IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-60268

MICHAEL WIGGINTON, JR.,

Plaintiff-Appellee,

v.

CHANCELLOR DANIEL W. JONES, Individually and in his official capacity as Chancellor; PROVOST MORRIS H. STOCKS, Individually and in his official capacity as Provost; DEAN JOHN Z. KISS, Individually and in his official capacity as Dean; DEAN VELMER BURTON, Individually and in his official capacity as Dean; CHAIR ERIC LAMBERT, Individually and in his official capacity as Department Chair,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Mississippi.

(Filed Jul. 1, 2020)

Before: CLEMENT, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge.

Dr. Michael Wigginton was denied tenure during his sixth year as an assistant professor of Legal Studies at the University of Mississippi. He sued several

university officials in their individual capacities, alleging that they violated his substantive due process rights when they evaluated his eligibility for tenure in an arbitrary and capricious manner. The district court denied defendants' qualified immunity defenses and allowed Wigginton's case to proceed to a jury. After a week-long trial, Wigginton was awarded over $200,000 in damages for lost wages and past and future pain and suffering.

We hold that the district court erred when it denied defendants' motions for qualified immunity. Because Wigginton did not have a clearly-established property right, we REVERSE and RENDER judgment in favor of defendants.

I.

In 2008, Dr. Michael Wigginton was hired by the University of Mississippi as an assistant tenure-track professor of Legal Studies in the School of Applied Sciences. Before entering academia, Wigginton spent his career as a professional law enforcement agent. He became an assistant professor after earning his PhD from the University of Southern Mississippi. At the University of Mississippi ("the University"), his research and teaching responsibilities focused on criminal justice, homeland security, and terrorism.

A. Tenure Policies and Guidelines

As a tenure-track employee, Wigginton was required to complete a five-year probationary period before he would become eligible for a formal process of tenure review. During Wigginton's time with the University, three separate tenure documents governed the terms of his employment.[1] The University's policy, which applies to all schools within the University of Mississippi system, provides that tenure candidates will be evaluated on three different axes: "teaching, research and/or creative achievement, and service." The policy defines "research and creative achievement" as scholarly work that "make[s] contributions to the expansion of knowledge and indicate[s] the professional vitality of the candidate." It identifies several examples of achievement in this area, including "articles in refereed or other scholarly professional journals."[2] Textbooks are not included in the policy's list of scholarly achievements; instead, the University policy explains that a professor's contributions to textbooks are evaluated as an aspect of the professor's teaching abilities.

The School of Applied Sciences ("the School") maintains its own tenure guidelines. Like the

---

[1] According to the University's "Tenure Policies and Procedures" document, the Provost or Vice Chancellor for Academic Affairs bears the responsibility of ensuring "that each school's or department's standards are consistent with the University's mission."

[2] A "refereed" journal is a journal that ensures rigorous review of scholarship by experts within a scholar's field before articles are selected for publication.

University policy, the School's guidelines explain that "instructional textbooks" will be evaluated as an aspect of a professor's teaching abilities—not his scholarly and research skills. The School's guidelines emphasize the importance of research, warning that tenure will not be granted unless the professor establishes a "continuous record of scholarship in refereed, academic journals."

Finally, the Legal Studies Department ("the Department") maintains its own "Guidelines for Tenure and Promotion." In contrast with the above documents, the Department's guidelines explain that a candidate's publication of textbooks by a "recognized professional press" will be considered when evaluating the professor's research and scholarship contributions. The Department guidelines do not require professors to publish articles in refereed journals in order to become eligible for tenure.

All three documents contain language that highlights the subjective nature of the tenure review process. Though the University's policy notes that "[t]here is an understanding that good faith is a requirement for all facets of th[e] policy," it also explains that candidates who meet the specified criteria are not necessarily guaranteed a tenure award. The University's policy explains that candidates may be denied tenure if they are not "fitted or needed to serve the present and future needs of the University's programs." Likewise, both the School and Department guidelines explain that a candidate's scholarship record is measured in terms of quantity and quality. The quality

of a professor's research contributions will be judged by objective *and* subjective measures, including by the opinions of peer scholars in the professor's field, "ranking sources for journals, [and] citations and citation rates (when available)."

B. Tenure Denial and Termination

The events leading to the University's decision to deny Wigginton tenure are largely undisputed. Because this appeal follows a jury verdict, we recount the facts "in the light most favorable to the jury's determination." *Waganfeald v. Gusman*, 674 F.3d 475, 480 (5th Cir. 2012).

When Wigginton was hired, Dr. David McElreath, the Chair of the Legal Studies Department during the 2008–2009 and 2009–2010 school years, told him that the "major emphasis in [the] [D]epartment was teaching." Consistent with that priority, McElreath encouraged Wigginton to focus his scholarship efforts on publishing textbooks, rather than pursuing other forms of research and writing. McElreath gave Wigginton positive evaluations in his first two annual reviews, expressing the opinion that Wigginton had "outstanding" research skills and that he was "exceed[ing] all expectations for advance in rank."

During the 2010–2011 school year, Dr. Stephen Mallory took over as interim Chair of the Legal Studies Department. Mallory told Wigginton to "keep doing what [he had been]" doing under McElreath's supervision. In Wigginton's third, fourth, and fifth year

evaluations, Mallory gave Wigginton high marks for his "cutting edge" research, and explained that it was his belief that Wigginton was "making excellent progress toward meeting the expectations for tenure-track faculty." A month before Mallory submitted Wigginton's fifth-year review, Wigginton was notified that he had been nominated for the Thomas A. Crowe Outstanding Faculty Award—a Department prize that recognized "meritorious faculty engagement in scholarship, teaching, and service." Though Wigginton was his Department's nominee, he was not selected as the winner of the Award.

In accordance with University policy, Wigginton formally applied for tenure in 2013, at the beginning of his sixth year at the University. At that time, he had co-authored five textbooks, published two peer-reviewed journal articles and had a third accepted for publication, and published one article in a professional, non-academic journal. Wigginton prepared his application and submitted a list of potential external reviewers with knowledge of his work. The Department Chair was responsible for selecting three reviewers from that list and, in consultation with the faculty, identifying two additional reviewers who could provide their assessment of Wigginton's work. All five of Wigginton's external reviewers provided a positive review of Wigginton's skills, research record, and eligibility for tenure.

Wigginton's application was forwarded to the tenured faculty members in his Department, who voted 5 to 2 in favor of granting tenure and 4 to 2 in favor of

promoting him from assistant to associate professor.[3] The faculty recommendation was then submitted to Dr. Eric Lambert, who had assumed the position of Chair of the Legal Studies Department a few months earlier, in August 2013. In a six-page letter, Lambert recommended that the University deny Wigginton tenure and promotion. He based his recommendation primarily on his conclusion that Wigginton's "scholarly productivity and quality is very low." Though he acknowledged that Wigginton had contributed to several textbooks, he found Wigginton's peer-reviewed articles to be "both few and of low quality."

Lambert submitted his recommendation to the Dean's Committee, which voted 3 to 2 in favor of granting tenure and promotion. Wigginton's application and the Dean's Advisory Committee recommendation were then sent to Velmer Burton, Jr., the Dean of the School of Applied Sciences. Burton echoed much of Lambert's assessment and recommended rejecting Wigginton's application for tenure and promotion. In addition to his reservations about Wigginton's scholarship, Burton expressed "real concerns" that the five external reviewers who evaluated Wigginton's work were biased in their assessment.

---

[3] When Wigginton applied for tenure, he simultaneously applied for a promotion—a related but distinct University process. One of the tenured professors who voted to grant Wigginton tenure was an assistant professor, so he was unable to vote for or against Wigginton's promotion.

Dean John Kiss, the Dean of the Graduate School, agreed with Lambert and Burton and recommended denying Wigginton tenure and promotion.

Pursuant to University policy, Wigginton's application was forwarded to the Tenure and Promotion Review Committee. The Committee expressed concern that the guidelines used to evaluate Wigginton were insufficiently clear. Nevertheless, the Committee "did not . . . find cause to consider the negative recommendations as arbitrary, capricious, or otherwise associated with improper grounds."

Wigginton's application was sent to Provost Morris Stocks, who recommended denying tenure and promotion because Wigginton's research "d[id] not rise to the level of outstanding."

Wigginton sought review of these recommendations by the Tenure and Promotion Appeals Committee, which held a hearing in April 2014. Though the Committee did not believe that university officials acted improperly by failing to consider evidence of Wigginton's record, it did find flaws with Wigginton's review process. The Committee was concerned that Wigginton had received inconsistent advice throughout his probationary period, and also expressed the opinion that Wigginton's external reviews should have been viewed with more deference. It ultimately recommended that the University grant Wigginton an extended probation period "so that he can demonstrate his ability to meet [the University's tenure] expectations."

The Committee's assessment was forwarded to Daniel Jones, Chancellor of the University. Jones agreed with the previous administrator recommendations and declined to nominate Wigginton for tenure or promotion. Jones declined the Committee's recommendation to grant Wigginton an extended probationary period, and instead granted Wigginton a contract for a final year of employment. Wigginton's employment at the University concluded on May 10, 2015.

C. Procedural History

Wigginton filed this lawsuit in June 2015. He asserted a variety of federal and state-law claims, including claims for age, sex, and race discrimination; retaliation; and a violation of his substantive due process rights. After a week-long trial, the jury returned a verdict in favor of Wigginton on his substantive due process claim and awarded him $218,000 in damages.[4]

The defendants filed a renewed motion for judgment as a matter of law and a motion to alter or amend the judgment. The district court denied defendants' motions in their entirety, and this appeal followed.

---

[4] Only two of Wigginton's claims were submitted to the jury: his substantive due process claim and his age discrimination claim. The jury found no liability on Wigginton's age discrimination claim. Wigginton does not challenge that finding on appeal.

