No. 22-34

IN THE
SUPREME COURT OF THE UNITED STATES

WEI-PING ZENG

Petitioner,

v.

MARSHALL UNIVERSITY; JEROME A. GILBERT; JOSEPH SHAPIRO; W. ELAINE HARDMAN; DONALD A. PRIMERANO; RICHARD EGLETON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX (PAGES 1-112)

WEI-PING ZENG
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PRO SE PETITIONER

(a) QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts have departed from the accepted and usual course of judicial proceedings by refusing to provide Petitioner the record on appeal (ROA), and this Court should exercise its supervisory power to order the lower courts to comply with Federal Rules of Appellate Procedure (FRAP).

2. Whether this Court should provide more definite guidelines to balance a court's responsibility to determine discrimination by blatant disparate treatments of employees and avoidance to sit as a "super personnel department".

3. Whether an unauthorized warning of potential termination of employment instead of the termination itself is the adverse employment action for the purpose of determining unlawful retaliation.

(b) LISTS OF ALL PARTIES AND PROCEEDINGS

Parties

The caption of the case contains the names of all parties. Respondents were represented by counsels Brian D. Morrison and Eric D. Salyers.

Proceedings

Wei-ping Zeng v. Marshall University; Jerome A. Gilbert; Joseph Shapiro; W. Elaine Hardman; Donald A. Primerano; Richard Egleton. The U.S. District Court for Southern West Virginia in Huntington. Docket No. 3:17-CV-03008. Date of Judgment: March 26, 2020.

Wei-ping Zeng v. Marshall University; Jerome A. Gilbert; Joseph Shapiro; W. Elaine Hardman; Donald A. Primerano; Richard Egleton. The U.S. Court of Appeals for the Fourth Circuit. Docket No. 20-1481. Date of Judgment: January 11, 2022.

Wei-ping Zeng v. Marshall University; Jerome A. Gilbert; Joseph Shapiro; W. Elaine Hardman; Donald A. Primerano; Richard Egleton. The U.S. Court of Appeals for the Fourth Circuit. (Petition for panel and en banc rehearing). Docket No. 20-1481. Date of Decision: February 8, 2022. Date of Judgment: February 16, 2022.

(c) TABLES OF CONTENTS AND AUTHORITIES

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(d) CITATION TO OPINION BELOW

The Fourth Circuit Court's opinion is not published.

(e) BASIS FOR JURISDICTION

The 4th Circuit Court entered orders denying Petitioner's appeal on Jan 11, 2022, and denying panel and *en banc* rehearing on Feb 8, 2022. This Court has jurisdiction to review the 4th Circuit Court's final judgment under 28 U.S.C. §1254.

(f) STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

> 42 U.S.C. §1981(a). "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other".

42 U.S.C. §1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".

42 U.S.C. §2000e–2(a). "It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin".

42 U.S.C. §2000e–3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

14th Amendment to U.S. Constitution, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

(g) STATEMENT OF THE CASE

Factual background

Petitioner is an accomplished Immunologist known for his discovery of the master regulator of allergy and immunity against worm infections. (Exh. Z48 pp1-2) [1]. In 2009, Respondent Marshall University (the university) recruited Petitioner as a tenure-track associate professor in the basic science Department of Biochemistry and Microbiology of the Medical School to succeed Dr. Susan Jackman to teach Immunology in anticipation of Jackman's retirement. (Exh. Z85 ¶¶3, 5). Petitioner is a naturalized U.S. citizen of Chinese origin.

Tenure-track faculty had 7 years of probationary period, and had to apply for tenure by

[1] The District Court refused to provide Petitioner the Record on Appeal. As a result, Petitioner has to cite exhibits in this petition as in the District Court proceedings.

the penultimate year. The School of Medicine Promotion & Tenure Regulations (P&T Regs) required a faculty member to demonstrate "excellence in either teaching or research" for tenure. (Exh. Z8 pp4,7). The quality or "excellence" of medical teaching was determined by the students' evaluation scores and teaching load, whereas there was no formal mechanism of evaluating the quality of graduate teaching. (Exhs. Z4 p22; Z25 p388). Research performance was judged by "evidence of establishment/continuation of research/scholarly program substantiated by publications in peer review journals." (Exh Z8 p4). In 2015, the School of Medicine also officially recognized the journal "impact factors" of the publications as a determinant of research performance. (Exh. Z39). In addition to the standard requirements stipulated in the P&T Regs, the department chair could impose

department-specific tenure requirements but only in writing at the time of hiring. (Exh. Z9 p2). The chair did not propose department specific tenure requirements for Petitioner at the time of hiring. (Exhs. Z6 pp1-2, Z85 ¶11).

Petitioner started his employment with the university on September 1, 2009 instead of the usual July 1 of the beginning of an academic year, and was not provided a lab. Dr. Niles, the department chair and medical school associate dean at the time, told Petitioner in multiple occasions and confirmed in writing that the clock of Petitioner's position would not start until Petitioner's lab was set up. (Exh. Z57) Petitioner was finally provided a lab in February 2010. (Exh. Z29 p1). In 2011, the Petitioner's department hired 2 more faculty members Drs. Koc and Denvir as tenure-track associate and assistant professors, respectively, (Exh. Z6), both of who are

Caucasian, Koc of Turkish and Denvir of British origins. (Exh. Z3 pp2-3).

In 2012, the departmental Promotion and Tenure Committee (DPTC) conducted a mid-tenure review on Petitioner and stated that it was mandatory for Petitioner to obtain external research funding. (Exh. Z11 p2). However, external research funding was not a standard requirement for tenure. (Exh. Z8 p4). Therefore, in response to the DPTC's statement, Petitioner commented that he would continue to seek external research funding, (Exh. Z11 p6), which was a polite way to say that Petitioner did not agree to it as a potential tenure requirement. (Exh. Z10 p672 lns11-14).

