

  
 UNIVERSITY OF ARKANSAS SYSTEM

*Office of the General Counsel*

October 12, 2012

Senator David Johnson, Co-Chair  
 Representative Billy Gaskill, Co-Chair  
 Litigation Reports Oversight Subcommittee  
 Arkansas Legislative Council  
 One Capitol Mall, Room R-501  
 Little Rock, AR 72201

Re: Shannon v. Board of Trustees of the University of Arkansas  
 U.S. District Court, No. 4:10 CV 2044 DPM

Dear Senator Johnson and Representative Gaskill:

Pursuant to Ark. Code Ann. §19-4-1614(c), University of Arkansas Associate General Counsel Sarah James has presented a request to Arkansas Department of Finance and Administration Director, Richard Weiss, that he review and recommend a proposed settlement of the above-referenced litigation. On October 3, 2012, Mr. Weiss corresponded with you requesting favorable review of the proposed settlement and attached a copy of Ms. James' letter with his recommendation. I am attaching a copy of those two letters for your convenience.

Given the facts of the case, particularly the unusual fact that statements were made by the former Director of the program that could be viewed by a court as direct evidence of age discrimination, our office feels that the proposed settlement is reasonable and appropriate, and in the best interest of the University, the State and the public. We would appreciate the Subcommittee's favorable review of this proposed settlement at its meeting on October 25, 2012.

Thank you very much for your attention to this matter.

Sincerely yours,



Jeffrey A. Bell  
 Senior Associate General Counsel

2404 North University Avenue / Little Rock, Arkansas 72207-3608 / 501-686-2520 / Fax 501-686-2517

University of Arkansas, Fayetteville / University of Arkansas at Little Rock / University of Arkansas at Pine Bluff  
 University of Arkansas for Medical Sciences / University of Arkansas at Monticello / Division of Agriculture / Criminal Justice Institute  
 Arkansas Archeological Survey / Phillips Community College of the University of Arkansas / University of Arkansas Community College at Hope  
 University of Arkansas Community College at Batesville / Cossatot Community College of the University of Arkansas  
 University of Arkansas Community College at Morrilton / University of Arkansas at Fort Smith  
 Arkansas School for Mathematics, Sciences, and the Arts / University of Arkansas Clinton School of Public Service

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STATE OF ARKANSAS  
**Department of Finance  
and Administration**

**OFFICE OF THE DIRECTOR**  
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October 3, 2012

**OCT 09 2012**

Senator David Johnson, Co-Chairman  
Representative Billy Gaskill, Co-Chairman  
Litigation Reports Oversight Subcommittee  
Arkansas Legislative Council  
One Capitol Mall, Room R-501  
Little Rock, AR 72201

Re: Melissa Shannon, M.D. v. Board of Trustees of the University of Arkansas,  
et. al, U. S. District Court No. 4:10-CV-2044DPM  
Proposed Settlement

Dear Senator Johnson and Representative Gaskill:

I respectfully request a favorable review of the proposed settlement referenced above based on the recommendation of Sarah James, Associate General Counsel for the University of Arkansas System. I have attached a copy of the letter from Ms. James that details the facts of the lawsuit and the terms of the proposed settlement agreement.

Again, I respectfully request your review of this case. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Weiss".

Richard A. Weiss  
Director

cc: ✓ Sarah James  
Associate General Counsel  
University of Arkansas System  
  
Paul S. Louthian, Administrator  
Office of Accounting



UNIVERSITY OF ARKANSAS SYSTEM

Office of the General Counsel

September 25, 2012

Handwritten signature: Tim Paul

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2012 OCT - 1 AM 8:17  
JFA DIRECTORS OFFICE

Mr. Richard Weiss, Director  
Arkansas Department of Finance  
and Administration  
401 DF&A Building  
1509 West 7<sup>th</sup> Street  
Little Rock, AR 72201

RE: Proposed Settlement of *Melissa Shannon, M.D. v. Board of Trustees of the University of Arkansas, et. al*, U.S. District Court No. 4:10-CV-2044DPM.

Dear Mr. Weiss:

Ark. Code Ann. § 19-4-1614(c) provides that when a state employee files a lawsuit under the provisions of certain federal laws cited under that statute, the Chief Fiscal Officer of the State may investigate the claim and, if he determines that the Federal Court would sustain the claim and award to the employee wages or salaries in addition to those paid or due for the employee's personal services rendered, then the Chief Fiscal Officer may settle the case upon the advice of the Arkansas Legislative Council. This letter is to recommend settlement of the above-referenced lawsuit and to request that you submit this case to the Litigation Subcommittee with a recommendation that settlement be accomplished.