II.

We review a challenge to a district court's denial of a motion for judgment as a matter of law "*de novo*, applying the same standard applied by the district court." *Montano v. Orange County*, 842 F.3d 865, 873 (5th Cir. 2016). Under Federal Rule of Civil Procedure 50, judgment as a matter of law is appropriate if "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1).

Defendants argue that the district court erred when it denied their motions for qualified immunity. Defendants raised their qualified immunity defense multiple times in the district court, both before and after the jury issued its verdict.[5] *See* Fed. R. Civ. P. 50(b) (authorizing the losing party to file a renewed motion for judgment as a matter of law within 28 days of entry of judgment). They argue that they are entitled to qualified immunity because the terms of Wigginton's employment did not give rise to a clearly-established protected property interest—a necessary prerequisite for the viability of his substantive due process claim.

"Whether an asserted federal right was clearly established at a particular time . . . presents a question

---

[5] Specifically, defendants moved for qualified immunity on at least five separate occasions: in their motion to dismiss; in their post-discovery motion for summary judgment; at the close of Wigginton's case-in-chief; at the close of all evidence; and after the jury verdict was announced.

of law, not one of 'legal facts.'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994). We review questions of law, including the district court's qualified immunity conclusion, *de novo. See id.*; *see also Tamez v. City of San Marcos*, 118 F.3d 1085, 1091 (5th Cir. 1997) ("We review *de novo* [the court's] legal conclusions, whether regarding federal or state law, in entering judgment under Rule 50(b)."). "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was *clearly established* at the time of the challenged conduct." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (emphasis added). "To be clearly established, a right must be sufficiently clear 'that every reasonable official would [have understood] that what he is doing violates that right.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The court must be able to point to "controlling authority—or a 'robust consensus of [cases of] persuasive authority'—that defines the contours of the right in question with a high degree of particularity." *Morgan v. Swanson*, 659 F.3d 359, 371–72 (5th Cir. 2011) (footnote omitted) (quoting *al-Kidd*, 563 U.S. at 742). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

In addition to their qualified immunity defenses, defendants make several additional arguments in favor of an amended judgment or new trial. We agree that Wigginton fails to establish that his rights were

clearly established, and we therefore do not reach defendants' other arguments in support of reversal.

III.

The district court erred when it denied defendants' motion for qualified immunity and concluded that Wigginton had a clearly-established property interest. In reviewing a substantive due process claim, the existence of a protected property interest is a threshold issue we must reach before we consider whether the defendants' actions were arbitrary and capricious. *See Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). "If there is no protected property interest, there is no process due." *Spuler v. Pickar*, 958 F.2d 103, 106 (5th Cir. 1992); *see also Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 344 (5th Cir. 2006), *abrogated on other grounds by Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018). We regularly grant qualified immunity in substantive due process cases where the plaintiff fails to establish a clearly-established property interest. *See*, *e.g.*, *Wilkerson v. Univ. of N. Tex. By and Through Bd. of Regents*, 878 F.3d 147, 155 (5th Cir. 2017); *Williams v. Tex. Tech. Univ. Health Scis. Ctr.*, 6 F.3d 290, 294 (5th Cir. 1993). Because Wigginton fails to identify any state or federal law that placed defendants on notice that his alleged contractual right to a fair tenure-review process was a constitutionally-protected interest, we reverse.

In order to have a property interest in a benefit, "a person . . . must have more than an abstract need or

desire for it," and he must be able to establish "more than a unilateral expectation" that he would receive it. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). To succeed on his substantive due process claim, Wigginton must show that he had a "legitimate claim of entitlement" to the interest he asserts. *Id.* Property interests are created and defined by "existing rules or understandings that stem from an independent source such as state law." *Id.* However, whether a state-created property interest "rises to the level" of a constitutionally-protected interest is a matter of federal constitutional law. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005).[6]

By definition, the establishment of a discretionary tenure policy demonstrates that "teachers without tenure are *not* assured of continuing employment." *Staheli v. Univ. of Miss.*, 854 F.2d 121, 124 (5th Cir. 1988). Discretionary tenure policies provide universities with the flexibility to grant or deny tenure based on subjective criteria, rather than "restrict[ing] . . . administrators' discretion by objective criteria and mandatory language." *Wicks v. Miss. Valley State Univ.*, 536 So. 2d 20, 23 (Miss. 1988). Consistent with these principles, we

---

[6] In *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), Justice Powell suggested in a concurrence that "substantive due process rights are created *only* by the Constitution." *Id.* at 229 (Powell, J., concurring) (emphasis added). Since then, however, this circuit has held that substantive due process rights can be derived from state law, and are therefore treated in the same manner as rights that give rise to a procedural due process claim. *See Schaper v. City of Huntsville*, 813 F.2d 709, 718 (5th Cir. 1987).

have rejected claims by professors who argue that positive annual reviews create a *de facto* right to tenure. *See Whiting*, 451 F.3d at 345 ("[P]ositive annual reviews do not serve to generate a property interest in tenure."); *Staheli*, 854 F.2d at 124 (rejecting a professor's claim that the University had an "informal tenure obligation" because he met the policy's specific standards of excellence and his department chairman had "assured him that his progress [toward tenure] was satisfactory").

Though an automatic or non-discretionary tenure policy may give rise to a protected property interest, *see Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987), the University's policies and guidelines clearly indicated that Wigginton was not guaranteed tenure. The policies and guidelines explained that even professors who meet the tenure criteria may not be "automatically fitted or needed to serve the present and future needs of the University's programs." Moreover, Wigginton's tenure evaluation process was based on a qualitative assessment, and the policies and guidelines made clear that he was not guaranteed tenure simply by fulfilling a specific set of numerical criteria. *Id.* The University's tenure system thus demonstrates the "inexorable internal logic" of a tenure system: "The whole purpose of the distinction between tenured and non-tenured faculty [is] to give the University discretion over the employment of non-tenured teachers." *Staheli*, 854 F.2d at 124–25.

The district court acknowledged that Wigginton did not have a protected property interest in

"continued employment,"[7] but it concluded that he presented sufficient evidence to establish a different kind of protected interest—an interest in "a fair merit-based inquiry free from irrationality as to whether he should receive tenure and promotion." We hold that the district court erred in denying defendants' motion for qualified immunity because there was neither controlling authority nor a robust consensus of persuasive authority that placed Wigginton's rights beyond debate. *See Morgan*, 659 F.3d at 371–72, 382; *Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (permitting courts to determine whether a right is clearly established before determining whether a constitutional violation occurred).

In *Klingler v. University of Southern Mississippi*, an unpublished decision issued in 2015, we observed that Mississippi law recognizes that an employee's "contract rights . . . constitute enforceable property interests, and 'employee manuals become part of the employment contract, creating contract rights to which employers may be held.' " 612 F. App'x 222, 227–28 (5th Cir. 2015) (footnote omitted) (first citing *Univ. of Miss. Med. Ctr. v. Hughes*, 765 So. 2d 528, 536 (Miss. 2000);

---

[7] It is well-established that a tenure-track employee in Mississippi does not have a property interest in continued employment. *See Whiting*, 451 F.3d at 344 ("Mississippi law is clear that neither state legislation nor state regulations create a legitimate expectation of continued employment for a non-tenured faculty member."); *Wicks*, 536 So. 2d at 23 (citing Miss. Code. Ann. § 37-101-15(f) for the principle that state law "does not create a legitimate expectation of continued employment for a non-tenured employee").

then quoting *Whiting*, 451 F.3d at 345). We have also been clear, however, that not all employment contracts or manuals rise to a vested property right. Protected property interests are "not incidental to public employment," *Muncy v. City of Dallas*, 335 F.3d 394, 398 (5th Cir. 2003), and the Mississippi Court of Appeals has explicitly held that "[t]he mere existence of a faculty handbook does *not* create [a protected property interest]." *Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158, 1171 (Miss. Ct. App. 2007) (emphasis added). "In determining whether statutes and regulations limit official discretion, the Supreme Court has explained that we are to look for 'explicitly mandatory language. . . .'" *Ridgely v. FEMA*, 512 F.3d 727, 735 (5th Cir. 2008) (quoting *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 463 (1989)). In other words, "[i]t matters what the handbook actually says." *Suddith*, 977 So. 2d at 1172.

Wigginton fails to cite "explicitly mandatory language" in his tenure policies that created a clearly-established property interest. *See Ridgely*, 512 F.3d at 735. To support his claim, he points to the University's "understanding that good faith is a requirement for all facets of [the tenure] policy." He also observes that the University's policies and guidelines established specific criteria for tenure, arguing that the defendants were required to apply that criteria in a consistent manner.

We have rejected substantive due process claims brought by tenure-track employees who assert that similar contractual language or tenure procedures gave rise to a clearly-established protected property

interest. In *Klingler*, for example, citing *Whiting*, 451 F.3d at 346, we rejected a tenure-track employee's claim that he had a protected property interest in "satisfy[ing] the tenure criteria" promulgated by his employer. 612 F. App'x at 228. Like Wigginton, the plaintiff in *Klingler* was employed by a university with a discretionary tenure policy, which meant that "the decision over his continued employment [was] entirely within the discretion of the board." *Id.* Because Klingler had no "legitimate expectation of *attaining* tenure," we held that "[i]t follows, *a fortiori*, that Klingler could have no legitimate expectation in an opportunity to satisfy the tenure criteria." *Id.* (first emphasis added). We have also held that a university's failure to follow its own internal rules does not always establish to a due process violation. *See Levitt v. Univ. of Tex. at El Paso*, 759 F.2d 1224, 1230 (5th Cir. 1985). And, outside of this circuit, courts have resisted the efforts of plaintiffs to "construct a property interest out of procedural timber." *Bunger v. Univ. of Okla. Bd. of Regents*, 95 F.3d 987, 990–91 (10th Cir. 1996). Against this backdrop, Wigginton fails to demonstrate that the language in his contract that allegedly guaranteed him a "fair process of tenure review" gave rise to a clearly-established property right.