At the end of 2013, Petitioner learned that the department had asked Koc to submit and approved her tenure application. (Exh. Z10 p680). Since Petitioner was hired earlier than Koc, Petitioner

asked the department whether he could also apply for tenure. Chair Niles and future Interim Chair Primerano recommended that the DPTC conducted a preliminary review. (Exh. Z10 p681). In the DPTC's summary of the preliminary review dated March 31, 2014, the DPTC stated that for consideration for tenure Petitioner must achieve teaching score of 4 and it was mandatory to obtain independent external research funding (i.e. being the principal investigator of grant award). (Exh. Z25 pp197-8). In October 2014, Denvir applied for tenure, and the department also approved his application. (Exh. Z17 pp7-8).

In 2014 Petitioner did not have much information regarding the requirements and credentials for tenure of other faculty members. Such information was later discovered in the legal proceedings. With regard to teaching, the department recognized that faculty members

typically had difficulty in medical teaching in the early years but expected them to eventually achieve score of 4. (Exhs. Z4 p22; Z25 p388). However, in practice, the average score of basic science faculty was below 4. (Exhs. Z4 pp30-31; Z15 p3; Z37 pp271, 273, 275)[2]. In fact, Chair Niles considered Koc's teaching of 3.69 as at the departmental average, and reviewers of her tenure application rated her teaching as "outstanding" (the highest). (Exh. Z4 p29-30). Dr. Egelton, the primary reviewer of Petitioner's tenure application on the Medical School Personnel Advisory Committee (PAC), received

[2] A course was taught by faculty from various basic science and clinical departments. Interim Chair Primerano testified that he was unclear how the "Dept/Div Average" on the student evaluation form was determined, and indicated it might be the average of all faculty teaching the course instead of the true departmental average. (Exh. Z10 p524 lns1-6).

excellent rating of teaching for scores in the low 3s. (Exh Z37 pp3, 271-275). As for research, neither Koc nor Denvir had external research funding, but nonetheless were rated as outstanding and excellent, respectively. (Exhs. Z4 pp2-3,8; Z5 pp56-7,14). The discovery in the grievance process also revealed that Petitioner's hiring salary ($75K) was much lower than Koc's ($87K) and Denvir's ($100K), (Exh. Z6 pp1, 3, 6), although Petitioner had more years of experience. (Exh. Z27 pp2, 8, 16). The pay disparities remained throughout Petitioner's employment. (3:17-CV-03008 ECF 343-3).

State rule Title 133 Series 9 (Title133-9) in the faculty handbook provided that the latest time a tenure-track faculty member could apply for tenure was in the 6th academic year of his or her probationary period. (Exh. Z61 §10.3). Accordingly, if Petitioner had started his employment normally on

July 1, 2009 and had not had delay of lab assignment his last chance to apply for tenure would be in the Fall of 2014. Given the fact that the department had promised to reset the start of Petitioner's position to the time after his lab was set up (in Feb 2010) and the negative outcome of the DPTC's preliminary review, upon suggestion by Niles and Primerano, on Aug 1, 2014 Petitioner wrote to the new Medical School dean Dr. Shapiro to request that Petitioner be allowed to apply for tenure in 2015. Petitioner cited the delay of lab assignment as the primary reason for his request. (Exh. Z53). A week later, Shapiro approved the request without condition attached. (Exh. Z98).

Title 133-9 also provided that only the university president or his designee was authorized to make decision on faculty retention, and non-tenured faculty must be offered a one-year terminal

contract after tenure denial. (Exh. Z61 §§10.3, 10.6, 17.2.6). Contrary to these policy provisions, without authorization from the university president and prior discussion with Petitioner, on March 24, 2015 Shapiro and Primerano wrote a letter to Petitioner stating that "in the event that tenure is not approved your contract would expire on June 30[sic] 2016". (Exh. Z66). This meant that Petitioner would not have a terminal contract if tenure were denied. Unlike professionals in industry, professors in academia do not get severance package for involuntary discharge. A one-year terminal contract is the only thing that provides some degree of financial and career cushion.

Unknown to Petitioner at the time, Dr. Jackman submitted her retirement in February 2015 after finishing her teaching in Fall 2014 for the 2014-15 academic year. (Exh. Z25 p536). However,

although by then Petitioner had achieved score above 4 in his medical teaching including Immunology in the previous two academic years, (Exh. Z26 pp1-5, 27)[3], without Petitioner's knowledge the department and school assigned Jackman's Immunology teaching to Dr. Gullo for the 2015-16 academic year. Gullo is self-described White and Hispanic American. (Exh. Z3 p1). He was hired in October 2014 as an administrator, and his original job description did not include teaching. (Exh. Z80). Gullo taught in Fall 2015 and received teaching score of 2.51, whereas Petitioner's score in the same course at the same time was 4.48. (Exh. Z72 pp1-15). However, Gullo was retained to teach Immunology in 2016 whereas Petitioner was dismissed. Gullo received

[3] Petitioner taught in 3 medical courses. Immunology was part of the Principles of Disease course.

teaching score of 3.10 in 2016-2017 academic year, after which he left the university. (Exh. Z72 pp16-28) Since then, the Medical School had not been able to recruit an Immunology professor and had to rely on a guest lecturer while this case was being adjudicated. (Exh. Z73).

