

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YI YAN HONG

v.

TEMPLE UNIVERSITY

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CIVIL ACTION  
No. 98-4899

O'Neill, J.

May 30, 2000

**MEMORANDUM**

Presently before me is plaintiff's motion for summary judgment on Count I and defendant's cross motion for summary judgment on all counts. I will grant summary judgment in favor of plaintiff on Count I (breach of contract) and in favor of defendant on Count II (disability discrimination under the ADA), Count III (disability discrimination under the Philadelphia Fair Practices Ordinance), Count IV (race discrimination under 42 U.S.C. § 1981), and Count V (race discrimination under the Philadelphia Fair Practices Ordinance).

**BACKGROUND**

Plaintiff Yi Yan Hong ("Dr. Hong") became an Assistant Professor of Anesthesiology at defendant Temple University's School of Medicine in June 1994. See Myers Ltr. of May 19, 1994, Defendant's Ex. B at 1 (the "appointment letter").

In November 1995, Dr. Hong underwent laser eye surgery to repair a hole in the retina of his left eye. See Complaint ¶ 6; Def.'s Mem. at 5. Immediately following the surgery, Dr. Hong

experienced severe pain in his eye that “crippled” him. See Hong Dep., Defendant’s Ex. E at 57. The pain was so severe that he was unable to perform his duties as an anesthesiologist when he returned to work several days after the surgery. Id. at 59. It inhibited his ability to concentrate, read, and focus his eye on objects. Id. at 62. In his words, he was “totally dysfunctional” as a result. Id. at 63.

Dr. Hong sought various treatments to alleviate the pain, but none were successful. In particular, in July 1996 he underwent surgery to freeze the nerve in his eyeball, but the procedure did not improve his condition. Id. at 62. He consulted with numerous experts in the fields of ophthalmology and pain management, but none were able to provide him any relief. Id. at 64-66. He also tried at least 30 different medications to manage the pain, but none substantially improved his condition. Id. at 63.

In July 1996, Dr. Hong sought psychological counseling to treat the depression that had arisen out of his physical condition. Id. at 67. Based on the recommendation of his psychologist, Dr. Hong tried a series of antidepressant medications, including Prozac, Zoloft, Elavil, Compazine, Gabapentin and several others. Id. at 68. These medications impaired Dr. Hong’s motor and cognitive functions and had other serious side effects, including drowsiness, insomnia, tremors, dizziness, and memory loss. Id. at 69, 87-89.

In February 1997, Dr. Hong underwent a second surgical procedure that involved cutting the nerve in his eye. Id. at 62. This surgery allowed him to better control his pain, but did not eliminate it. Id. Even to this day, Dr. Hong continues to suffer chronic pain similar to “a toothache behind the eyeball.” Id. at 5-6. He also continues to receive psychological treatment to help him cope with the effects of the pain. Id. at 37. His judgment and reaction time continue

to be impaired. Id. at 17-19.

At the onset of Dr. Hong's condition, Dr. Christer Carlsson, then-Chair of Temple's Department of Anesthesiology, agreed to temporarily relieve Dr. Hong of his most physically demanding duties until he was better able to cope with the pain. Id. at 60. It was agreed that Dr. Hong would cover the preop assessment unit and the recovery room, but would not administer anesthesia in the operating room, perform any invasive procedures, or perform on-call duty. Id. at 61.

Dr. Hong was unable to perform even these physically least demanding tasks of his position. Id. at 132. His ability to treat patients was hampered by his limited ability to concentrate, focus, and read, and he was often unable to report to work. Id. at 62. In fact, Dr. Hong's requested three extended leaves of absence during 1996 (in May, September and October), and all three of were granted. Id. at 65-66, 71-72. After each leave of absence, Dr. Hong attempted to return to work, but was unable to perform the duties of his position. Id. at 66, 72. During 1996, including leaves of absence and sick days, Dr. Hong missed more than five months of work. Id. at 65, 70, 72.