Wigginton cites a number of additional cases to support his claim that his constitutional rights were clearly established, but those cases are similarly unavailing. As the party defending against a claim of qualified immunity, Wigginton bears the burden of demonstrating that clearly-established law placed

defendants on notice that they were violating his protected property interest. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019). The cases he relies upon do not define his asserted property right with sufficient particularity to defeat defendants' qualified immunity defense. *See Morgan*, 659 F.3d at 372.

First, though Wigginton cites *Honore v. Douglas* to support his claim that his property interest was clearly established, that case involved an automatic tenure process—not the discretionary process at issue here. 833 F.2d at 569. Likewise, in *Spuler*, we rejected the plaintiff's argument that his employment manual established a property interest in a "reasonable expectation of achieving tenure if he was qualified." 958 F.2d at 106. We held that the handbook, which gave the administrators the right to grant or deny tenure as they chose, "bestowed no contractual rights on [plaintiff] and no concomitant obligations on the University." *Id.* at 107. And though we recognized that employment contracts may create clearly-established property rights in *Klingler*, that case dismissed a claim that was similar to Wigginton's, further undermining Wigginton's argument that defendants were on notice of his constitutional rights. 612 F. App'x at 227 (holding that plaintiff had no property interest in satisfying the tenure criteria outlined in his employment handbook).

Moreover, to the extent that the district court relied upon our decision in *Harrington v. Harris* to conclude that Wigginton's property right was clearly established, there are several distinguishing circumstances in that case that set it apart from Wigginton's.

In *Harrington*, a group of tenured professors argued that their employer, Texas Southern University, awarded merit-based pay increases in an arbitrary and capricious manner. 118 F.3d 359, 368 (5th Cir. 1997). We assumed without deciding that plaintiffs "had a property interest in a rational application of the university's merit pay policy." *Id.* Unlike Wigginton, however, the plaintiffs in *Harrington* already had tenure, giving them a stronger claim to a clearly-established protected property interest. *See Levitt*, 759 F.2d at 1231 (holding that tenured employees have a constitutional interest in continued employment). The court in *Harrington* also reached its decision without conducting any analysis regarding the plaintiffs' property right, assuming that a property right existed because the defendants failed to contest it. 118 F.3d at 368. In light of these distinctions, we decline to find that *Harrington* defined the contours of Wigginton's constitutional rights with enough specificity to place defendants on notice. *See Morgan*, 659 F.3d at 371–72.

Wigginton cites a handful of Sixth Circuit cases involving similar claims, but those cases also fail to persuade. In *Purisch v. Tennessee Technological University*, the Sixth Circuit held that a professor "who is eligible for tenure consideration" may have "some minimal property interest in a fair tenure review process." 76 F.3d 1414, 1423 (6th Cir. 1996); *see also Webb v. Ky. State Univ.*, 468 F. App'x 515, 521 (6th Cir. 2012). But the Sixth Circuit reached that conclusion in cases involving *procedural* due process claims—not the substantive due process claim at issue here. Though

property interests may be established in the same manner for both substantive and procedural due process claims, *see Schaper v. City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987), Wigginton's claims are materially distinct from the interests identified in *Purisch* and *Webb*. He does not argue that the defendants failed to provide him with the required tenure review process—indeed, he admits that he received several rounds of appeals and hearings. In *Purisch* itself, the Sixth Circuit rejected the plaintiff's claims, concluding that he had been given sufficient process when the University afforded him the opportunity to present his tenure-related grievance orally and in writing. 76 F.3d at 1424; *see also Webb*, 468 F. App'x at 521–22 (holding that plaintiff who was provided with opportunity to appeal a tenure decision was not deprived of a property interest). Even if these out-of-circuit cases supported Wigginton's claim, they do not constitute robust, persuasive authority sufficient to defeat a motion for qualified immunity. *Morgan*, 659 F.3d at 371; *al-Kidd*, 563 U.S. at 742.

In *Spuler*, we held that tenure-track employees face an uphill battle when challenging the denial of tenure under a discretionary tenure system. "[I]n future challenges, officials formulating tenure decisions in circumstances similar to the instant case will likely benefit from qualified immunity." 958 F.2d at 108. Because Wigginton has failed to demonstrate that clearly-established law placed defendants on notice that he had a protected property interest, we reverse

the district court's denial of their qualified immunity defense.

IV.

For the foregoing reasons, we REVERSE and RENDER judgment in favor of defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

MICHAEL WIGGINTON, JR.,	PLAINTIFF
V.	CIVIL ACTION NO. 3:15CV093-NBB-RP
THE UNIVERSITY OF MISSISSIPPI, CHANCELLOR DANIEL W. JONES, PROVOST MORRIS H. STOCKS, DEAN JOHN Z. KISS, DEAN VELMER BURTON, AND CHAIR ERIC LAMBERT	DEFENDANTS

MEMORANDUM OPINION

(Filed Apr. 1, 2019)

This cause comes before the court upon the individual defendants' Renewed Motion for Judgment as a Matter of Law and, Alternatively, for New Trial and to Alter and Amend Judgment. Upon due consideration of the motion, response, exhibits, and applicable authority, the court is ready to rule.

Factual and Procedural Background

The plaintiff, Dr. Michael Wigginton, filed this lawsuit against the University of Mississippi and named administrators following the denial of Wigginton's tenure and promotion application and his subsequent termination from the University. A five-day jury trial was held wherein witness testimony and evidentiary

documents were presented. The court submitted two of Dr. Wigginton's original claims to the jury – an age discrimination claim and a substantive due process claim. The jury found in favor of the University on the age discrimination claim and for Dr. Wigginton against the individual defendants on the due process claim, specifically finding that each individual defendant's decision to deny Dr. Wigginton's tenure and promotion application was arbitrary and capricious and "literally irrational." The jury found the defendants liable to Dr. Wigginton for $18,000 in lost wages and $200,000 in past and future pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Dr. Wigginton was hired in 2008 as an assistant professor in a tenure-track position in the University's Department of Legal Studies. Neither his employment agreement nor subsequent agreements contained any language excluding the incorporation of external documents, and the parties agreed that the tenure and promotion review process was governed by the University, School of Applied Sciences, and Department Guidelines. The guidelines from the School and Department were designed to supplement the University Guidelines and provide more specific guidance regarding the criteria to be used to evaluate a professor's application for tenure and promotion. Under the University Guidelines, tenure applicants are evaluated on the quality of their research and scholarly activity, teaching, and service. All applicants are required to assemble a dossier summarizing his or her relevant activity and work

product demonstrating satisfaction of these three factors.

The University Guidelines outline the procedure required of all tenure-track professors which begins with a five-year probationary period prior to tenure eligibility. The guidelines provide:

> Each candidate must serve a probationary period of five years of continuous or accumulated full-time employment at The University of Mississippi in a tenure-track professorial position. . . . The sixth year shall be the year of formal review. . . . A person who is not awarded tenure during his or her sixth year of service shall be given a terminal contract for his or her seventh year of service. . . . Consideration for tenure shall be mandatory.

Once a professor becomes eligible for tenure and promotion, he or she is to be notified in writing by May 15 of that year and is to meet with the chair of the department no later than July 1 of that year to discuss the submission of the dossier. The applicant also provides the chair with a list of five external reviewers from which the chair is to select three as well as two external reviewers from the chair's own list. The applicant is to submit the dossier no later than September 1 of that year.

Upon submission of the applicant's dossier, the tenured and associate professors of the department meet and vote as to whether the applicant should be granted tenure and promotion. This vote is provided to the appropriate department chair who reviews the

tenure application and makes a recommendation to the appropriate school dean. The school dean also receives a recommendation from a separate advisory committee. The school dean reviews the application and makes a recommendation to the graduate school dean who in turn makes a recommendation to the provost.

The Tenure and Promotion Review Committee reviews the application to ensure that the process has been properly conducted and submits its findings to the provost. The provost then makes his recommendation. In the event of a negative recommendation from the provost, the applicant has five days to appeal and request a hearing from the Tenure and Promotion Appeals Committee, which will further assess whether the negative recommendations were based on impermissible grounds, including being arbitrary and capricious. Following a formal hearing, the Appeals Committee's findings are sent to the Chancellor, who makes the final recommendation to the Board of Trustees of the Mississippi Institutions of Higher Learning ("IHL Board"). The IHL Board makes the ultimate decision to award tenure.

The testimony and evidence produced at trial showed that Dr. Wigginton complied with this process, timely preparing and submitting a dossier which summarized his relevant teaching, service, and scholarly activity to demonstrate why he was entitled to tenure and promotion. Dr. Wigginton's dossier included five years of glowing reviews from his superiors which, he asserts, confirmed that he had met and exceeded the

requirements necessary for an award of tenure and promotion.

The tenured members of the Department of Legal Studies voted five to two in favor of a grant of tenure and four to two in favor of promotion.[1] Despite the faculty vote in favor of Dr. Wigginton, Defendant Eric Lambert, Chair of the Department of Legal Studies, recommended against granting tenure and promotion. His recommendation was considered by the Dean's Committee, which voted three to two in favor of tenure and promotion. Like Lambert, Defendant Velmer Burton, Dean of the School of Applied Sciences, who is no longer employed by the University, recommended, against the favorable recommendations of the faculty and committee, that Dr. Wigginton should not receive tenure. Defendant John Kiss, Dean of the Graduate School, followed suit and likewise recommended against the grant of tenure and promotion.