In October 2015, Petitioner submitted his tenure application. By this time, he had achieved teaching score of above 4 for his medical teaching for 3 consecutive academic years with the latest score of 4.48. (Exh. Z26 pp1-7, 27). His medical teaching load was around 17 hours per year. (Exhs. Z19; Z26 p26; Z10 p593). Petitioner's graduate teaching load was about 20 hours per year. (Exhs. Z2 pp47, 57, 68, 75; Z25 p306; 3:17-CV-03008 ECF 332 p6). The reviewers of the tenure application rated Petitioner's teaching as satisfactory or good. (Exhs. Z7; Z15; Z35) Evidence discovered in the legal proceedings showed

that Koc and Denvir received outstanding and excellent ratings in teaching, respectively. (Id.). Koc had 11 hours of medical teaching load and score of 3.69; Denvir had 2 hours and score of 4.32. (Exh. Z26). Koc's graduate teaching load was about 13 hours, (Exh. Z27 p12), and Denvir's about 14 hours (Exh. 15 p6).

Research performance was judged by the establishment/continuation of a faculty member's research program, which must be demonstrated by the number and quality of research articles in which the faculty member is the corresponding and/or first author and affiliated with the university. Petitioner published 3 or 4 research articles as corresponding and first author affiliated with the university[4] ; Koc

[4] The DPTC was reluctant to count one of the articles because most of the research was done in the Petitioner's previous institution even though it was published after Petitioner joined

published 0.5 such article[5]; Denvir publish no first or corresponding author articles. (Exhs. Z4 p47; Z25 pp62-71; Z27; Z40 p35;). The quality/importance of the publication is generally assessed by impact factor The total impact factor of Petitioner's first and corresponding author research articles was 23.253, one of the articles had an impact factor of 11.476 and was published in the No. 1 journal in field of Allergy and Clinical Immunology. (Exhs. Z29; Z40 p35). This was the best publication by the Medical School since Petitioner joined its faculty. (Exhs Z29 p1; Z10 p631 ln15-21). Koc's only research article was published in a new journal that did not have an impact factor at the time of her publication and tenure application.

Marshall University (MU) and affiliated with both MU and the previous institution.

[5] Koc is a joint corresponding author of the article, therefore her lab deserves half of the credit.

(Exh. Z40 pp26-30). Reviewers of tenure applications rated Petitioner's research as poor or satisfactory, Koc's as outstanding, and Denvir's as excellent. (Exhs. Z15 pp2, 6; Z35 pp2, 4, 8; Z7 p2). While the DPTC, chair, PAC and dean recommended tenure for Koc and Denvir, they recommended denial of tenure for Petitioner. (Exhs. Z7, Z15, Z35).

On Feb 22, 2016, Petitioner had a meeting with the medical school dean Shapiro upon Shapiro's suggestion. (Exh. Z65). In the meeting Shapiro told Petitioner that if Petitioner would not "make a fuss" about the denial of tenure, Petitioner could have employment until June 2017, (i.e., equivalent of a one-year contract), otherwise Petitioner's employment would end on June 30, 2016 as stated in the March 24, 2015 letter. (Exh. Z10 pp107, 769-70). Undeterred, Petitioner filed Intake Questionnaire with the Equal Employment Opportunity

Commission (EEOC) on March 21, 2016, (Exh Z67), and one month later, filed formal charges of discrimination and retaliation. (Exh Z10 pp770 – 771).

On April 30, 2016, President Gilbert made the final decision to deny Petitioner tenure, but did not terminate or set a date of termination of Petitioner's employment. (Exh. Z18). On May 5, 2016, a university counsel sent an email to Petitioner, stating that if Petitioner withdrew the EEOC charges, waived the right to file grievance, and brought no further claims against the university, the university was willing to extend Petitioner's employment to February 1, 2017. (Exh. Z70 p2). On May 17, 2016, Petitioner filed grievance with the West Virginia Public Employee Grievance Board (WV-PEGB), requesting "reversal of decision of denying tenure" and "removal of threat of early

termination of employment". (Exh. Z68). On June 29 2016, Interim Chair Primerano wrote and handed a letter stating that Petitioner employment would be terminated the next day June 30, 2016. (Exh. Z63). Primerano testified that he wrote the letter "with authority from Dean Shapiro and the President's office". (3:17-CV-03008 ECF 343-18 ¶25). Based on this letter, the Human Resources terminated Petitioner's employment effective June 30, 2016. (Exh. Z64).

Federal jurisdiction in the court of first instance

The U.S. District Court for the Southern District of West Virginia in Huntington (the District Court) has jurisdiction over this case pursuant to 28 U.S.C. § 1331 as this case involves federal questions, and the District Court has jurisdiction over all civil actions arising under the Constitution, laws, and

treaties of the United States. The District Court has jurisdiction over this case pursuant to 28 U.S.C. §1343, which gives the District Courts original jurisdiction of any civil action authorized by law to be commenced by any person. The District Court has supplemental jurisdiction over this case on claims arising under state laws pursuant to 28 U.S.C. §1367(a).

Judicial history

After attempting to find a solution to no avail, on May 23, 2017 right before the expiration of statute of limitations, Petitioner filed suite (Civil Case No. 3:17-3008) in the District Court, alleging employment discrimination, retaliation and due process violation pursuant to 42 U.S.C. §§1981, 2000 et seq., U.S. Constitution 14th Amendment, West Virginia Constitution and Human Rights Act. (3:17-CV-03008 ECF 2). On March 26, 2020, the District

Court entered order granting summary judgment on all counts to Respondents. (Appendix p111). On April 23, 2020, Petitioner filed Notice of Appeal from the District Court's decision to the U.S. Court of Appeals for the Fourth Circuit (the Circuit Court). (Docket No. 20-1481 Doc. 1). Normally the Circuit Court assigns a court-appointed counsel to a pro se case, but did not do so in this case. On June 8, 2020 Petitioner filed the final informal brief pro se. (20-1481 Doc. 22-1). However, despite repeated requests from Petitioner, the District Court refused to provide Petitioner the Record on Appeal (ROA). As a result, Petitioner moved the Circuit Court to provide or order the District Court to provide Petitioner the ROA. (20-1481 Doc. 15). On Jan 11, 2022, the Circuit Court affirmed the district's decision without specific explanation regarding the merit of the case, and in the same order denied Petitioner's motion for ROA.