On October 24, 1996, Dr. Rodger Barnette (then-Acting Chair of the Department) wrote to Dr. Richard Kozera (then-Acting Dean of the School of Medicine) concerning Dr. Hong's appointment. See Barnette Ltr. of October 24, 1996, Defendant's Ex. J. Because of Dr. Hong's continued inability to perform his duties and the lack of any prognosis for recovery, Dr. Barnette recommended that Dr. Hong's appointment not be renewed when it expired in June 1997. Id. As Dr. Barnette put it:

Dr. Carlsson and I have attempted to re-integrate Dr. Hong into his professional duties at Temple [] several times without success. Due to the chronic pain Dr. Hong has been unable to focus, think or act clearly and it is uncertain at this time if he will ever return to the profession.

For the above reasons and because Dr. Hong's contract expires June 30, 1997 I have relieved Dr. Hong of all clinical responsibilities and I have recommended to him that he complete the pathway for long-term disability insurance. I feel very badly for Dr. Hong but at this point in time I believe I can best serve my responsibilities to him and Temple [] by making the above recommendation.

Id.

In December 1996, Dr. Hong applied for long term disability benefits. See Hong Dep., Defendant's Ex. E at 134. On his application, Dr. Hong certified that he was unable to work because of "chronic severe pain in [his] eye." See Disability Claim Application, Defendant's Ex. L. In addition, one of Dr. Hong's treating physicians (who is also an anesthesiologist), certified that Dr. Hong should not review charts and medical records and that Dr. Hong could not read or "direct medical care." Id. The physician also certified that Dr. Hong had no prognosis for recovery. Id.

In February 1997, Dr. Kozera and Dr. Barnette met with Dr. Hong to check on his progress and assess his ability to return to work. See Hong Dep., Defendant's Ex. E at 77-78, 84-85. After the meeting, Dr. Kozera wrote to Dr. Hong requesting a letter from Dr. Hong's physician stating whether he was able to return to work. See Kozera Mem. of Feb. 27, 1997, Defendant's Ex. O. Dr. Kozera also stated that if Dr. Hong obtained medical clearance, Temple would give him the opportunity to resume his duties as an anesthesiologist. Id.

On February 28, 1997, Dr. Kozera wrote to Dr. Hong informing him that his appointment to the Temple faculty would not be renewed and would expire on June 30, 1997. See Kozera Ltr.

of February 29, 1997, Defendant's Ex. P.

## DISCUSSION

### A. The Standard for Summary Judgment

Rule 56 empowers a court to enter summary judgment if “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 249. In considering a motion for summary judgment, “all inferences to be drawn from the evidence . . . must be viewed in the light most favorable to the party opposing the motion.” Todaro v. Bowman, 872 F.2d 43, 46 (3d Cir. 1989).

### B. Breach of Contract Claim

In Count I, Dr. Hong claims that Temple breached his employment contract by notifying him on February 28, 1997 that his appointment would not be renewed and would expire on June 30, 1997. The parties have made cross motions for summary judgment on this issue.

Temple argues that the appointment letter unambiguously specified that his appointment would expire on June 30, 1997 unless otherwise renewed. Dr. Hong argues that the appointment letter incorporated the Faculty Guide, which guaranteed him twelve-months notice of non-renewal of his appointment. I agree with Dr. Hong.

The appointment letter states that Dr. Hong's “faculty appointment [would] terminate on June 30, 1997 unless [he was] notified of its renewal.” See Myers Ltr. of May 19, 1994,

Defendant's Ex. B at 1. However, it also makes three references to the Faculty Guide. The third reference is the most sweeping. It states: "I recommend that you maintain familiarity with the Faculty Guide . . . in order that there may be a full understanding of the commitments undertaken by you and by Temple." *Id.* at 2 (emphasis added). The most natural reading of this provision is that it was intended to incorporate the terms of the Faculty Guide by reference. At the very least, it created a substantial ambiguity regarding the relationship between the appointment letter and the Faculty Guide. Since Temple drafted both documents, the ambiguity must be construed against it. *See Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999), quoting *Gene & Harvey Builders v. Pennsylvania Mfrs. Ass'n*, 517 A.2d 910, 913 (Pa. 1983).