Dr. Wigginton's application was then reviewed by the Tenure and Promotion Review Committee, which questioned the recommendations of Defendants Lambert, Burton, and Kiss as to arbitrariness and capriciousness and issued a report making no official finding in this respect. Defendant Morris Stocks, the Provost, who is no longer in that position, followed the other defendants in recommending against a grant of tenure and promotion.

---

[1] One tenured professor was an assistant professor, not an associate, and therefore not included in the latter vote as to whether Dr. Wigginton should be promoted.

Dr. Wigginton then filed a request for a hearing with the Tenure and Promotion Appeals Committee. In its report to the Chancellor dated April 17, 2014, the Appeals Committee noted that in reviewing the defendants' recommendations against tenure and promotion, it considered the following definition of "arbitrary and capricious": that "an action [is arbitrary and capricious] if the agency entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Docket 172-15. The Committee then reported its findings as follows:

> In this context, the Committee felt that the agency (the University) as represented by the two department chairs preceding Dr. Lambert during Dr. Wigginton's probationary period had provided annual evaluations indicating satisfactory or excellent progress towards tenure and promotion for the previous 5 years, leading Dr. Wigginton and, the Committee felt, any reasonable person to expect that they would be granted tenure and promotion. The Committee also found that the final selection of external reviewers was entirely within the University's control, and that the selection of a reviewer from Dr. Wigginton's dissertation committee, entirely at odds with university policy, was a University decision. As such, the **Committee finds the negative recommendation on tenure and promotion to be arbitrary and capricious** in that the

> University failed to consider an important aspect of the problem, namely that the candidate was led to believe by a series of supportive annual reviews that he was on track to be successful in tenure and promotion, and that the discounting of the external reviewer letters was inappropriate since the reviewers were selected through the University's own actions. The Committee recommends that Dr. Wigginton be given a written explanation of how the department's tenure and promotion guidelines are interpreted and that an extended probation period be given to him so that he can demonstrate his ability to meet those expectations.

Id. (Emphasis added). Disregarding the Tenure and Promotion Appeals Committee's finding that Dr. Wigginton's tenure and promotion review process had been performed in an arbitrary and capricious manner, Defendant Chancellor Dan Jones, who is no longer the Chancellor, followed suit with the other defendants and recommended against tenure and promotion to the IHL Board. Jones issued a letter on June 17, 2014, advising Dr. Wigginton that his employment would be terminated on May 10, 2015. Jones also denied Dr. Wigginton's request and the Committee's recommendation that Dr. Wigginton's probationary period be extended for a year.

Dr. Wigginton subsequently brought the instant lawsuit alleging a number of claims, two of which were ultimately submitted to the jury after a five-day trial: an age discrimination claim and a substantive due

process claim. The jury found for the University on the age discrimination claim but found that the individual defendants had acted arbitrarily and capriciously in denying tenure and terminating from the University and were liable for $18,000 in lost wages and $200,000 in past and future pain and suffering. The defendants now renew their motion for judgment as a matter of law notwithstanding the verdict of the jury and also ask for the alternative relief of a new trial or a vacating or reduction of the damages award.

Standard of Review

Federal Rule of Civil Procedure 50(b) allows a defendant to renew his motion for judgment as a matter of law following a verdict for the plaintiff. Judgment as a matter of law after the conclusion of trial should be granted when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have had a legally sufficient evidentiary basis to find for a party on that issue[.]" Fed. R. Civ. P. 50(a)(1). "It goes without saying that the evidence must be viewed in the light most favorable to the nonmovant." *Montano v. Orange County, Tex.*, 842 F.3d 865 (5th Cir. 2016). "Moreover, consistent with the role of the jury under the Seventh Amendment to the Constitution, it is more than well-established that all reasonable inferences are drawn in favor of the nonmovant, with the credibility of witnesses and weight of the evidence being within the sole province of the jury." *Id.* The court "accord[s] great deference to the jury's verdict when evaluating the sufficiency of

the evidence." *Baltazor v. Holmes*, 162 F.3d 368, 373 (5th Cir. 1998). The verdict is reversed "only if the evidence points 'so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at any contrary conclusion.'" *Id.* (quoting *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)).

A district court may grant a new trial under Federal Rule of Civil Procedure 59(a) when such action is necessary "to prevent an injustice." *Seibert v. Jackson County, Miss.*, 851 F.3d 430, 438 (quoting *United States v. Flores*, 981 F.2d 231, 237 (5th Cir. 1993)). "The decision to grant or deny a motion for new trial is a matter for the trial court's discretion; [and the appellate court] will reverse its ruling only for an abuse of discretion." *Seibert*, 851 F.3d at 438. "A trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence." *Id.* "In other words, the movant must show 'an absolute absence of evidence to support the jury's verdict.'" *Id.* (quoting *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1998)).

Analysis

Renewed Motion for Judgment as a Matter of Law

Substantive Due Process

"The protections of the Due Process Clause, whether procedural or substantive, only apply to deprivations of constitutionally protected property or

liberty interests." *Klingler v. Univ. of S. Miss.*, 612 F. App'x 222, 227 (5th Cir. 2015). "Without such an interest, no right to due process accrues." *DePree v. Saunders*, 588 F.3d 282, 289 (5th Cir. 2009). A successful claim for deprivation of substantive due process requires two showings in the context of public employment: (1) that the plaintiff possessed the aforementioned property interest or right and (2) that the public employer's depriving of that interest was arbitrary and capricious. *Stark v. Univ. of S. Miss.*, 8 F. Supp. 3d 825, 841 (S.D. Miss. 2014) (citing *Lewis v. Univ. of Tex. Med. Branch at Galveston*, 665 F.3d 625, 630 (5th Cir. 2011)).

The Supreme Court has held that in order "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it [or] . . . a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court has also held that a "person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

The Supreme Court has acknowledged that an implied contract right precluding arbitrary state interference may qualify as a property interest protected by the Due Process Clause[2] but has also made clear that "[p]roperty interests . . . are created and their

[2] *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 220-21 (1985).

dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Roth*, 408 U.S. at 577. The Fifth Circuit has held accordingly, stating that "[c]onstitutionally protected property interests are created and defined by understandings that stem from an independent source such as state law" or contract. *Klingler*, 612 F. App'x at 227; *Martin v. Mem. Hosp. at Gulfport*, 130 F.3d 1143, 1147 (5th Cir. 1997).

The Fifth Circuit has stated, "In general, we have recognized that a property interest is created where the public entity has acted to confer, or alternatively, has created conditions which infer, the existence of a property interest by abrogating its right to terminate an employee without cause." *Muncy v. City of Dallas, Tex.*, 335 F.3d 394, 398 (5th Cir. 2003). The court noted, "This abrogation may take the form of a statute, rule, handbook, or policy which limits the condition under which the employment may be terminated." *Id.* (citing *Henderson v. Sotelo*, 761 F.2d 1093, 1096 (5th Cir. 1985)). "Ultimately, however, the question of whether a property interest exists is an individualized inquiry which is guided by the specific nature and terms of the particular employment at issue and informed by the substantive parameters of the relevant state law." *Id.*

In Mississippi, "employee manuals become part of the employment contract, creating contract rights to which employers may be held." *Klinger*, 612 F. App'x at 227 (citing *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 345 (5th Cir. 2006)); *Stark*, 8 F. Supp. 3d at 840. Mississippi courts have held that when an employer

"publishes and disseminates to its employees a manual setting forth the proceedings which will be followed in the event of an employee's infraction of rules, and there is nothing in the employment contract to the contrary, then the employer will be required to follow its own manual in disciplining or discharging employees." *Bobbitt v. The Orchard, Ltd.*, 603 So. 2d 356, 357 (Miss. 1992).

The substantive component of the Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). The Fifth Circuit has explicitly acknowledged that the substantive process due a nontenured applicant for tenure and promotion, is "the exercise of professional judgment, in a non-arbitrary and non-capricious fashion." *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992).

The defendants move the court to set aside the jury's verdict and grant judgment as a matter of law in their favor based on their position that Dr. Wigginton had no protected property interest in a grant of tenure because under Mississippi law "there is no legitimate expectation of employment for a nontenured faculty member that creates a protected interest." *Whiting v. Univ. of S. Miss.*, 62 So. 3d 907, 915 (Miss. 2011). Dr. Wigginton does not dispute this point but instead accurately asserts that under Mississippi law, non-tenured employees' "contract rights do constitute enforceable property interests." *Klingler*, 612 F. App'x

at 227 (citing *Univ. of Miss. Med. Ctr. v. Hughes*, 765 So. 2d 528, 536 (Miss. 2000)).

Dr. Wigginton asserts that he presented sufficient evidence to establish a constitutionally protected contractual property interest in the fair administration of his tenure and promotion review process which was required to be free from irrationality and arbitrary or capricious decisions, and further that his tenure and promotion review process was not, in fact, free from irrationality and was conducted in an arbitrary and capricious manner, thus depriving him of his constitutionally protected interest. The jury agreed.

The court finds that based upon the evidence presented at trial, it is clear there existed mutually explicit understandings between Dr. Wigginton and the University which were memorialized in the University, School, and Department's tenure policies and guidelines and incorporated through Dr. Wigginton's employment agreement, which contained no language excluding external documents. In accordance with these mutually explicit understandings, Dr. Wigginton was eligible for and entitled to a fair merit-based inquiry free from irrationality as to whether he should receive tenure and promotion following his satisfactory completion of the five-year probationary period. The Fifth Circuit has recognized that a plaintiff may have a property interest in a rational application of a university merit-based policy. *Harrington v. Harris*, 118 F.3d 359, 368 (5th Cir. 1997).