This case involves allegations of age discrimination under the Age Discrimination in Employment Act (ADEA), and sex discrimination and retaliation under Title VII, the Fourteenth Amendment to the U.S. Constitution and the Arkansas Civil Rights Act. The plaintiff, Dr. Melissa Shannon, claims that she was denied a three-year employment as a Fellow in the Gastroenterology and Hepatology Division at UAMS because of her age and her gender, female. The fellowship was to commence in 2010 and end in 2013. At the time of her application, Dr. Shannon was 56 years old. She further claims that during the time she was grieving this claim to UAMS officials, she was denied the opportunity to apply and be considered for a 2011 fellowship in retaliation for lodging a complaint of discrimination. Two of the individuals selected for the 2010 and 2011 fellowship spots were younger females whom Dr. Shannon claims were less qualified than she. The University has denied any discrimination or retaliation and continues to maintain that Dr. Shannon was not qualified for the fellowship positions. Nonetheless, for the reasons discussed below, the University feels that it would be in the best interest of the State to settle this litigation, rather than face substantial risk at trial and incur both damages and attorney fees.

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Dr. Shannon attended medical school and completed a residency in internal medicine at UAMS. As stated above, she was a non-traditional student in that she was 53 years of age at the time she completed her residency and 56 at the time she applied for the 2010 Gastroenterology ("GI") fellowship at issue. This application was the second attempt by Dr. Shannon to gain acceptance into a gastroenterology fellowship. She first applied for a fellowship for the 2007-2010 term during her final year in residency. The division was undergoing a change at that time and had recently hired Dr. Kevin Olden as Director. Dr. Shannon maintains that Olden told her she was not selected at that time for "political reasons." When she was not selected for the GI fellowship, Dr. Shannon applied for and received a three-year fellowship in the Nephrology division. During 2008, after her first year in Nephrology, Dr. Shannon applied a second time for a fellowship spot in the GI division, to begin in 2010. She was chosen as one of five final candidates to fill two slots. The customary method of selection for GI fellows at that time was for the entire division to meet, review the applications, and open discussion for each candidate. The final selection rested with the Director, who would make the decision based on the group's input.

At trial, Defendants would present evidence, first, that Dr. Shannon's online application was incomplete. However, the application process itself was not as efficient and clear as it could have been, and Dr. Shannon may show that several other candidates' applications were likewise incomplete. Second, the University would argue that Dr. Shannon's application was rejected after being thoroughly vetted by the entire GI division, and that the consensus of the group was simply that she was not as qualified as the selected candidates. A number of the group related personal experiences in working with Dr. Shannon that reflected poorly on her ability to work as a team player. The two candidates who were selected were male and younger than Dr. Shannon.

There are a number of troubling aspects to this case, the most serious being that Dr. Shannon can present direct evidence of discrimination. It should be emphasized that direct evidence of discrimination in employment cases is very rare. Here, however, one of the GI division physicians has testified in deposition that Dr. Olden remarked to him that he would not hire Dr. Shannon due to the fact that "she is too old." This direct statement evidencing a discriminatory motive by the decision-maker creates a significant obstacle for Defendants at trial. The witness is a respected and credible member of the division. Further, although Dr. Olden denies the statements, Dr. Shannon will also testify that in a meeting with Dr. Olden before she formally applied for the fellowship, he told her that she had not been selected for the 2007 position due to "the age card." She claims he went on to relate a story to her about a sister-in-law who started her residency at an older age and quit shortly thereafter. Although there were no witnesses who overheard those particular alleged comments, a jury will determine whether the statements were made based on whom they find most credible - Dr. Shannon or Dr. Olden. Given the other GI division doctor's similar testimony, we believe that it would be reasonable for a jury to find Dr. Shannon's testimony credible.

In addition, Dr. Shannon will argue that the second prong of her case - retaliation - is bolstered by the fact that the selection for fellows in 2011 took place only a few months after the 2010 selection and occurred while she was in the process of pursuing an internal grievance regarding her non-selection within the College of Medicine. Although the grievance panel

ultimately found that Dr. Shannon's non-selection for the 2010 and 2011 fellowships lacked discriminatory motive, several witnesses would testify that the timing of the 2011 selection was somewhat unusual and appeared to be hurried along by Dr. Olden. In addition, two women were selected for 2011 whose applications had been rejected for 2010. Dr. Shannon also takes issue with the fact that after she learned of the 2011 selection, she complained to the Chair of Internal Medicine, but that this aspect of her grievance was never investigated or addressed. These facts could easily persuade a jury that the selection of the 2011 female candidates was retaliatory. Finally, many of the GI fellows and faculty who were present at the fellowship selection meeting, and who offered comments concerning Dr. Shannon, are no longer working at UAMS or even in the state. These witnesses cannot be compelled to testify at trial, and many expressed reluctance to do so voluntarily.