When the Faculty Guide is read to be part of Dr. Hong's employment, it is clear that he was entitled to twelve-months notice of non-renewal of his appointment. The Faculty Guide purports to govern the appointment and termination of faculty members with the rank of Assistant Professor, such as Dr. Hong. Specifically, under the heading "Letters of Appointment" it states: "All full-time members of the faculty with the rank of . . . Assistant Professor . . . shall be appointed for such terms of office as shall be provided in this statement of policy, subject to the provisions contained herein with respect to the termination of their appointments." *See* Temple University Faculty Guide (August 1993), Plaintiff's Ex. C at 4 (emphasis added). In turn, under the heading "Non-Renewal of Contract for Untenured Faculty" it states:

Written notice that an initial appointment or reappointment is not to be renewed will be given to faculty members in advance of the expiration of their current terms of appointment, as follows:

1. Not later than March 15 of the first academic year of service if the appointment expires at the end of that year; or if a one-year appointment terminated during an academic year, at least

three months in advance of its termination.

2. Not later than December 15 of the second academic year of service, if the appointment expires at the end of that year.

3. At least twelve months before the expiration of an appointment after three or more years of service at the University.

Id. at 5.

Dr. Hong was appointed to a term that commenced on June 1, 1994 and ended on June 30, 1997, a period of approximately three years and one month. Dr. Hong therefore had “three or more years of service at the University” and was entitled to notice of non-renewal of his contract “at least twelve months before the expiration” of his term.

Temple cites Krasik v. Duquesne University, 437 A.2d 1257 (Pa. Super. 1981), and Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. 1986), to rebut this conclusion, but both cases are distinguishable from the facts at hand. In Krasik, a law school librarian challenged the Dean’s decision not to renew her appointment. She argued that her appointment letter had specifically incorporated the American Bar Association and Association of American Law Schools standards for faculty appointments and that under those standards the non-renewal of her contract required faculty approval (which the Dean had not sought). See Krasik, 437 A.2d at 1260. The court agreed that the standards had been incorporated by reference and were part of her employment contract. Id. However, the court went on to find that the “vague advisory language” of those standards could not modify the clearly stated dates of her appointment in the appointment letter. Id. at 1261.

Similarly, in Baker, a college professor whose appointment was not renewed argued that the College breached its obligation to consider his renewal in good faith, an obligation that was

contained in the Faculty Handbook rather than his appointment letter. The court agreed that the Faculty Handbook was part of the employment contract. Baker, 504 A.2d at 254. However, the court found that nothing in the Handbook “expressly” gave the professor a right to renewal. Id. at 255. Rather, it simply contained “general statements of hiring policy and evaluation procedure.” Id. On this basis, the court ruled that there had been no breach of contract.

Temple argues that Krasik and Baker stand for the proposition that as a matter of law statements in the Faculty Handbook cannot create an enforceable right to employment beyond the term stated in the appointment letter. See Defendants’s Brief at 8. This clearly is not true. In both cases, the courts ruled that the employment contract included documents that were referenced in the appointment letter. See Krasik, 437 A.2d at 1260; Baker, 504 A.2d at 204. However, because those documents only contained “vague advisory language” and “general statements of [] policy,” they did not create enforceable rights. See Krasik, 437 A.2d at 1261; Baker, 504 A.2d at 255. Although these cases occurred in the context of complex faculty contracts, they are best understood as standing for the proposition that specific contract terms trump general or vague contract terms.

Dr. Hong’s claim is very different. In his case, the specific term giving the dates of his appointment in his appointment letter was supplemented by equally specific terms regarding notification of non-renewal in the Faculty Handbook.<sup>1</sup> Each was part of the employment

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<sup>1</sup> Dr. Hong has also cited the written description of the Clinician Educator Track (the “CET”), which was also incorporated into the appointment letter by reference, to support his contention that he was entitled to twelve-months notice. The CET states that the “individual’s appointment to the faculty shall end at the time specified in the letter of appointment, unless written notification of reappointment is provided.” See CET, Plaintiff’s Ex. I at 5. However, it also states that “under ordinary circumstances, there will be written notification of [non-renewal] in the penultimate year of the contract.” Id. Read by itself, this passage would not create a right

contract, and neither was mutually exclusive. Therefore, each must be given its full effect. For this reason, summary judgment will be entered in favor of Dr. Hong on the breach of contract claim.<sup>2</sup>

### C. ADA Claim

In Count II, Dr. Hong claims that Temple violated the Americans with Disabilities Act by failing to accommodate his disability and refusing to renew his appointment in February 1997. Under the ADA, Dr. Hong bears the burden of establishing a prima facie case of disability discrimination by showing that: 1) he is a disabled person within the meaning of the ADA; 2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and 3) he has suffered an otherwise adverse employment decision as a result of discrimination. See Gaul v. Lucent Tech., Inc., 134 F.3d 576, 580 (3d Cir. 1998). The parties agree that Dr. Hong is disabled and suffered an adverse employment decision,

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to twelve-months notice because the phrase “under ordinary circumstances” renders it “vague advisory language” or a “general statement of policy.” Cf. Krasik, 437 A.2d at 1261; Baker, 504 A.2d at 255. However, read in conjunction with the specific terms in the Faculty Handbook, this passage adds to the ambiguity in the appointment letter and reinforces my conclusion that Dr. Hong was entitled to twelve-months notice.