Based on the applicable authority and the evidence produced at trial, it is clear that Dr. Wigginton successfully established an enforceable and constitutionally protected contractual property interest as contemplated by substantive due process jurisprudence which entitled him to a fair tenure and promotion review process based on professional judgment free from irrationality and arbitrary and capricious decision-making. Dr. Wigginton has satisfied the first prong of a successful substantive due process claim.

The court also finds that because Dr. Wigginton's claim is that of a contractual property interest entitling him to a fair tenure and promotion review process – as opposed to a claim of entitlement to a grant of tenure itself – the defendants' argument that only the final decision makers – that is the Chancellor in nominating for tenure and the IHL Board in actually awarding the grant of tenure – could be held liable is without merit. Each of the defendants was involved in the tenure and promotion review process and each owed Dr. Wigginton a review and recommendation based on professional judgment free from irrationality and arbitrary and capricious decision-making. In this context it is irrelevant that the Chancellor and the IHL Board are the final decision makers.

The court now examines whether sufficient evidence was presented to support Dr. Wigginton's claim that the defendants deprived him of this constitutionally protected property interest. "If state action is so arbitrary and capricious as to be irrational, its infringement on a constitutionally protected interest

may violate substantive due process rights." *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 558 (5th Cir. 1988). The jury was instructed accordingly and found that Dr. Wigginton's denial of tenure and promotion was literally irrational. The court finds there was sufficient evidence presented to warrant such a verdict by reasonable jurors.

As mentioned, Dr. Wigginton received glowing reviews from his superiors during his five-year probationary period at the University. While this is insufficient under applicable authority to establish an expectation of tenure amounting to a property interest,[3] it does provide evidence of the arbitrary and capricious nature of Dr. Wigginton's tenure promotion and review process, and such was noted by the University's own Tenure and Promotion Appeals Committee. The Committee stated:

> [T]he Committee felt that the agency (the University) as represented by the two department chairs preceding Dr. Lambert during Dr. Wigginton's probationary period had provided annual evaluations indicating satisfactory or excellent progress towards tenure and promotion for the previous 5 years, leading Dr. Wigginton and, the Committee felt, any reasonable person to expect that they would be granted tenure and promotion. . . . As such, the Committee finds the negative

[3] *See*, *e.g.*, *Whiting*, 451 F.3d at 345 ("[T]he Mississippi Supreme Court has held that positive annual reviews do not serve to generate a property interest in tenure.") (citing *Wicks v. Miss. Valley State Univ.*, 536 So. 2d 20, 23 (Miss. 1988)).

> recommendation on tenure and promotion to be arbitrary and capricious in that the University failed to consider an important aspect of the problem, namely that the candidate was led to believe by a series of supportive annual reviews that he was on track to be successful in tenure and promotion.

Docket 172-15.

The jury also considered testimony which suggested that the defendants baselessly discounted the overwhelmingly positive opinions of external reviewers, stating the reviewers were of poor quality and had tenuous conflicts of interest. The external reviewer selection process was entirely in the control of the School of Applied Sciences and in accordance with the University Guidelines; also the external reviewers were approved by the Office of the Dean of the School.

The jury was also presented with the University's Tenure and Promotion Appeals Committee's findings as to this matter. The discounting of the reviewers was specifically noted by the Committee as one of its reasons for finding an arbitrary and capricious recommendation against tenure. The Committee stated:

> The Committee also found that the final selection of external reviewers was entirely within the University's control, and that the selection of a reviewer from Dr. Wigginton's dissertation committee, entirely at odds with university policy, was a University decision. As such, the Committee finds the negative recommendation on tenure and promotion to be

> arbitrary and capricious in that the University failed to consider an important aspect of the problem, namely . . . that the discounting of the external reviewer letters was inappropriate since the reviewers were selected through the University's own actions.

Docket 172-15. A reasonable juror could take note of the apparent disingenuousness in the defendants' discounting the opinions of the reviewers and ignoring the Committee's findings, as the facts suggest that each individual defendant failed to exercise professional judgment and instead simply rubber-stamped the recommendations of the other defendants.

The defendants argue that Dr. Wigginton failed to demonstrate sufficient scholastic achievement and impact during his probationary period to warrant an award of tenure. The evidence, however, showed that conflicting standards for assessing scholarship among the University, School, and Department policies were applied arbitrarily. When Dr. Wigginton was hired, the University provided him with documents entitled "The University of Mississippi Tenure Policies and Procedures" ("University Guidelines"), "The University of Mississippi School of Applied Sciences Guidelines and Procedures for Annual, Tenure, Promotion, and Post-Tenure Reviews" ("School Guidelines"), and "Legal Studies Guidelines for Tenure and Promotion" ("Department Guidelines"). The evidence showed that throughout his probationary period Dr. Wigginton was repeatedly informed by his direct supervisor that he should follow the Department Guidelines.

The Department Guidelines provided in pertinent part:

> Evidence [of scholarly activity] will include books or journals published by commercial or university presses; articles in refereed or other scholarly professional journals with state, regional, national, or international reputations; papers presented at scholarly conferences; discussant and/or chair at conferences, seminars, workshops, symposiums, etc.; organizer of professional workshops or seminars; editorial responsibilities within one's discipline; publications of manuals, text chapters, monographs or media materials; research grants and nonresearch funding and contracts. The publication of a textbook within one's discipline through a recognized professional press and articles published within the genres of one's specialization in professional journals will be considered for tenure/promotion.

Docket 172-8. Testimony revealed, however, that when Dr. Wigginton's application for tenure and promotion was evaluated by the defendants, they used other guidelines regarding scholarly activity. These later-applied "School Guidelines" provided in pertinent part:

> Within the School of Applied Sciences, research and scholarly activity is demonstrated primarily through the publication of research papers in refereed, academic journals with international, national, or regional reputations and publication of scholarly books by commercial or university presses. Other research

> activity may also be manifest in: non-refereed journals; professional journals; proceedings papers; presentations at scholarly meetings; editorial work for refereed academic journals; research grants; contracts which support continued research; and other work relevant to the candidate's academic discipline.

Docket 172-7.

The application of the more restrictive School Guidelines provided the defendants with an alleged basis to discount some of Dr. Wigginton's scholarly work such as textbook publication as well as certain journal articles and research grants. The evidence also showed that certain defendants utilized an even narrower view of scholarship than that contemplated by the more restrictive School Guidelines.

It was further revealed that defendants expected Dr. Wigginton to participate in and make presentations at specific conferences not mentioned in the guidelines. For instance, Defendant Lambert's recommendation against tenure asserts that Dr. Wigginton should have been required to participate in more American Society of Criminology and Academy of Criminal Justice Sciences events; yet Dr. Wigginton was never advised of this very specific expectation during his five-year probationary period, and many of the conferences Dr. Wigginton did attend were discounted by the defendants though Dr. Wigginton was led to believe these would be credited toward his scholarship.

Testimony also revealed that the defendants relied on Dr. Wigginton's Google Scholar score as a statistic to determine whether an applicant should be granted tenure and promotion. The Google Scholar score requirement is not mentioned in the applicable guidelines, and the jury heard testimony from several witnesses suggesting that no applicant for tenure and promotion in the Department of Legal Studies had ever been held to said standard.

The defendants provided no explanation as to why the School Guidelines were applied exclusively over the Department Guidelines. The defendants simply argued that it was Dr. Wigginton's responsibility to be familiar with all guidelines and determine which ones applied. Dr. Wigginton testified that he was repeatedly informed by his direct supervisor during his probationary period that the Department Guidelines applied and that accordingly he strictly adhered to the requirements for tenure and promotion for professors in the Department. The Department Guidelines were drafted specifically for reference by professors within the Department. Despite the defendants' position that Dr. Wigginton was responsible for complying with all guidelines, common sense dictates that guidelines designed specifically for the Department would be the logical guidelines for a professor within that Department to follow as opposed to the School Guidelines, especially considering he was directed to follow those guidelines by his direct supervisor.

Reasonable jurors could and did find disingenuousness in the defendants' actions regarding the

arbitrary application of potentially conflicting guidelines as well as certain specific expectations found nowhere in the guidelines such as participation in certain conferences and the Google Scholar score matter and could determine that the defendants simply manufactured an excuse to deny Dr. Wigginton tenure, forcing him out of the University to make way for new staff.[4]

Evidence was also presented which revealed that certain defendants characterized the faculty majority votes in favor of Dr. Wigginton's tenure and promotion as "split," suggesting that these defendants did so to discredit the recommendation of the Department of Legal Studies faculty vote in support of Dr. Wigginton. The defendants argue that the votes in fact *were* "split," and that it was not inappropriate to characterize them as such. While the votes were not unanimous, nevertheless they were majority votes in favor of tenure and promotion. To characterize such votes as "split" in the defendants' recommendations against tenure could appear to a reasonable juror as a deliberate attempt to discredit these majority votes in Dr. Wigginton's favor.

In sum, sufficient documentary evidence and testimony were presented to the jury which suggested, inter alia, that the individual defendants discounted a

---

[4] Testimony suggested that Defendant Dean Burton, who came into the University toward the end of Dr. Wigginton's probationary period and is no longer employed by the University, repeatedly expressed his desire to terminate Dr. Wigginton and that he intended to move the makeup of the department away from "practitioner" professors toward more academic professors.

majority faculty vote in favor of tenure, arbitrarily discounted relevant scholarship, held Dr. Wigginton to conflicting standards and undocumented expectations without explanation and did so against its own internal Review and Appeals Committees' concerns and recommendations in this regard. The evidence and testimony presented also showed that the defendants improperly discounted the legitimacy of Dr. Wigginton's external reviewers although the reviewers were pre-approved by the University, and further, that they deliberately ignored the Tenure and Promotion Appeals Committee's explicit finding that the recommendations against granting Dr. Wigginton tenure and promotion had been based on arbitrary and capricious grounds. The jury agreed with that finding. In accordance with the "especially deferential" standard of review afforded jury verdicts challenged by a motion for judgment as a matter of law,[5] the court finds the evidence presented at trial more than sufficient to support the jury's unanimous decision that the defendants failed to exercise professional judgment and made arbitrary and capricious decisions which had "no rational connection between the known facts and the decision or between the found facts and the evidence." *Neuwirth*, 845 F.2d at 558.