(Appendix pp2-3). Petitioner filed petition for panel and en banc rehearing. On Feb 8, 2022, the Circuit Court denied the petition, (Appendix p395), from which Petitioner now appeals to this Court.

(h) REASONS FOR ALLOWANCE OF THE WRIT

1. Whether the lower courts have departed from the accepted and usual course of judicial proceedings by refusing to provide Petitioner the record on appeal (ROA), and this Court should exercise its supervisory power to order the lower courts to comply with Federal Rules of Appellate Procedure (FRAP).

FRAP 10(e) affords parties the opportunity to examine, correct and modify the ROA:

> "(1) If any difference arises about whether the record truly discloses what occurred in the District Court, the difference must be submitted to and settled by that court and the record conformed accordingly.
> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a

> supplemental record may be certified and forwarded". (FRAP 10(e)).

In this case, the opportunity for the parties to examine the ROA is particularly important because the District Court granted Respondents motion to extensively seal a large number of exhibits although most if not all of them are public record because the university is an arm of the state. (3:17-CV-03008 ECF 350). As a result, these exhibits could not even be retrieved from Pacer. However, despite Petitioner's repeated requests by phone and in writing, (3:17-CV-03008 ECF 441), the District Court refused to provide Petitioner the ROA. Therefore, Petitioner filed motion to request that the Circuit Court provide or order the District Court to provide Petitioner the ROA, but the motion was denied. (Appendix pp1-3). Without examination of the ROA and potentially necessary corrections and

modifications thereof, the Circuit Court's decision could have been skewed by misinformation or the omission of material evidence, which compromised Petitioner's right to equal protection by law.

2. Whether this Court should provide more definite guidelines to balance a court's responsibility to determine discrimination by blatant disparate treatments of employees and avoidance to sit as a "super personnel department".

In this case, Petitioner alleged that Respondents discriminated against him because of his race and/or national origin with regard to tenure, pay and employment privilege.

In 1972, Congress eliminated the exemption of higher educational institutions from Title VII Civil Rights Act. *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990). As such, legal analysis of claims of employment discrimination against a university and its agents must follow the same legal standards as

those applied to other employers. Thus, when an employer had proffered a nondiscriminatory reason for its employment action, unlawful discrimination is ultimately determined by whether the proffered reason is pretext. Pretext can be demonstrated by disparate treatments of the employees. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, a competing legal standard calls for courts not to sit as "super personnel department" to second-guess employers' business decisions. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321 (10th Cir. 1999). Currently, there is no uniform guidance as to how to strike a balance between these two competing legal standards. Some circuits have decided cases with more emphasis on disparate treatments and treated employer's opinion inconsistent with objective evidence as indication of pretext, e.g., *Byrnie v. Town*

of Cromwell, Bd. Of Educ., 243 F.3d 93 (2nd Cir. 2001). Others have emphasized deference to employer's opinion, e.g., *Scott v. University of Mississippi,* 148 F.3d 493 (5th Cir. 1998). Petitioner would like to take the liberty to urge this Court to use the instant case as an opportunity to provide more clear guidance for the application of these two competing legal standards.

In this case, the lower courts took an extreme stance, rejecting evidence of blatant disparate treatments and giving essentially unconditional deference to Respondents' employment decisions for the sake of not becoming "super personnel council". (Appendix p81).

For review by this Court, Petitioner herein summarizes evidence that shows how Petitioner was treated unfavorably as compared with his colleagues of the majority race, and argues that in the face of

such overwhelmingly striking evidence no reasonable jury could deny that Respondents had intentionally discriminated against Petitioner because of his race and/or national origin.

(A) Denial of tenure. In the recommendation letters included in the dossier of Petitioner's tenure application, Petitioner's colleagues described him as collaborative, friendly, hard working and dedicated to serving the university (Exh. Z7 pp99-102). Respondents' sole proffered reason for denying Petitioner tenure was that Petitioner failed to demonstrate excellence in either teaching or research as the P&T Regs required excellence in either area for tenure. (Exhs. Z7; Z15; Z35; Z8 pp4,7). Petitioner argues that the proffered reason was pretext because Respondents used double standards to evaluate Petitioner's job performances, and objective evidence showed that Petitioner's

performances in both teaching and research were much better than or at least comparable to those of his colleagues Koc and Denvir who were awarded tenure. The comparisons and evaluations of the job performances of Petitioner, Koc and Denvir were summarized in 2 tables in (3:17-CV-03008 ECF 332), (Appendix pp397-400; 404-5), those of which concerning the primary criteria for evaluating teaching and research are further described below.

Evaluation of job performances

As a preliminary matter, Petitioner prepared his tenure application together with and according to the instructions of Interim Chair Primerano. (Exhs. Z10 p479lns 22-24, pp498-9; Z85 ¶¶50-2). The comparative data were derived from Petitioner's tenure application and those of Koc's and Denvir's, and the Respondents' reviews of the applications, as well as the medical school curriculum maps that

reviewers particularly Dean Shapiro had used. (Exh. Z7 p2)[6].

Evaluation of teaching. For medical teaching, Petitioner taught 3 courses, whereas Koc and Denivr each taught 1 course. (Exh. Z26). The quality of medical teaching was judged by student evaluation scores. The department recognized that all faculty had difficulty in early years, but expected them to eventually achieve score of 4 or above. (Exhs Z4 p22, Z25 p388). However, in practice basic science faculty's average was below 4.0. (Exhs. Z4 pp30-31; Z15 p3; Z37 pp271, 273, 275; Z14). In fact,

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[6] The school maintained curriculum maps for medical students. Faculty member's medical teaching loads were derived from the maps and the web links embedded in the maps, as well as the faculty reports in the tenure application packets. There were no curriculum maps for graduate students. Graduate teaching loads were derived from the faculty reports.

the chair considered Koc's score of 3.69 to be at departmental average, (Exh. Z15 p3), but Koc received outstanding rating in teaching, (Exh Z35 p4) Similarly, the PAC primary reviewer of Petitioner's application Dr. Egleton received excellent rating in teaching for scores only in the low 3s. (Exh. Z37 pp3, 271-275). In contrast, by the time of his tenure application, Petitioner had achieved scores above 4 for three consecutive academic years, with the latest score of 4.48. (Exhs. Z26 pp1-7, 27; Z2 p2). Given that Koc's score of 3.69 was considered to be at the departmental average and Petitioner was the only untenured tenure-track professor, (Exh. Z14 p2), Petitioner apparently had achieved teaching proficiency above the average of tenured professors. However, Respondents rated Petitioner's teaching only as satisfactory or good. (Exhs. Z15 p2, Z7 p2, Z35 p2).

Another factor of primary consideration in teaching performance was teaching load. However, objective comparison of teaching loads could not explain why Petitioner received lower rating either. Petitioner's medical teaching load was around 17 hours per year since 2012-13 academic year. (Exhs. Z2 p75; Z10 p607 lns 6-11; Z85 ¶21). Koc's medical teaching load was 11 hours, and Denvir's was merely 2 hours, (Exh. Z15 pp3, 6). For graduate teaching loads, Petitioner had on average about 20 hours per year, (Exhs. Z2 pp47, 57, 68, 75; Z25 p306; 3:17-CV-03008 ECF 332 p6); Koc 15.5 hours and Denvir about 14 hours, (Exhs. Z4 p9, Z15 p6)[7]. Dean Shapiro miscalculated Petitioner's medical teaching load as 11 hours, and accused Petitioner of having low

[7] Two hours were assigned to each active/independent learning modality although the actual student contact time was more. (Exh. Z10 p842 lns 16-24).

medical teaching load. (Exh. Z7 p2). However, even 11 hours was the same as Koc's and much more than Denvir's, and all three individuals had similar effort allocations to teaching, research and service. (Exhs. Z2 pp92; Z7 p3; Z17 p2; Z4 pp2, 20, 37; Z5 pp27, 29, 54). Thus, a reasonable jury could easily find Shapiro's comment of low teaching load as a clumsy pretext of his discriminatory intent towards Petitioner. In other teaching activities Petitioner also compared favorably with Koc or Denvir. (Appendix pp397-400).

Evaluation of research. The first disparate treatment that had an overarching effect on the evaluation of Petitioner's research performance was that in 2014 the DPTC imposed a "mandatory" requirement of independent external research funding, (Exh. Z11 p2), which was followed through in the review of Petitioner's tenure application, (Exh.

Z15 p1, Z16, Z7 p2). Employees must meet employer's legitimate expectation of job performance. *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007); *Duke v. Uniroyal Inc.*, 928 F.2d 1413 (4th Cir. 1991). However, the said funding requirement was not a legitimate expectation for a number of reasons. First, as Respondents self described, the university is a primarily teaching but not research university, (3:17-CV-03008 ECF 67 p16), its formal policy the P&T Regs did not require research funding for tenure. (Exh. Z8, pp4, 7). Although the department could impose department-specific requirements, the DPTC did not have the authority to do so. It was the chair that had such authority, and he had to do so in writing at the time of hiring. (Exh. Z9 p2). The chair did not impose any specific tenure requirements for Petitioner at the time of hiring in writing or otherwise. (Exhs. Z6 pp1-2, Z85

¶11). Second, this requirement contradicted the standard requirement of excellence in only teaching or research but not both for tenure, (Exh. Z8, pp4, 7), because it would exclude those who were excellent only in teaching for tenure. Finally and importantly, both Koc and Denvir were not required to have external research funding, and they were awarded tenure without it. (Exhs. Z4 pp2-3,8; Z5 pp56-7,14)[8].

The legitimate expectation for research was the "establishment/continuation of research/scholarly program substantiated by publications in peer review journals", which in practice had to be judged the number and importance of research articles in which the faculty member was the first or corresponding

[8] Denvir was on the payroll of the infrastructure grant WV-INBRE earmarked for and awarded to a network of universities and colleges in West Virginia before Denvir was hired. (Exh. Z6 p6).

author and affiliated with the university. (Exh. Z8 p4). By this standard, Petitioner compared much favorably with Koc or Denvir. Petitioner published 3 or 4 (see footnote 4) first and corresponding author research articles affiliated with the university; Koc could claim half of the credit of the only research article she published as a co-corresponding author affiliated with the university; Denvir published no first or corresponding author articles of any kind. (Exhs. Z4 p47; Z25 pp62-71; Z27; Z40 p35). Reviewers must also take into consideration of the importance of the publications. (Exh. Z62 §3.5.1). In this regard, in 2015 the Medical School had officially recognized impact factor as a measurement of the importance of publication. (Exh. Z39). Petitioner had a total impact factor of 23.253 of his first and corresponding author research articles; one of the articles had an impact factor of 11.476, and was

published in the No. 1 journal in the field of Allergy and Clinical Immunology, and was the best publication of the Medical School since Petitioner joined its faculty. (Exhs. Z29, Z40 p35, Z10 p631 ln15-21). Koc's only research article was published in a new journal that did not have an impact factor at the time of her publication and tenure application. (Exh. Z40 pp26-30). For basic scientists, meeting participation is a way of facilitating research, but by itself is not a measure of research productivity as Dr. Hardman testified "what you see on posters at national meetings often never see the light of day anyplace else", and "we are not evaluating your presentation for research productivity" (Exh Z10, at p314 ln10-17). Nonetheless, Petitioner's meeting participations were comparable to those of Koc's or Denvir's. (Appendix p405). However, Petitioner received poor or satisfactory rating in research,

whereas Koc received outstanding and Denvir excellent rating, respectively. (Appendix p405; Exhs. Z15 pp2, 6; Z7 p2; Z35 pp2, 4, 8).

(B) Pay disparity. Discovery during the grievance process revealed that while Respondent Marshall University apparently wanted Petitioner to do more, in the meantime it paid Petitioner much less than Koc or Denvir. Respondent offered Petitioner annual salary of $75K, whereas offered Koc $87K and Denvir $100K. (Exh. Z6 pp1, 3, 6). The disparity was even greater if taken into consideration that at the times of hiring Petitioner had over 10 years of experience as a professor, Koc had 8 years and Denvir 7 years. (Exh. Z27 pp2, 8, 16) Moreover, Petitioner was paid almost 13% less than what he earned previously, whereas Koc and Denvir received 23.6% and 20.3% raise, respectively. (Exhs. Z60 p1, Z59 p2, Z58 p78). When Petitioner

questioned about his low salary, he was misled to believe that was the West Virginia standard. (Exh. Z85 ¶¶7-8).

Respondent initially denied that Petitioner was paid unfavorably because several Caucasian faculty members were paid similarly to or somewhat less than Petitioner. (3:17-CV-03008 ECF 344 pp18-9). However, all those other faculty members were hired as assistant professors; whereas Petitioner was hired as and in fact had already been an associate professor before the hire. (3:17-CV-03008 ECF 418 pp26-7). Although Delidow was an associate professor at 2009, she was hired as an assistant professor in 1993, her salaries in 2009-2016 were irrelevant because the pay discrimination against Petitioner was about the hiring salary. How much Dr Delidow earned in 2009 to 2016 could not show that she was hired below market value and received

significant salary cut as Petitioner did. The fact is that Petitioner was the only one who was hired with lower salary than he had earned before. Further, even if arguendo Delidow was also mistreated by Respondent, it did not make it right to mistreat Petitioner.

After the initial denial of the mistreatment, Respondent later proffered a reason for the pay disparity claiming that salaries were determined by market values of skilled workers, Koc and Denvir were paid differently then Petitioner because they were not Immunologists but Biochemist and Bioinformatician, respectively. (3:17-CV-03008 ECF 363 pp2-3). Thus, the Respondent was essentially claiming that Petitioner was paid less because market value of Immunologist was lower than Biochemist or Bioinformatician. However, contrary to this claim, market values of associate professors of

Immunology, Biochemistry, and assistant professors of Bioinformatics were consistently similar in the medical schools of the tri-state region of West Virginia, Ohio and Kentucky from 2009 to 2018. (3:17-CV-03008 ECF 418 p30; Exhs. Z6 pp1, 3, 6; Z102 p32; Z105 p64; Z106 p64). In fact, it was more difficult for Respondent to recruit an Immunologist than a Biochemist or Bioinformatician. While Respondent had to conduct 2 rounds of searches to hire Petitioner, it conducted only 1 round each to hire Koc or Denvir. (Exh. Z103 ¶4). After Respondent dismissed Petitioner and Gullo left the university, Respondent advertised the opening for an Immunologist's position but was not able to fill the position at least as late as the motion for summary judgment was being adjudicated in 2020. (Exh. Z103 ¶5).

Nonetheless, the District Court accepted Respondent's argument, citing *Spencer v. Virginia State University*, 919 F.3d 199 (4th Cir. 2019). (Appendix pp56. 87). Petitioner respectfully argues that *Spencer* is inapposite to this case because the *Spencer* court found that in that case the comparators' higher salaries were based on their positions as university executives but not because the market values of their academic specialties were higher. Id. In this case, the salaries of Petitioner, Koc and Denvir were based solely on their academic positions.

(C) Deprivation of employment privilege.

Petitioner was hired to succeed Dr. Jackman to teach Immunology in anticipation of Jackman's retirement. Therefore, even after Petitioner was denied tenure, he could still continue to teach Immunology as a professor without tenure. However, when Jackman

retired in 2015, Respondent gave Jackman's teaching assignments to Dr. Gullo who was hired in October 2014, and his original job description included no teaching responsibility. (Exh. Z80).

Again, Respondent first tried to deny that Petitioner had the privilege to take over Jackman's teaching responsibility by stating that Petitioner did not request to teach Jackman's lectures upon her retirement. (3:17-CV-03008 ECF 363 p9). Respondent's statement is misleading because Petitioner was hired to succeed Jackman to teach Immunology therefore he did not have to request; besides, Petitioner was not informed of Jackman's retirement; when he accidently learned about it, Respondent had already asked Gullo to teach Jackman's lectures. (Exh. Z10 p751).

Respondent also proffered two reasons why it did not gave Jackman's lectures to Petitioner. One

was that it would exceed Petitioner's effort allocation to teaching ("increase his teaching by more than 1,000%"), and the other was that it worried that Petitioner could not give effective or excellent performance in teaching. (3:17-CV-03008 ECF 363 pp9-10). The first proffered reason was false and apparently intended to mislead the court. Respondent included Jackman's administrative activities in its calculation and lowballed Petitioner's medical Immunology teaching load as only 3 hours. (3:17-CV-03008 ECF 363 pp9-10). The facts were that Jackman's teaching load that Gullo picked up in the 2015-16 academic year was 15.5 hours, (Z24 pp229-71), whereas Petitioner's medical teaching load was 17 hours among which 11 hours was Immunology teaching. (Exhs. Z24 pp229-71, 500-40;

Z23; Z20)[9]. Therefore, adding Jackman's teaching would increase Petitioner's effort allocation to teaching from about 25% to 48%. It should also be noted that a faculty member's effort allocations varied from year to year (Exh. Z2pp13-5). If effort for teaching increased, efforts for research and service decreased. In fact, Jackman had no research before she retired.

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[9] Notice that 2 of Petitioner's active/independent learning sessions, "Antigen Receptor Homework" and "Case-based Learning-Cancer Immune Therapy", did not need classroom assignments, but Petitioner still needed to interact with students. (Exh. Z10 pp606-7). Hardman testified that usually 2 hours were credited to one such active learning session. (Exh. Z10 p843). Since Fall 2013, Petitioner had been teaching the same or similar subjects of medical Immunology and Microbiology. (Exh. Z85 ¶21).

Respondent's second proffered reason was not credible either. It was true that in Petitioner's faculty report of the 2012-13 academic year, the chair made the comment of "needs improvement" of teaching. However, in the same year Koc received the same comment but was recommended for tenure, and her teaching was rated as outstanding. (Exhs. Z4 p21, Z17 p5, Z35 p4). Therefore, "needs improvement did not mean poor performance in teaching. More importantly, by 2015 Petitioner had achieved medical teaching score above 4.0 for two consecutive academic years, exceeding the score of 4.0 required of Petitioner by the DPTC. (Exh. Z26 pp1-2, 27). Moreover, at the end of Fall 2015 Petitioner received score of 4.48, Gullo received score of 2.51 in the same course where Immunology was taught. (Exh. Z72 pp1-5). However, Petitioner was dismissed whereas Gullo was retained to teach Immunology in the next

academic year. (Exh. Z72 p16). From these lines of evidence a reasonable jury would conclude that Petitioner's teaching performance was not the true reason for Respondent to take away the teaching opportunities initially intended for Petitioner and gave them to Gullo.

In summary, Petitioner has set forth overwhelming amounts of facts of disparate treatments by Respondents with regard to the evaluation of job performances, compensation and employment privilege. If these facts were to be presented at a jury trial, a reasonable jury would conclude that Respondents had intentionally discriminated against Petitioner because of his race or national origin.

3. Whether an unauthorized warning of potential termination of employment instead of the termination itself is the adverse employment action for the purpose of determining unlawful retaliation.

Petitioner alleged that he was entitled to employment beyond June 30, 2016, but for his protected activities Respondent retaliated him by prematurely terminating his employment. Respondent contended that Petitioner was not entitled to employment after June 30, 2016, and Petitioner was not retaliated because he was warned of potential termination of employment in a letter dated March 24, 2015 long before Petitioner filed charges against Respondents with EEOC and grievance with WV-PEGB. (3:17-CV-03008 ECF 344 pp7-12). Thus, Respondent essentially argued that the March 24, 2015 warning letter instead of the termination itself was the adverse employment action, which the lower courts agreed. (Appendix p99).

Entitlement to employment beyond June 30, 2016. Petitioner's entitlement to employment beyond June 30, 2016 was based on West Virginia laws, policy provisions of Title 133-9 in the faculty handbook, and the special circumstances of his employment. In West Virginia, "A contract is formed when the minds of the parties meet." *Brown v. Woody* 98 W. Va. 512127 S.E. 325, (W. Va. S. Ct., 1925). Policies in employee handbook are evidence of implied contract. *Cook v. Heck's Inc.*, 342 SE 2d 453 (W. Va. S. Ct., 1986). Employer cannot be released from contractual obligations of its policies in the employee handbook unless the employee handbook contains a disclaimer that employee expressly relieves the employer from such contractual obligation. *Dent v. Fruth*, 453 SE 2d 340 (W. Va. S. Ct., 1994).

In this case, Petitioner was not provided a lab when he joined the university. Former department Chair and Associate Dean Dr. Niles repeatedly told Petitioner and confirmed in writing that the starting date of Petitioner's position would be reset to the date when Petitioner's lab was set up, which was in Feb 2010. (Exhs. Z57, Z103 ¶6). Thus, there was "meeting of minds" or mutual agreement that Petitioner's position was reset to start in Feb 2010. Title 133-9 was also evidence of implied contract because there was no disclaimer in the faculty handbook or Petitioner's offer letter that Petitioner had to give up any contractual rights by accepting employment. (Exhs. Z25 pp340-83; Z6 pp1-2). Title 133-9 §10.9 provided "Tenure-track appointments for less than half an academic year may not be considered time in probationary status." (Exh. Z61 §10.9). Therefore, once the starting date of

Petitioner's position was reset to Feb 2010, there were only 5 months left in the 2009-10 academic year therefore the 2009-10 academic year should not be counted towards Petitioner's probationary period. Consequently, the penultimate academic year of the 7 years of probationary time became the 2015-16 academic year, in which Petitioner had the last chance to apply for tenure. (Exh. Z61 §10.3). This was the basis for Petitioner to explain to the new dean Dr. Shapiro about Petitioner's unusual situation and request to apply for tenure in October 2015 instead of 2014. (Exh. Z53). On August 7, 2014 Primerano informed Petitioner that Shapiro had approved the request; no condition was attached to the approval. (Exh. Z98). Title 133-9 further provided that non-tenured faculty should be "offered a one-year written terminal contract of employment", and a terminal contract had to be expressly stated

