiman and others. "[I]t is futile to seek [an administrative] remedy…when such action could not result in a favorable decision and invariably would result in further judicial proceedings." *Hunt v. Prior,* 236 Conn. at 433 quoting, *Simko v. Ervin,* 234 Conn. 498, 507 (1995). "The law does not require the doing of a useless thing." *Corsino v. Glover*, 148 Conn. 299, 308 (1961).

In addition to the futility of filing a subsequent complaint with the Provost, the remedy provided by the handbook is inadequate. The Review Committee's power to change the result was limited to making a procedural recommendation to the Provost, who has the power to reject the recommendation. The Provost had just rejected the only viable solution offered by Professor Lear and declared the process at an end.[40] The handbook's unfairness complaint process lacked fundamental due process protection, like adequate notice, hearing rights and an impartial decision-maker. Additionally, there is no ability to present common law claims for damages, such as the claim for negligent misrepresentation presented in this case. Thus, the trial court's finding that it would not have been futile to file another unfairness complaint following the last vote of the Advisory Committee is clearly erroneous.

CONCLUSION

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[40] It should be noted that the Faculty Handbook at Northeastern University provided for binding arbitration of procedural disputes, and the arbitrator could overrule the Provost and require the case to be submitted to the president if the arbitrator believed the record did not support the decision. *Brennan v. King*, 139 F.3d at 260, n.1.

As a matter of law, the defendant has not shown that an agreement to exhaust an exclusive remedy, such as a grievance–arbitration procedures exists in this case. As it is obvious that Yale University is not an administrative agency, the existence of such an agreement is a crucial prerequisite to claiming ouster of subject matter jurisdiction. Even if the collective bargaining model does not control the decision, it was improper for the trial court to decide the terms of the contract and the parties' compliance with their agreement, as those issues of fact were within the province of the jury. A reasonable juror could have determined that the complaint procedure in the handbook was permissive in nature and did not provide for a mandatory process before a resort to the courts. A reasonable juror could also find that Yale should be estopped from raising compliance with the handbook because defendant unilaterally suspended the handbook procedures by placing the Philosophy Department in receivership and failed to notify plaintiff of the new procedures for making the decision in her case. Furthermore, a reasonable juror could have determined that plaintiff substantially complied with the complaint procedure and that Yale University processed her complaint at the highest level of the administration. Finally, the evidence provided strong support that further efforts to invoke an inadequate, discretionary, internal complaint process would have been futile.

Wherefore, for all the foregoing reasons, this Court should reverse the judgment of the trial court dismissing the complaint.

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