---

[5] *Carley v. Crest Pumping Technologies, LLC*, 890 F.3d 575, 577 (5th Cir. 2018).

Qualified Immunity

Qualified immunity protects state actors "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When qualified immunity is asserted, as has been done here, the court must make two determinations. The court considers whether the evidence demonstrates a violation of a constitutional right. *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013). The court additionally must determine whether the right at issue was clearly established at the time of the defendants' alleged misconduct. *Id.* The constitutional right must be sufficiently clear to put a reasonable official on notice that certain conduct violates that right. *Sanchez v. Swyden*, 139 F.3d 464, 466 (5th Cir. 1998).

In the present case, as to whether the constitutional right at issue was clearly established at the time of the violation, Dr. Wigginton accurately notes that in 1987 the Fifth Circuit recognized that a state employee has a substantive due process right to be free from arbitrary and capricious deprivations of state employment related property interests. *Honore v. Douglas*, 833 F.2d 565, 568 (5th Cir. 1987). Then in 1992 the Fifth Circuit recognized that the substantive process due tenure applicants with a property interest is the "exercise of professional judgment, in a non-arbitrary and non-capricious fashion." *Spuler*, 958 F.2d at 107.

A public employee may demonstrate a constitutionally protected property interest by showing that it is founded on a "legitimate claim of entitlement based on mutually explicit understandings." *Honore*, 833 F.2d at 568 (quoting *Roth*, 408 U.S. at 577). The existence of such an interest must be determined by reference to state law. *Muncy*, 335 F.3d at 398. As addressed under the substantive due process analysis above, "[u]nder Mississippi law, nontenured employees do not have a legitimate expectation of continued employment; [b]ut their contract rights do constitute enforceable property interests, and employee manuals become part of the employment contract, creating contract rights to which employers may be held." *Klingler*, 612 F. App'x at 227.

Dr. Wigginton was contractually obligated to apply for tenure and promotion, resign, or be terminated. Dr. Wigginton's employment agreement incorporated mutually explicit understandings regarding a formal set of policies and procedures by which his tenure and promotion application would be reviewed, thus establishing an enforceable and protected property interest to a fair tenure and promotion review process.

In light of the relevant case law, a reasonable official would have been aware that he cannot make irrational decisions and fail to exercise professional judgment in denying an application for tenure and promotion. The court finds that the constitutional right at issue here was clearly established at the time of the defendants' misconduct. The defendants should have been aware that they were required to exercise professional judgment and make a rational decision that was

not arbitrary and capricious. *If for no other reason, the defendants should have been aware of their duties based simply on the fact that the University has established two administrative bodies, the Tenure and Promotion Review Committee and the Tenure and Promotion Appeals Committee, created for the* **specific purpose** *of ensuring that the tenure and promotion review process is free of arbitrary and capricious decision-making. The former committee questioned the arbitrary nature of the process as applied to Dr. Wigginton's application, and the latter explicitly found arbitrary and capricious decision-making; yet the defendants ignored these findings and each recommended against a grant of tenure and promotion.*

Having determined that this case involves a clearly established constitutional right of which a reasonable official would have known, the court will now consider whether the evidence demonstrates a violation of that right. This analysis has already been set forth above. The jury has resolved the question of fact as to whether the individual defendants arbitrarily and capriciously deprived Dr. Wigginton of a constitutional property right, unanimously finding that the defendants failed to exercise professional judgment and made decisions that were literally irrational. The court has found the evidence legally sufficient to support the verdict.

In *Honore v. Douglas*, the Fifth Circuit noted that "a federal court is generally not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Honore*, 833

F.2d at 569. The court added, however, that "[t]his measure of judicial restraint . . . does not require slavish deference to a university's arbitrary deprivation of a vested property right." *Id.* This court finds, in accordance with the applicable case law, the evidence presented at trial, and the jury's verdict, that the individual defendants arbitrarily deprived Dr. Wigginton of a clearly established constitutional right of which a reasonable official would have known. The individual defendants are, therefore, not entitled to qualified immunity. The court finds that the defendants' motion for judgment as a matter of law is denied.

Motion for a New Trial

As alternative relief to their motion for judgment as a matter of law, the defendants seek a new trial based on allegedly improper jury instructions. The defendants argue that the court failed to instruct the jury of the appropriate standard by which it could find a deprivation of a due process right. They further argue that the court erred in answering a written question proposed by the jury regarding the definition of "due process."

"The district court has broad discretion in formulating the jury charge." *Deines v. Tex. Dept. of Protective and Regulatory Services*, 164 F.3d 277, 279 (5th Cir. 1999). The court's instructions to the jury, considered as a whole, must instruct the jurors so that they understand the issues to be tried and are not misled. *Frosty Lands Foods v. Refrigerated Transport*, 613 F.2d

1344, 1348 (5th Cir. 1980). "[A] challenge to jury instructions 'must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Deines*, 164 F.3d at 279 (quoting *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995)).

The court instructed the jury, in part, that Dr. Wigginton had "a right free from that [tenure and promotion] process being made in an arbitrary and capricious way and free of irrationality on the part of the defendants." Citing *Lewis v. Univ. of Tex. Med. Branch at Galveston*, 665 F.3d 625, 630 (5th Cir. 2011), the defendants assert that to be "arbitrary and capricious," a decision must have "no rational connection between the known facts and the decision or between the found facts and the evidence." Shortly after the instruction quoted above, the court further instructed as follows: "To be arbitrary and capricious, the Defendant Jones' decision must have been literally irrational. There must have been no rational connection between the known facts and the decision or between the found facts and the decision." The court added, "And the plaintiff must prove, by a preponderance of the evidence, that the Defendant Jones' decision not to nominate the plaintiff for tenure was irrational."

The defendants argue that the initial instruction quoted above is an inaccurate statement of the law and that the court improperly instructed regarding the defendants' exercise of professional judgment. The defendants admit that the court later expounded on the

original instruction regarding the arbitrary and capricious standard and actually included the very language the defendants argue should have been included. The defendants nevertheless maintain that the jury was improperly instructed. They fail to note, however, that the majority of the instructions given in this case were in fact proposed by the defendants and that the court specifically gave the defendants' own requested substantive due process instruction and business judgment instruction.

The court finds that the initial instruction that Dr. Wigginton had "a right free from that [tenure and promotion] process being made in an arbitrary and capricious way and free of irrationality on the part of the defendants" is not an incorrect statement of the law; and even if it were, the additional instruction expounding on the arbitrary and capricious standard would cure any confusion. The court, however, finds no legitimate basis for confusion. "There is no error if the instructions, when taken together, properly express the law applicable to the case, even though an isolated clause is inaccurate, ambiguous, incomplete, or otherwise subject to criticism." *Vicksburg Furniture Mfg., Ltd. v. Aetna Cas. and Sur. Co.*, 625 F.2d 1167, 1169 (5th Cir. 1980).

The court also finds no merit to the defendants' argument that the court's response to the jury's inquiry regarding due process did not accurately state the law or address the jury's confusion. During jury deliberations, the jury sent a note to the court reading, "Clarify exactly what is due process." The court responded in

writing: "Due process is a legal term and I consider basically that the words themselves in their context are their own best definition. Thank you and please continue your deliberation." The court finds that it provided an appropriate response and that there is no merit to the defendants' argument.

The defendants have not demonstrated that the charge as a whole creates substantial and eradicable doubt as to whether the jury received proper guidance for their deliberations. Accordingly, the court finds that the jury was properly instructed. The defendants' alternative motion for new trial based on improper jury instructions is denied.

Motion to Amend Judgment

The defendants also move the court to vacate the damages awarded by the jury due to an alleged lack of evidentiary basis or alternatively to reduce the award to nominal damages only. The jury awarded Dr. Wigginton $100,000 in past pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life and $100,000 in future pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life. The defendants argue that the evidence presented was insufficient to support the jury's award of damages for pain and suffering. The court disagrees.

The Fifth Circuit has stated that it "review[s] with deference damage awards based on intangible harm, because the harm is subjective and evaluating it depends considerably on the demeanor of witnesses."

Tureaud v. Grambling State Univ., 294 F. App'x 909, 916 (5th Cir. 2008) (quoting *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 487-88 (5th Cir. 2001)). "It is true that compensatory damages for emotional distress may only be awarded when specific evidence of actual harm is introduced." *Williams v. Trader Publishing Co.*, 218 F.3d 481, 486 (5th Cir. 2000). The Fifth Circuit "has held, however, that the testimony of the plaintiff alone may be enough to satisfy this requirement." *Id.* (citing *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046 (5th Cir. 1998); *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996)).

In *Williams v. Trader Publishing Co.*, the Fifth Circuit upheld a compensatory damages award of $100,000 for emotional distress based solely on the plaintiff's testimony regarding severe emotional distress, sleep loss, severe weight loss, and beginning the habit of smoking. *Id.* Again recognizing that "a plaintiff's testimony alone may be sufficient proof of mental damages," the Fifth Circuit affirmed a $140,000 award based solely on the plaintiff's testimony in *Tureaud v. Grambling State University* for emotional distress damages to a law enforcement officer who accused his employer of retaliatory discharge. *Tureaud*, 294 F. App'x at 916.