"that it is a terminal contract". (Exh. Z61 §§10.3, 17.2.6). Accordingly, after Petitioner was denied tenure in the 2015-16 academic year, he should be offered a one-year terminal contract for the academic year from July 1 2016 to June 30, 2017. Arguendo, even if not considering the reset of the starting date of Petitioner's position and the terminal contract, given that Petitioner joined the university on September 1, 2009, he should be given a "Notice of Faculty Appointment" to cover "part of" the 2016-17 academic/fiscal year from July 1 to Aug 30, 2016 because according to Title 133-9 a Notice of Faculty Appointment could cover "one fiscal year, or part thereof". (Exh. Z61 §3.14).

Adverse employment action. In *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001), the Circuit Court held that an adverse employment action or retaliatory act must be one that can

adversely affect the terms, conditions, or benefits of employment. In this case, Petitioner argues that the adverse employment action or retaliation was the premature termination of his employment on June 30, 2016. The letter of the termination was signed by Interim Chair Primerano, and as Primerano testified "with authority from Dean Shapiro and the President's office". (Exh. Z63; 3:17-CV-03008 ECF 343-18 ¶25). Based on this notice, the Human Resources terminated Petitioner's employment. (Exh Z64). However, Respondent argued and the lower court agreed that because on March 24, 2015 long before Petitioner's protected activities Primerano and Shapiro wrote a letter to Petitioner warning that if tenure was denied, Petitioner's employment would end on June 30, 2016, (Exh. Z66), Respondent therefore did not retaliate against Petitioner, (Appendix p99). Thus, the lower courts effectively

recognized the March 24, 2015 letter instead of the termination itself as the adverse employment action.

However, according *Von Gunten*, supra, the March 24, 2015 letter is not qualified as an adverse employment action. Title 133-9 provided that decision of faculty non-retention must be "made by the institution's president or designee, the tenure-track faculty member shall be notified in writing of the decision by letter post-marked and mailed no later than March 1". (Exh. Z61 §10.6). Not only was not the March 24, 2015 letter mailed to Petitioner before March 1, more importantly nor did Shapiro and Primerano have authorization from the president at the time to write the letter. (3:17-CV-03008 ECF 343-18 ¶¶13-15). Further, the March 24, 2015 letter could not be considered as a contract either. It was produced without Petitioner's input and prior knowledge, therefore there was no

"meeting of minds". (Exh. Z85 ¶24). Indeed, even Primerano himself testified that he could not say whether it was a contract. (Exh Z13, at p70 ln14-17). Thus, for its lack of authority and qualification as a contract, the March 24, 2015 letter could not alter Petitioner's employment terms. By accepting Respondents' argument, the lower courts created a new legal standard with regard to the definition of adverse employment action that is inconsistent with the precedents in their own circuit, as well as other circuits, for examples, *Ray v. Henderson,* 217 F.3d 1234 (9th Cir. 2000); *Sanchez v. Denver Public Schools*, 164 F.3d 527 (10th Cir. 1998). For this reason, it is proper for Petitioner to ask this Court to settle this inconsistency.

Nexus between protected activities and premature termination of employment. The causal relation between Petitioner's protected

activities and premature termination of employment was established in a series of facts. On Feb 8, 2016, Shapiro notified Petitioner of his decision not recommending Petitioner for tenure and suggested that Petitioner have a meeting "to discuss the matter personally with" him. (Exh. Z65 p1). Following such suggestion, on Feb 22, 2016 Shapiro met and told Petitioner that if Petitioner would not "make a fuss" about denial of tenure, which he had discussed with the president and the president had agreed with him, Petitioner could have employment until Feb or June 2017, otherwise Petitioner's employment would end as stated in the (March 24, 2015) letter (on June 30, 2016). (Exh. Z10 pp107, 769-70). In this context, it became clear that the March 24, 2015 letter was created as a tool to prevent Petitioner from protesting against unlawful discrimination. Despite the threat of early termination, on March 21, 2016

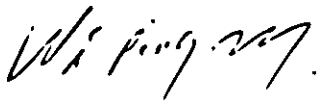
Petitioner filed charges of unlawful discrimination and retaliation against Respondents with the EEOC. (Exhs. Z67, Z10 pp770 – 771). On April 30, 2016, President Gilbert made the final decision to deny Petitioner tenure. (Exh. Z18). On May 5, 2016, a university counsel requested that Petitioner must withdraw the EEOC charges, waive the right to file grievance, and bring no further claims against the university in order to have employment until Feb 2017. (Exh. Z70 p2). Notwithstanding this repeat of threat, on May 17, 2017 Petitioner filed grievance with the WV-PEGB, requesting reversal of tenure decision and removal of threat of early termination. (Exh. Z68). On June 29, 2016, Primerano "with authority from Dean Shapiro and the President's office" wrote and hand delivered the letter of termination to Petitioner, which was executed by the Human Resources the next day. (Exhs. Z63, Z64).

Even so, Petitioner made a last attempt to avoid the disruption of his work and to save his job by requesting a meeting with Shapiro, but Shapiro denied the request because Petitioner had "decided to pursue the appeal pathway". (Exh. Z65 p4). From the sequence of these events, it was clear that Petitioner would have employment or a terminal contract until July 2017 but for his protected activities of filing the charges with EEOC and grievance with WV-PEGB. (See *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir.1998), holding that causal link between protected activities and adverse employment action can be shown by their sequential proximity).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,



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