<sup>2</sup> Temple has argued in the alternative that even if they did breach the employment contract, Dr. Hong suffered no compensable damages because he was on disability by the time his appointment expired. It is unclear at this time whether Dr. Hong’s disability payments should be counted against the amount he is entitled to recover. However, even if the payments should be so counted, Temple concedes that Dr. Hong only recovered approximately 60% of his normal salary under the disability policy. See Defendant’s Mem. at 10 n.5. Therefore, summary judgment will be entered in Dr. Hong’s favor on the question of liability, and damages are an issue for the jury.

but disagree as to whether he was a qualified to perform the essential functions of his job.<sup>3</sup> I agree with Temple's assertion that Dr. Hong was not a qualified individual because he could not perform the essential functions of his job with or without reasonable accommodations.

#### 1. The Essential Functions of an Anesthesiologist

The ADA's implementing regulations define the phrase "essential functions" to mean "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). A job function may be considered essential because "the reason the position exists is to perform that function," or because "the incumbent in the position [was] hired for his or her expertise or ability to perform the particular function." 29 C.F.R. § 1630.2(n)(2)(i) and (iii). Evidence of whether particular functions are essential includes "[t]he amount of time spent on the job performing the function." 20 C.F.R. § 1630.2(n)(3)(iii).

On this basis, the best evidence of the essential functions of Dr. Hong's position is his own deposition. He testified that prior to the onset of his condition, "about 40 percent of [his] time [was] devoted to the pain center, another 40 percent [was] in the OR anesthesia area" and "the rest of the 20 percent [was] concentrated in teaching and research and administration." See Hong Dep., Plaintiff's Ex. S at 38. His time spent in the pain center included "assessing the patient, performing [] noninvasive procedures and invasive procedures, pain research, education, giving lectures to the residents and administrative staff." Id. at 39. Dr. Hong estimated that on average he would spend two and a half days per week in the operating room and would be on call

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<sup>3</sup> Temple also disputes that adverse employment decision was a result of discrimination, but I need not address that issue because I find that Dr. Hong was not a qualified individual.

several days a month. Id. at 50-51, 54.

I therefore conclude that the essential functions of an anesthesiologist at Temple include, but are not necessarily limited to: administering anesthesia in the operating room, performing invasive procedures, and performing on-call duty.

## 2. Dr. Hong's Inability to Perform these Essential Functions

There is no issue of fact as to whether Dr. Hong was capable of performing these essential functions when Temple refused to renew his appointment in February 1997. The undisputed evidence shows that Dr. Hong was rendered incapable of performing these essential functions in November 1995 and remained incapable of performing them for at least two full years after he left Temple. This undisputed evidence includes the following:

- Dr. Hong testified that from the time of his eye surgery until the non-renewal decision in February 1997, he could not perform most of his duties, including work in the pain center and operating room and taking call. See Hong Dep., Plaintiff's Ex. S at 82-86.
- In December 1996, Dr. Hong applied for long-term disability benefits. As part of his application, he certified that he was unable to work because of the chronic pain in his eye. See Disability Claim Application, Defendant's Ex. L. In addition, one of his treating physicians certified that Dr. Hong could not "direct medical care" and had no prognosis for recovery. Id.
- In June 1997, Dr. Hong admitted in a letter to Dr. Barnette that he did not have medical clearance to administer anesthesia. See Hong Ltr. of June 16, 1997,

Defendant's Ex. Q.