In *Forsyth v. City of Dallas*, the Fifth Circuit affirmed emotional anguish awards of $100,000 and $75,000 respectively for two police officers who successfully sued the city for First Amendment retaliation when they were transferred from the intelligence unit to night uniformed patrol after making allegations of

illegal wiretapping within the police department. *Forsyth*, 91 F.3d at 774. The $100,000 award was based on the plaintiff's testimony "that she suffered depression, weight loss, intestinal troubles, and marital problems, that she had been sent home from work because of her depression, and that she had to consult a psychologist." *Id.* The $75,000 award was based on the co-plaintiff's testimony "that he suffered depression, sleeplessness, and marital problems." *Id.* In affirming the awards, the court stated, "Judgments regarding noneconomic damages are notoriously variable; we have no basis to reverse the jury's evaluation." *Id.*

In the present case, Dr. Wigginton testified that he relocated to Oxford, Mississippi, to pursue the tenured faculty position with the University of Mississippi and set down roots and built a life in the community. He lived here with his family for seven years and was ultimately forced to uproot his life and relocate because of the defendants' wrongful actions. After the defendants' actions and attempting to mitigate his damages and provide for his family, prior to moving, Dr. Wigginton commuted 730 miles round trip to Troy University in southern Alabama at the age of 65 years old. The commute required him to spend multiple nights per week in a motel away from his family.

Dr. Wigginton further testified that he had never been seriously ill before the events giving rise to this action. He testified that he took the only position he could find, which happened to be 365 miles away from home. He testified that he had commuted to Troy for approximately a year when his wife found him

unconscious on his bedroom floor after he had become seriously ill with a bacterial infection that resulted in a week-long hospitalization. During the hospitalization, he suffered cognitive, cardiological, and pulmonary difficulties.

Dr. Wigginton testified that his wrongful termination from the University constituted a devastating blow to himself and his family. He stated that he felt hurt and betrayed by officials in whom he had placed his trust. He testified that the stress associated with the defendants' actions eventually had a detrimental effect on his health.

Dr. Wigginton also testified about the burden of moving his family to Louisiana and selling his home in Oxford in 2017. During this time Dr. Wigginton taught an online course for Tulane University because he could not find another job. At the time of trial, he had been teaching at the University of Southern Mississippi for approximately three months in a nontenured position. As the position was non-tenured and the university's budget was in a significant deficit with cuts likely to be made, Dr. Wigginton continued to suffer stress regarding his employment situation.

The court finds that Dr. Wigginton's testimony provides sufficient evidence to support the jury's awards for past and future pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life. The evidence indicated that Dr. Wigginton's health significantly deteriorated after his wrongful termination from the University. A significant deterioration in

health suggests a strong possibility of future pain and suffering, in addition to past pain and suffering. The jury was free to reach this conclusion and to attribute the deterioration in Dr. Wigginton's health to the deprivation of his due process rights.

The Fifth Circuit does "not reverse a jury verdict for excessiveness except on the strongest of showings," and to determine whether a remittitur is in order, the court applies the "loosely defined 'maximum recovery rule.'" *In re Parker Drilling Offshore USA, LLC*, 323 F. App'x 330, 333 (5th Cir. 2009). "This judge-made rule essentially provides that [the court] will decline to reduce damages where the amount awarded is not disproportionate to at least one factually similar case from the relevant jurisdiction." *Id.* (quoting *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990)). The awards in the cases cited above were for past compensatory damages alone. As the jury in the present case awarded $100,000 for past damages and $100,000 for future, the court finds that upholding these awards is not inconsistent with the maximum recovery rule.

In light of Fifth Circuit precedent affirming similar awards in similar cases and repeatedly upholding such awards based solely on the plaintiff's testimony, this court finds that the defendants' motion to amend the judgment is without merit. The court will neither vacate the jury's award nor reduce it. The motion is denied in its entirety.

Conclusion

Based on the foregoing analysis, the court finds that the defendants' Renewed Motion for Judgment as a Matter of Law and, Alternatively, for New Trial and to Alter and Amend Judgment is denied. A separate order in accordance with this opinion shall issue this day.

This, the 1st day of April, 2019

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

MICHAEL WIGGINTON, JR.	PLAINTIFF
V.	CIVIL ACTION NO. 3:15CV093-NBB-RP
THE UNIVERSITY OF MISSISSIPPI, CHANCELLOR DANIEL W. JONES, PROVOST MORRIS H. STOCKS, DEAN JOHN Z. KISS, DEAN VELMER BURTON, AND CHAIR ERIC LAMBERT	DEFENDANTS

ORDER

(Filed Apr. 1, 2019)

In accordance with the memorandum opinion issued this day, it is **ORDERED AND ADJUDGED** that the individual defendants' Renewed Motion for Judgment as a Matter of Law and, Alternatively, for New Trial and to Alter and Amend Judgment is **DENIED**.

This, the 1st day of April, 2019.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

MICHAEL WIGGINTON, JR.	PLAINTIFF
V.	CIVIL ACTION NO. 3:15CV093-NBB-RP
THE UNIVERSITY OF MISSISSIPPI, CHANCELLOR DANIEL W. JONES, PROVOST MORRIS H. STOCKS, DEAN JOHN Z. KISS, DEAN VELMER BURTON, AND CHAIR ERIC LAMBERT	DEFENDANTS

ORDER DENYING SUMMARY JUDGMENT

(Filed Oct. 5, 2017)

Presently before the court is the defendants' motion for summary judgment. Upon due consideration of the motion, response, exhibits, and supporting and opposing authority, the court is ready to rule.

The plaintiff, Dr. Michael Wigginton, Jr., joined the Department of Legal Studies within the School of Applied Sciences at the University of Mississippi as an Assistant Professor in 2008. He alleges that despite his outstanding resume and documented success as a professor, his application for tenure and promotion was wrongly denied and his employment terminated, as a result of the defendants' discrimination based upon the plaintiff's gender, race, and age. Wigginton, a Caucasian male, was sixty-five years old at the time his application for tenure and promotion was denied and

his employment with the University terminated. Subsequent to the plaintiff's termination, two individuals were hired as tenure-track professors in the Department of Legal Studies, an African man in his thirties from Ghana and a Caucasian woman in her thirties.

The plaintiff's career in academia was preceded by a lengthy career in law enforcement. The plaintiff served in the United States Air Force, the New Orleans Police Department, the Louisiana State Police, the United States Department of Justice Drug Enforcement Administration, the United States Customs Service Office of Investigations, and the Federal Bureau of Investigation Joint Terrorism Task Force.

The University's Tenure Policies and Procedures mandate annual reviews which address tenure criteria and eligibility for non-tenured faculty. To apply for tenure and promotion, a candidate must include his annual reviews in his dossier. In the five academic years the plaintiff served on the University faculty before applying for tenure and promotion, he received outstanding reviews. In addition to these positive annual reviews, the plaintiff was nominated for the Thomas A. Crowe Award for the School of Applied Sciences for the 2013 spring semester. Defendant Velmer Burton, Dean of the School, advised the plaintiff of his nomination in a letter stating, "This is an award that celebrates and recognizes meritorious faculty engagement in scholarship, teaching, and service."

The plaintiff's application for tenure and promotion went through numerous levels of review, including

the Department Promotion and Tenure Committee and an Advisory Committee to the Dean of the School, both of which recommended tenure based on a 5-2 majority vote and a 3-2 majority vote respectively. Further, the Department faculty and the plaintiff's external reviewers recommended tenure and promotion. Defendant John Kiss, Dean of the Graduate School, Defendant Burton, Dean of the School of Applied Sciences, and Defendant Eric Lambert, Chair of the Department of Legal Studies, however, all reviewed Wigginton's tenure application and recommended denial, contradicting the recommendations of the aforementioned committees. The defendants assert that the recommendations of denial were based in part on the discounting of the plaintiff's external reviewers, which the plaintiff notes had been previously approved by the University, and an alleged deficiency in scholarship, despite the plaintiff's five previous annual reviews which commended his scholarship and research.

In accordance with the University's Tenure Policies and Procedures, prior to a tenure and promotion application being evaluated by the Provost, a Review Committee provides an assessment of whether the appropriate procedures were followed in the application review process. The Review Committee is comprised of tenured professional faculty members from throughout the University. On February 6, 2014, Dr. Anne Bomba, as a member of the Review Committee, found that violations occurred during the evaluation of the plaintiff's tenure application. Among these violations, Dr. Bomba found that appropriate procedures were not

followed, that non-permissible grounds led to a negative recommendation, that the Department Guidelines were not followed, and that the tenure and promotion process was not properly applied. Dr. Bomba also questioned whether the recommendations of denial were arbitrary and capricious.

Despite Dr. Bomba's concerns, the review process continued, and the plaintiff's dossier reached defendant, the University Provost, for action. In March 2014, the Provost advised the plaintiff that he would not recommend him for tenure and promotion and that Wigginton had the right to appeal the decision. The plaintiff then appealed the denial of tenure to the University Tenure and Promotion Appeals Committee. After an April 14, 2014 hearing, the committee concluded that the plaintiff's prior positive reviews led the plaintiff to expect a grant of tenure and promotion. The Appeals Committee held "that the discounting of the external reviewer letters was inappropriate since the reviews were selected through the University's own actions."

The Appeals Committee further concluded that the denial of tenure and promotion was arbitrary and capricious and recommended an extension of Wigginton's probationary period.

Despite the Appeals Committee's recommendation, the defendant Chancellor of the University at that time denied the plaintiff's application for tenure and promotion and refused to extend the plaintiff's probationary period. The Chancellor later terminated

Wigginton's employment in June 2014, effective May 10, 2015. The plaintiff appealed the Chancellor's decision denying him tenure to the Mississippi Board of Trustees of Institutions of Higher Learning (the "IHL Board"), which denied his request for review. The IHL Board later terminated the Chancellor's employment in March 2015.