It is important to note that the former Director, Dr. Olden, through mutual agreement, left UAMS shortly after these events transpired. The new Director, Dr. Jonathan Dranoff, has instituted a more efficient and clear application and selection process and is committed to ensuring that these changes are carried out. It is his desire to move the division forward with new leadership, and this settlement would allow him to continue those efforts without the divisiveness that could be created if the case proceeds to trial. While these changes will help us in preventing a situation like this from reoccurring, these changes do not offer us any protection with regard to Dr. Shannon's claims.

With regard to the damages Dr. Shannon seeks, she will ask the court to award her "front pay" which, here, is the difference in salary from what she could have made in practice as a gastroenterologist, as opposed to a nephrologist. Her expert economist has estimated that this amount would be over \$500,000 over the next 10 years. Defendants do have strong arguments that her damages are too speculative and that courts will not award these types of damages beyond three or four years out. In addition, Dr. Shannon has not pursued work in Nephrology, but has remained in general internal medicine. Nonetheless, there is a fairly significant gap in earning potential between the two specialties and the court could easily award her several years' difference. In the alternative, Shannon has asked for placement in the fellowship. Although Defendants feel this is unlikely, if awarded, it would create a disruptive and untenable situation for the division. Lastly, if Dr. Shannon prevails, the Defendants would be assessed attorneys fees and costs. Because the parties have engaged in extensive discovery and taken numerous depositions, as well as participated in court-ordered mediation, Dr. Shannon's attorney's fees through a week-long trial will be substantial. We would estimate the potential fee exposure to be as much as \$100,000.

As noted above, the parties participated in court-ordered mediation before Federal Magistrate Jerome Kearney on April 18, 2012. (Though it was court-ordered mediation, the parties had, in fact, asked the court to order mediation after the parties concluded discovery and settlement discussions appeared appropriate.) The mediation lasted an entire day, and the magistrate carefully considered each party's arguments and proposals in separate conferences. At the conclusion of the mediation, and with the magistrate's recommendation, the parties reached an agreement to settle the case. However, due to some ambiguity in the wording of the

Mr. Richard Weiss  
Page 4  
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terms pertaining to training, the parties continued to negotiate those terms and did not complete a final draft of the Agreement until August 2012.

As per the Agreement, the University agrees to pay a total sum of \$100,000, of which \$66,904.80, less withholdings and deductions required by law, would be paid to Dr. Shannon and the remaining \$33,095.20 to her attorney for fees and costs. In addition to monetary payment, UAMS would agree (1) to conduct mandatory training on the applicable laws governing discrimination and training for all Department of Internal Medicine faculty and fellows; (2) that it will not retaliate against any witnesses or participants involved in the proceedings; (3) that it will not retaliate against Dr. Shannon's daughter in the event she applies to medical school at UAMS; and (4) that it will propose Dr. Shannon for an adjunct faculty teacher appointment, subject to her meeting the standard UAMS conditions and criteria for such appointment. The agreement contains a specific provision stating that by settling the case, the defendants are not admitting liability and continue to deny liability for the plaintiff's claims. The lawsuit will be dismissed with prejudice, and there is a full release by Dr. Shannon of any claims brought in the lawsuit or which she may have asserted as of the date of the execution of the agreement. The Agreement provides that legislative review must first be obtained before any monies under the Agreement can be paid. The University feels the proposed amount is reasonable and appropriate in light of the facts of the case and the problems that would be faced by taking it to trial. Many witnesses are either unavailable or unwilling to participate, and the person allegedly responsible for the conduct at issue is no longer with UAMS.

For all the above-stated reasons, I request that you submit this settlement proposal to the Litigation Subcommittee of the Arkansas Legislative Council with a recommendation that the settlement be approved in the best interest of the State and UAMS. It is my understanding that the subcommittee may schedule its next meeting in October, and I would appreciate your submission of this request within such time that it can be included on the agenda at that meeting.

Your attention to this matter is greatly appreciated.

Sincerely,



Sarah James  
Associate General Counsel