- In September 1997, Dr. Hong's treating psychologist wrote that she could only support Dr. Hong's "return to work for 4-5 hours daily initially, in a supervised setting, excluding the operating room, without utilizing invasive procedures, injections or responsibilities compromised by his affected reaction time." See Singer Ltr. of September 30, 1997, Defendant's Ex. R
- In October 1997, Dr. O'Grady wrote in support of Dr. Hong's return to work, but stated that: "[Dr. Hong] is not able to work in the OR but may be able to work in the pre anesthesia [sic] center where the need for quick decisions is not needed." See O'Grady Ltr. of October 17, 1997, Defendant's Ex. X.
- In February 1998, Dr. Portenoy certified to Dr. Hong's long-term disability carrier that Dr. Hong is "limited from working in any capacity that would require sustained attention or could put patient [sic] at imminent risk." See Disability Claim -- Physician's Statement, Defendant's Ex. S.
- In July 1998, Dr. O'Grady wrote in support of Dr. Hong receiving privileges at a different medical facility. He stated that Dr. Hong was capable of performing some pain procedures, but he was "not willing to agree to Dr. Hong being able to administer anesthesia." See O'Grady Ltr. of July 28, 1998, Defendant's Ex. T.
- In January 1999, Dr. O'Grady certified to Dr. Hong's long-term disability carrier that Dr. Hong's "disability stems from the pain in his eye causing inability to concentrate hence function as an anesthesiologist/physician." See Disability Claim – Estimated Functional Abilities Form, Defendant's Ex. T.

- In February 1999, Dr. Hong's treating psychologist wrote to his long-term disability carrier. She stated: "[Dr. Hong's] concentration is still impaired and it is not suggested that he resume full anesthesia duties at this point in time. It is still recommended that he not work more than five hours a day in patient care . . . It is still questionable whether or not he will be able to work full-time in his field, given that most anesthesiologists have to have quick reaction time in order to work in the O.R. and he still has concentration impairment and chronic pain." See Singer Ltr. of February 3, 1999, Defendant's Ex. V.

### 3. Dr. Hong's Suggested Accommodations are Not Reasonable.

Dr. Hong concedes that he has been unable to perform these essential functions since his eye surgery in November 1995. He argues, however, that Temple violated the ADA by failing to provide reasonable accommodations that would have allowed him to stay in his job. Dr. Hong suggests two such accommodations, but neither is reasonable.

First, Dr. Hong suggests that Temple should have allowed him to remain in the "restructured" job that he performed from November of 1995 until his appointment was not renewed. See Plaintiff's Mem. at 16. During this period, Dr. Hong covered "the preop assessment unit and the recovery room," but did not administer anesthesia in the operating room, perform any invasive procedures, or perform on-call duty. See Hong Dep., Defendant's Ex. E at 61. Such an accommodation is not reasonable. Dr. Hong is suggesting that the many of the essential functions of his job should have been eliminated, not that he should have been accommodated so that he could perform those essential functions. However, "the ADA does not

require an employer to relieve the employee of any essential functions of the job [or] modify actual duties.” Robertson v. Neuromedical Center, 161 F.3d 292, 295 (5th Cir. 1998) (neurologist with attention deficit hyperactivity disorder was not a qualified individual under the ADA because he could not perform the essential functions of his job; creation of a part-time/no call duty position was not a reasonable accommodation). Accord Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963 (E.D.N.C. 1994) (physician with injury precluding the use of her arm was not a qualified individual under the ADA because she could not perform the essential functions of her job, including on-call duty).

Second, Dr. Hong suggests that Temple should have given him “a phase-in period so that he could slowly but surely reintegrate himself into the workplace.” See Plaintiff’s Mem. at 17. It is clear, however, that Temple did give Dr. Hong such a phase-in period. From November 1995 until his appointment was not renewed, Dr. Hong remained employed at Temple in his “restructured” job, i.e., not performing many of the essential functions of his position. When Temple refused to renew his appointment in February 1997, there was evidence from which Temple could have reasonably concluded that Dr. Hong would never recover to the point of being able to perform the essential functions of his position. See Disability Claim Application, Defendant’s Ex. L at 6 (Dr. O’Grady certifies that Dr. Hong has no prognosis for recovery). In fact, even two years later Dr. Hong’s treating psychologist wrote that: “It is still questionable whether or not [Dr. Hong] will be able to work full-time in his field.” See Singer Ltr. of February 3, 1999, Defendant’s Ex. V. I must therefore conclude that either Temple made the reasonable accommodation that was suggested by Dr. Hong but he was nonetheless unable to perform the essential functions of his job, or Dr. Hong is actually suggesting that the “phase-in”

period should have been of indefinite duration. In either case, Temple has not violated the ADA.

It is important to also note that both of Dr. Hong's suggested accommodations fail for an additional, common reason. Temple exceeded the ADA's requirements during the period from November 1995 to June 1997 when Dr. Hong was retained despite the fact that he was unable to perform the essential functions of his position with or without reasonable accommodations. It is unclear from the present record whether Temple did so out of benevolence, because of a pre-existing contractual duty, for a combination of both reasons, or for some other reason. In any event, the mere fact that an employer has exceeded its statutory obligations for a limited period of time does not create an obligation for it to continue to exceed those obligations indefinitely. To hold otherwise would undermine the goals of the ADA; employers would be reluctant to attempt extraordinary accommodations of disabled individuals, even for a limited period of time, for fear of being locked in to those extraordinary measures indefinitely.

For these reasons, summary judgment will be entered in favor of Temple on Count II.

#### D. Race Discrimination Claim

In Count IV, Dr. Hong, who is a Chinese-American, claims that his contract was not renewed because of race discrimination. The parties agree that this claim is governed by the McDonnell Douglas/Burdine burden-shifting framework. Under that framework:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Dr. Hong has failed to get past the first step in the burden-shifting framework. In order to make a prima facie case of discrimination, Dr. Hong must show that he was qualified to perform the job at issue. See McDonnell Douglas, 411 U.S. at 802. As discussed above, I have already determined that Dr. Hong was not a “qualified person” for the purposes of the ADA. From a plaintiff’s perspective, the ADA standard for a “qualified person” is easier to meet than the McDonnell Douglas/Burdine standard for a prima facie case of discrimination because the former creates a duty of reasonable accommodation but the latter does not. Therefore, because Dr. Hong could no longer perform the duties of an anesthesiologist in February 1997 when his appointment was not renewed, he was not qualified to do the job and he has failed to make a prima facie case of discrimination. Summary judgment will entered in favor of Temple on Count IV.

#### E. State Law Claims

In Counts III and V, Dr. Hong claims that Temple violated the Philadelphia Fair Practices Ordinance by discriminating against him on account of his disability and race. However, discrimination claims under this local law are generally governed by the same standards as the operative federal statutes. See COIA v. USAir, Inc., No. 94-3307, 1995 WL 89014, at \*3 n.1 (E.D. Pa. Mar. 2, 1995). Therefore, summary judgment will be entered in favor of Temple on Counts III and V for the same reasons stated above in the discussion of Counts II and IV.

#### F. Subject Matter Jurisdiction

28 U.S.C. § 1367(c)(3) empowers a court to dismiss supplemental state law claims if all of the claims over which it has original jurisdiction have been dismissed. “[W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendant state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.” Hedges v. Musco, 204 F.3d 109, 123 (3d Cir. 2000) (emphasis in original), quoting Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995).

I am generally parsimonious in my exercise of supplemental jurisdiction. If this were a motion to dismiss, I would likely dismiss the remaining state claim since the federal claims fail. However, this is an example of the rare case in which considerations of judicial economy and fairness overcome the presumption against exercising supplemental jurisdiction. Dismissal is inappropriate here because discovery has been completed and the only issue remaining for trial is the question of damages. See 28 U.S.C.A. § 1367 (West Practice Commentary 1993) (“[I]f the dismissal of the main claim occurs late in the action, after there has indeed been substantial expenditure in time, effort, and money in preparing the main claims, knocking [the supplemental claims] down with a belated rejection of supplemental jurisdiction may not be fair.”). I will, therefore, continue to assert jurisdiction over the contract claim and the case will be listed for trial on damages in Count I.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YI YAN HONG

v.

TEMPLE UNIVERSITY

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CIVIL ACTION  
No. 98-4899

**ORDER**

AND NOW, this 30th day of May, 2000, after consideration of plaintiff's motion for summary judgment, and defendant's cross motion, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that: 1) summary judgment is entered in favor of plaintiff on the issue of liability on Count I (breach of contract); and 2) summary judgment is entered in favor of defendant on Counts II, III, IV, and V. It is further ORDERED that the case is listed for trial to commence October 2, 2000.

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THOMAS N. O'NEILL, JR., J.