The plaintiff filed the present action on June 11, 2015, and his amended complaint on October 26, 2015. He alleges violations of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, and 42 U.S.C. § 1983, seeking damages and declaratory and injunctive relief against the defendants for committing acts under color of state law with the intent of depriving him of constitutional and statutory rights; wrongfully discriminating against him on the basis of race, gender, and age; arbitrarily and capriciously denying him of property and liberty interests in violation of his due process rights; retaliating against him for his exercise of constitutionally protected speech in violation of the First Amendment; and state law claims including breach of the plaintiff's employment contract with the University.

The defendants subsequently moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) and on qualified immunity grounds. The court denied the motions. The defendants have now moved for summary judgment on all claims.

Having thoroughly reviewed the record, briefing, and applicable authority in this case, the court finds

the existence of genuine issues of material fact including, but not limited to, whether the defendants' proffered legitimate reason for the plaintiff's denial of tenure and promotion is pretext for discrimination, whether the defendants' decision to deny tenure and promotion to the plaintiff was arbitrary and capricious, and whether the individually named defendants retaliated against the plaintiff by denying his application for tenure and promotion because the plaintiff exercised his right to constitutionally protected speech of which the defendants were aware. The presence of genuine issues of material fact precludes summary judgment in this case.

Accordingly, it is **ORDERED AND ADJUDGED** that the defendants' motion for summary judgment should be and the same is hereby **DENIED**.

This, the 5th day of October, 2017.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

MICHAEL WIGGINTON, JR.	PLAINTIFF
V.	CIVIL ACTION NO. 3:15CV093-NBB-SAA
THE UNIVERSITY OF MISSISSIPPI; DAN JONES, Individually, and in his Official Capacity as Chancellor; MORRIS H. STOCKS, Individually, and in his Official Capacity as Provost; JOHN Z. KISS, Individually, and in his Official Capacity as Dean; VELMER BURTON, Individually, and in his Official Capacity as Dean; and ERIC LAMBERT, Individually, and in his Official Capacity as Department Chair	DEFENDANTS

MEMORANDUM OPINION

(Filed Sep. 30, 2016)

This cause comes before the court upon the defendants' motion to dismiss for failure to state a claim and motion to dismiss for lack of jurisdiction. Upon due consideration of the motions, responses, and applicable authority, the court is ready to rule.

Factual and Procedural Background

The plaintiff, Michael Wigginton, Jr., brings this civil action for violations of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, and 42 U.S.C. § 1983 seeking damages and injunctive relief against the defendants for allegedly committing acts under color of state law with the intent of depriving him of constitutional and statutory rights; wrongfully discriminating against him on the basis of race, color, sex, and age; arbitrarily and capriciously denying him of property and liberty interests; retaliating against him for his exercise of constitutionally protected speech in violation of the First Amendment; and state law claims including breach of the plaintiff's employment contract with the University of Mississippi.

Defendant University of Mississippi hired Wigginton in 2008 as a tenure-track assistant professor in the Department of Legal Studies in the School of Applied Sciences. Wigginton applied for tenure and promotion in 2013. Wigginton's application went through numerous levels of review, including the Department Promotion and Tenure Committee and an Advisory Committee to the Dean of the School, both of which recommended tenure based on a 5-2 majority vote and a 3-2 majority vote respectively. Defendant John Kiss, Dean of the Graduate School, Defendant Velmer Burton, Dean of the School of Applied Sciences, and Defendant Eric Lambert, Department Chair, however, all reviewed Wigginton's tenure application and recommended denial, contradicting the recommendations of

the aforementioned committees. These decisions were based in part on the discounting of the plaintiff's external reviewers. In March 2014, Defendant Provost Morris Stocks advised the plaintiff that he would not recommend him for tenure or promotion and that Wigginton had the right to appeal the denial.

The plaintiff appealed the University's decision to the University Tenure and Promotion Appeals Committee. After an April 14, 2014 hearing, the committee concluded that Defendant Lambert's prior positive reviews of Wigginton led him to expect a grant of tenure and promotion. The Appeals Committee held "that the discounting of the external reviewer letters was inappropriate since the reviews were selected through the University's own actions." The Appeals Committee concluded that the negative recommendation was arbitrary and capricious and recommended an extension of Wigginton's probationary period.

Despite the recommendation of the University's Tenure and Promotion Appeals Committee, Defendant Jones denied the plaintiff's application for tenure and promotion and refused to extend the plaintiff's probationary period. On June 17, 2014, Jones terminated Wigginton's employment effective May 10, 2015. Wigginton appealed Jones' decision to the Mississippi Board of Trustees of Institutions of Higher Learning (the "IHL Board") which denied his request for review on December 18, 2014. The IHL Board terminated Jones as Chancellor in March 2015.

The plaintiff filed the present action on June 11, 2015, and his amended complaint on October 26, 2015. The defendants subsequently filed their motion to dismiss for failure to state a claim and for qualified immunity and their motion to dismiss for lack of subject matter jurisdiction. The motions are fully briefed and ripe for review.

Standards of Review

12(b)(1) – Lack of Subject Matter Jurisdiction

"Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). The court properly dismisses a claim for lack of subject matter jurisdiction when it lacks the statutory or constitutional authority to adjudicate the claim. *Home Builders Ass'n, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming*, 281 F.3d at 161. "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.*

12(b)(6) – Failure to State a Claim

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232-33 (5th Cir. 2009). A court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff. *Id.* But the court is not bound to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

A legally sufficient complaint must establish more than a "sheer possibility" that the plaintiff's claim is true. *Id.* It need not contain detailed factual allegations, but it must go beyond labels, legal conclusions, or formulaic recitations of the elements of a cause of action. *Twombly*, 550 U.S. at 555. In other words, the face of the complaint must contain enough factual matter to raise a reasonable expectation that discovery will reveal evidence of each element of the plaintiff's claim. *Lormand*, 565 F.3d at 255-57. If there are insufficient factual allegations to raise a right to relief above the speculative level or if it is apparent from the face of the complaint that there is an insuperable bar to relief, the claim must be dismissed. *Twombly*, 550 U.S. at 555; *Jones v. Bock*, 549 U.S. 199, 215 (2007); *Carbe v. Lappin*, 492 F.3d 325, 328 & n.9 (5th Cir. 2007).

Qualified Immunity

Qualified immunity protects a defendant acting under color of state law "insofar as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). The court is to apply a two-step analysis, now discretionary, to determine whether a government official is entitled to qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). "First, the plaintiff must show that he suffered a constitutional violation, and then [the court] must determine whether the action causing the violation was objectively unreasonable in light of clearly established law at the time of the conduct." *Lacy v. Shaw*, 357 Fed. App'x 607, 609 (5th Cir. 2009) (citing *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007)). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Analysis

It is axiomatic that "absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). This bar also applies when state officials are sued for damages in their official capacity because "a judgment against a public servant in his official capacity imposes liability on the entity that he represents." *Id.* It is well settled

that Mississippi's state universities are arms of the State and, as such, are immune from suit under the Eleventh Amendment unless an exception applies. *See Yul Chu v. Miss. State Univ.*, 901 F. Supp. 2d 761, 772 (N.D. Miss. 2012). The state's immunity can be overcome in an injunctive or declaratory action grounded on federal law by naming state officials as defendants. *Graham*, 473 U.S. at 170, n.18 (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *Ex parte Young*, 209 U.S. 123 (1908)). The *Ex Parte Young* exception to Eleventh Amendment immunity allows the plaintiff's Section 1983 claims for prospective injunctive relief to proceed against the individually named defendants in their official capacities. *Yul Chu*, 901 F. Supp. 2d at 775. For this reason, the court finds that, while the plaintiff cannot recover monetary damages from the University for any claims falling under Section 1983, he has sufficiently stated claims for injunctive and declaratory relief that are plausible on their face and therefore survive this stage of the litigation. This includes the plaintiff's claims under the Age Discrimination in Employment Act.

The plaintiff's Title VII claims survive because the plaintiff has alleged sufficient factual matter which the court must accept as true showing that the defendants may be liable for the conduct alleged. Further, Title VII expressly authorizes suits against the states and thereby abrogates Eleventh Amendment immunity. *Carpenter v. Miss. Valley State Univ.*, 807 F. Supp. 2d 579, 585 (N.D. Miss. 2011) (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)).

Taking the plaintiff's allegations as true at this stage and drawing all reasonable inferences in favor of the plaintiff from those allegations, the court finds that the individual defendants are not entitled to qualified immunity. The court is satisfied that the plaintiff has alleged sufficient factual matter to meet the requirements of *Harlow*, *supra*, and its progeny as well as *Lormand* and *Iqbal*, *supra*.

Conclusion

For the foregoing reasons, the court finds that the defendants' motions to dismiss and for qualified immunity are not well taken and should be denied. A separate order in accord with this opinion shall issue this day.

This, the 30th day of September, 2016.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

MICHAEL WIGGINTON, JR.	PLAINTIFF
V.	CIVIL ACTION NO. 3:15CV093-NBB-SAA
THE UNIVERSITY OF MISSISSIPPI; DAN JONES, Individually, and in his Official Capacity as Chancellor; MORRIS H. STOCKS, Individually, and in his Official Capacity as Provost; JOHN Z. KISS, Individually, and in his Official Capacity as Dean; VELMER BURTON, Individually, and in his Official Capacity as Dean; and ERIC LAMBERT, Individually, and in his Official Capacity as Department Chair	DEFENDANTS

ORDER DENYING MOTIONS TO DISMISS

(Filed Sep. 30, 2016)

In accordance with the memorandum opinion issued this day, it is **ORDERED AND ADJUDGED** that the defendants' motion to dismiss for lack of subject matter jurisdiction and motion to dismiss for failure to state a claim, including the motion for qualified immunity of the individual defendants, are **DENIED**.

This, the 30th day of September, 2016.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE