No. 22-34

In the Supreme Court of the United States

WEI-PING ZENG,
PETITIONER,
v.

MARSHALL UNIVERSITY, DR. JEROME GILBERT,
DR. JOSEPH SHAPIRO, DR. W. ELAINE HARDMAN,
DR. DONALD PRIMERANO and
DR. RICHARD EGLETON,
RESPONDENTS.

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

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brian D. Morrison
Oxley Rich Sammons, PLLC
517 Ninth Street, Suite 1000
Huntington, West Virginia 25701
(304) 522-1138
bmorrison@oxleylawwv.com

Attorney for the Respondents

No. 22-34

In the Supreme Court of the United States

WEI-PING ZENG,
PETITIONER,
v.

MARSHALL UNIVERSITY, DR. JEROME GILBERT,
DR. JOSEPH SHAPIRO, DR. W. ELAINE HARDMAN,
DR. DONALD PRIMERANO and
DR. RICHARD EGLETON,
RESPONDENTS.

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

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brian D. Morrison
Oxley Rich Sammons, PLLC
517 Ninth Street, Suite 1000
Huntington, West Virginia 25701
(304) 522-1138
bmorrison@oxleylawwv.com

Attorney for the Respondents

QUESTIONS PRESENTED

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 the 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 termination itself is the adverse employment action for the purpose of determining unlawful retaliation.

TABLE OF CONTENTS

OPINIONS BELOW

The opinion of the Fourth Circuit (Pet. App. 1), unpublished, affirmed the lower court's decision (Pet. App. 4), unpublished, 2020 WL 1488742 (Mar. 26, 2020), reproduced by Petitioner in his appendix to the petition for writ of certiorari.

JURISDICTION

The Fourth Circuit entered its judgment on January 11, 2022. Wei-Ping Zeng filed a petition for panel rehearing and hearing en banc which were denied on February 8, 2022. The petition for writ of certiorari was filed on or about May 2, 2022, and an amended petition for writ of certiorari filed July 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FACTS MATERIAL TO CONSIDERATION OF QUESTION PRESENTED

A. Respondents' evaluations of Petitioner's work consistently found him to lack excellence in his teaching or research as required for tenure

B. Petitioner's evaluations were based on his requirements rather than compared to other faculty

C. The Fourth Circuit affirmed the District Court, agreeing that Petitioner had not shown evidence that employment decisions or recommendations made by Respondents were motivated by Petitioner's race or national origin

D. Petitioner's salary is comparable to others in his department, and is actually more than some Caucasian co-workers

E. Petitioner's comparison to only two other faculty is not proper as those faculty were hired to do different jobs under a different specialty

F. Petitioner's low evaluations for several years led Marshall to ask another professor to teach a course to which Petitioner had no guarantee to teach

REASONS FOR DENYING THE WRIT

A. Petition's Request for a "More Definite Guideline" is unnecessary given this Court's prior holdings

1. Petition's reliance on the Second and Fifth Circuits as being inconsistent with the Fourth Circuit is misguided, as cases upon which Petitioner relies also applied the *McDonell Douglas* framework.

2. Petitioner did not produce evidence of a prima facie case under *McDonnell Douglas*.

3. Respondents produced evidence of legitimate, non-discriminatory reasons for the employment decisions involving Petitioner

4. Petitioner produced no evidence to rebut legitimate, non-discriminatory reasons for the employment decisions involving him

showing that said decision were simply a pretext for intentional discrimination

B. Petition is incorrect to suggest there is conflict between the *McDonnell Douglas* framework and restriction on courts to sit as super personnel departments as to employment decisions

C. Petition's claim of a retaliatory employment action before the event which gives rise to the alleged retaliatory action defies logic

1. March 2015 Notice of his last day of employment if tenure is not granted was issued far in advance of Petitioner's filing of an EEOC complaint or grievance

2. The lower court did not find that the March 2015 Notice was an adverse employment action but rather found that Petitioner's potential last day of employment was established well in advance of his filing of the EEOC complaint and grievance

3. Petitioner is not entitled to employment at Marshall beyond June 30, 2016.

a. Marshall's offer to resolve the dispute is not evidence of retaliation because Petitioner rejected said offer

b. There was never any contractual agreement to extend Petitioner's employment beyond June 30, 2016

TABLE OF AUTHORITIES

Cases:

Statutes

I. INTRODUCTION

Petitioner's characterization of the facts contorts, misstates and misrepresents the facts of this matter and upon which the United States District Court for the Southern District of West Virginia relied in granting Respondents' Motions for Summary Judgment and denying that of Petitioner. The Magistrate Judge issued a 123-page Proposed Findings and Recommendations included a finding that Petitioner "appears to frequently manipulate data in his own calculations to detract from the performance of compared faculty members and enhance his own." [ECF No. 412 at 86, ECF No. 343-13 at 41]. Still, Petitioner uses these same manipulated facts and data he utilized in the lower court to try to show that Respondents had a discriminatory intent in their decisions to recommend denial of his tenure application, pay him disparately than other professors, and refuse to assign him teaching assignments. Unfortunately for him, nowhere in his dissertation does Petitioner evidence

any discriminatory animus or intent on the part of Respondents.

Unrefuted evidence showed that the tenure evaluated Petitioner on his obligations and responsibilities which, the tenure evaluators unanimously found, he did not satisfy. They did not compare him or his requirements to other faculty members and their requirements. Further, despite his assertions that the denial of promotion and/or tenure was racially motivated, he fails or refuses to acknowledge how Marshall University has promoted other Asian faculty members, including one of his evaluators. This also included promotion of an Asian faculty member whose application for promotion was evaluated, and said application approved, during the same year as that of the Petitioner. Unrefuted evidence also showed that Marshall University hired Petitioner at an agreed-upon, negotiated salary which was more than some other faculty members, in his department, while less than others, regardless of race or national origin. Finally, though providing no evidence of

racial motivation, Petitioner contends that he was denied a teaching assignment which was given instead to another minority faculty member. Petitioner goes at length to compare himself to this faculty member in regards to evaluations, but never once submits any evidence as to the alleged discriminatory motivation behind the assignment, as no such evidence exists.

Petitioner further mischaracterizes evidence regarding a March 24, 2015 letter which advised Petitioner that should he not earn tenure the following year, his employment would terminate on June 30, 2016. While Petitioner argues that this was an "unauthorized" warning, the undisputed facts show that, on June 30, 2016, after failing to earn tenure, and at the end of his seventh one-year employment contract with Marshall University, his employment ended. While Petitioner characterizes this as a "warning", it is more appropriately described as a notice of what he may expect if he did not earn tenure.

II. STATEMENT OF THE CASE

Respondents disagree with how Petitioner has chosen to describe the factual background of the matter. Taking all reasonable inferences of fact in a light most favorable to Petitioner (see, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), Petitioner alleged in his Second Amended Complaint, as raised in his Petition for Writ for Certiorari, discrimination based upon race and national origin and retaliation against Petitioner for having filed a grievance and an EEOC complaint. His Second Amended Complaint also asserted claims of civil conspiracy, failure to prevent retaliation, breach of contract, and violation of his due process and deprivation of property and liberty interests which are not made part of the Petitioner's Questions Presented.

The lower court's decision, which incorporated the 123-page Proposed Findings and Recommendation provided an in depth, detailed analysis of Petitioner's claims and concluded that Petitioner had failed to present material facts in dispute sufficient to create a question of

fact. The lower court went on to then grant Respondents' Motions for Summary Judgment while denying that of Petitioner. Pet. App. 4. The Fourth Circuit did then Affirm this decision. Pet. App. 1.

Marshall University ("Marshall") hired Petitioner in 2009 to work in the Department of Biochemistry and Microbiology at the Marshall University School of Medicine (MUSOM) for a tenure-track appointment with a base salary of $75,000. Pet. App. 7. Marshall hired Petitioner effective September 1, 2009 and was renewable a the beginning of each fiscal year [or on July 1]. *Id.* Petitioner's appointment letter outlined the terms of his employment, and also indicated that he was eligible to apply for tenure as early as his third year at MUSOM but no later than his sixth year. *Id.*

Petitioner's Notice of Faculty Appointment, which Petitioner signed on August 22, 2009, stated the appointment was for the fiscal year beginning July 1, 2009 and ending June 30, 2010. Pet. App. 8. His appointment would be for no more than seven years, or

until June 30, 2016, if he did not earn tenure. Thereafter, Petitioner signed annual faculty appointments with effective dates of July 1 to June 30 of the following year. Pet. App. 10-12, 16. On July 13, 2015, Petitioner signed his seventh such contract with Marshall, with effective dates from July 1, 2015 to June 30, 2016. Pet. App. 24.

By September 17, 2012, Dr. Richard Niles, department chair, and Dr. Donald Primerano, one of the Respondents herein, met with Petitioner to discuss his evaluation from the 2011-2012 academic year. Pet. App. 12. Petitioner received ratings of satisfactory in teaching and good in research and service. Pet. App. 13.

In addition to the annual faculty evaluations, Petitioner requested and received a Mid-Tenure Review in October 2012 to determine his status and progress towards achieving tenure. Pet. App. 15. The Mid-Tenure Review was conducted by the Departmental Promotion and Tenure Committee (DPTC), members of which

consisted of Drs. Hongwei Yu,[1] Piero Paulo Claudio and Terry Fenger, as well as Respondent Dr. W. Elaine Hardman. The four-person DPTC assessed his performance in the areas of research, teaching and service after reviewing the expectations set forth in Petitioner's original offer of employment. Pet. App. 15. The DPTC offered recommendations to help Petitioner "improve his chance of obtaining tenure." *Id.* The DPTC also included significant discussion to Petitioner's research performance which they found to be lacking, suggesting ways for him to improve the same. Pet. App. 16.

On June 21, 2013, Dr. Niles completed Petitioner's evaluation from 2012-2013 year, noting that while Petitioner's teaching scores had improved, he still needed improvement in his research and that, to be awarded tenure, he would need to increase the number of publications per year and obtain external funding. Pet. App. 16-18.

---

[1] Like Petitioner, Dr. Yu is an Asian-American originally from China.

On March 10, 2014, Drs. Niles and Primerano wrote to Petitioner memorializing a mid-year evaluation of his academic progress. Pet. App. 18. That letter suggested ways Petitioner could help his lagging research and funding while also reminding him of ways to improve his teaching. [*Id.*]. Additionally, Drs. Niles and Primerano reminded the appellant of his obligation to apply for tenure in October 2014, noting that "tenure must be granted no later than the end of your sixth year (2014-2015)." Pet. App. 19. Further, they acknowledged that Petitioner may wish to request a re-set of his tenure clock so that 2009-2010 did not count but advised that approval of such a request would need to come from MUSOM Dean Dr. Joseph Shapiro or the MUSOM Personnel Advisory Committee (PAC). *Id.*

Petitioner then requested the DPTC provide him with a preliminary review of his tenure application. Pet. App. 19-20. In late March 2014, the DPTC completed its Pre-Tenure review, comparing his performance with tenure requirements, and once gain found that he had not

met his teaching requirements of receiving satisfactory teaching scores for the requisite four years. Pet. App. 20-21. The DPTC further found that Petitioner's research and publications were inadequate as he had not received a grant since coming to Marshall and did not have sufficient publications to indicate an active research program. *Id.* The DPTC further explained that "[t]wo original research papers in 4.5 years does not indicate an active research program" and made specific recommendations for improvement. *Id.* The DPTC advised Petitioner that, based on his current achievements, he would not be recommended for tenure at this time. *Id.*

Following the Pre-Tenure review, Petitioner wrote to Dr. Shapiro on August 1, 2014 wherein he acknowledged that because he arrived in 2009, he needed to apply for tenure during his sixth year (fall of 2014). Pet. App. 21. He went on to request permission from Dr. Shapiro to apply for tenure during his seventh year. Though not required, Dr. Shapiro nonetheless granted

Petitioner's request. Pet. App. 22. A few days thereafter, Petitioner signed his sixth-year faculty appointment agreement with Marshall spanning the time period July 1, 2014 to June 30, 2015. *Id.*

Student evaluations prepared between August and October 2014 rating Petitioner's class taught during that time showed that his teaching had improved but was still below departmental averages in multiple categories. As a result, Marshall appointed Dr. Charles Gullo to assume teaching an Immunology course after Dr. Susan Jackman retired. This would also permit Petitioner to focus on his research for which he was primarily hired to do.

On March 24, 2015, Respondents Dr. Shapiro and Dr. Primerano wrote to Petitioner reminding him of his obligation to apply for tenure by October 1, 2015 and further advising that if he did not earn tenure, his last day of employment would be June 30, 2016. Pet. App. 22. In response to this letter, Petitioner sent Dr. Primerano an email on May 7, 2015 expressing concern over the deadline for submitting his tenure application (October 1,

2015) and the potential last day of his employment (June 30, 2016). Pet. App. 23. Petitioner requested additional time to submit his tenure application and also felt that because his employment started on September 1, 2009, his contract termination date should be August 30, 2016 rather than June 30, 2016. *Id.* While Petitioner was given until October 19, 2015 to submit his tenure application, his employment termination date, should he not earn tenure, was not changed. Pet. App. 23-24. With an unmodified end date for his employment should he not earn tenure, Petitioner signed his seventh faculty appointment agreement with Marshall covering the time period of July 1, 2015 to June 30, 2016. Pet. App. 24.

In the Fall of 2015, Petitioner submitted his tenure application. Petitioner's tenure application was initially reviewed and examined by the DPTC, still made up of Drs. Yu, Claudio, Fenger and Hardman. After an independent review, the DPTC unanimously recommended against Petitioner's tenure promotion. Pet. App. 25. The DPTC found Petitioner to be adequate in

teaching, although no excellent. Likewise, the DPTC did not believe Petitioner had achieved excellence in his research. *Id.* The DPTC indicated that Petitioner, who had been hired primarily to establish a research program, had not done so despite having been provided funding, time and laboratory space. Pet. App. 26. The DPTC provided its unanimous recommendation against Petitioner's tenure promotion to Dr. Primerano who, by this time, was the interim department chair. Dr. Primerano agreed with the DPTC that Petitioner had not done enough to satisfy the requirements for tenure and forwarded his recommendation and that of the DPTC to Dr. Shapiro. Pet. App. 26-27.

Petitioner's tenure application was next considered by the PAC. After presentation and consideration of the tenure application and additional information, unanimously recommended against tenure. Pet. App. 27.

On January 29, 2016, Dr. Shapiro notified Marshall's newly-appointed President, Respondent Dr. Gilbert, of the PAC's recommendations. This included his

agreement with the PAC's unanimous recommendation that Petitioner not be awarded tenure. Pet. App. 28.

On March 17, 2016, Petitioner reached out to Dr. Gilbert, who makes the final decision regarding tenure, pleading for him to overrule the unanimous recommendations of the DPTC, PAC, and Drs. Shapiro and Primerano. Pet. App. 28-29.

A few days later, but before his application was formally denied, Petitioner filed a questionnaire complaint with the Equal Employment Opportunity Commission (EEOC) alleging discrimination. Pet. App. 30. On May 5, 2016, Marshall University's associate general counsel attempted to negotiate resolution of the dispute between Marshall and Petitioner by offering continued employment to Petitioner through February 2017 if he agreed to withdraw his EEOC complaint, waive his right to file a grievance and refrain from any other claims against Marshall. Pet. App. 30-31. Petitioner rejected this offer and filed a grievance with the West Virginia Public Employees Grievance Board (WVPEGB)

complaining that his tenure application was denied on the basis of racial discrimination and that his employment was terminated in retaliation to his opposition to the alleged discrimination. Pet. App. 31..[2] On June 29, 2016, Dr. Primerano provided a letter to Petitioner confirming his last day of employment would be June 30, 2016. [ECF No. 334-13].

III. ARGUMENT

A. Petition's Request for a "More Definite Guideline" is Unnecessary Given This Court's Prior Holdings

Petitioner's request for a more detailed bright-line rule regarding discrimination claims is unnecessary, as this Court has, for nearly fifty years, addressed and

---

[2] Petitioner's grievance was denied at Levels I and III (Level II is a mediation stage), and then by the Circuit Court of Kanawha County, West Virginia before being appealed to the Supreme Court of Appeals of West Virginia. Pet. App. 31-35. Petitioner's appeal to the Supreme Court of Appeals of West Virginia regarding his grievance was still pending at the time of the lower court's decision from which this appeal is ultimately taken. However, a decision on his grievance was subsequently entered about a month after the lower court's March 26, 2020 decision in the instant matter. *Zeng v. Marshall University*, 2020 WL 1911453 (W. Va. Sup. Ct. April 20, 2020).

established the bright-line procedural rule initially set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) and subsequently affirmed on several occasions. See, *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 503 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

1. Petition's reliance on Second and Fifth Circuit cases is misplaced, as those Circuits also follow the *McDonnell Douglas* framework

Petitioner asserts a perceived inconsistency between the holdings of various circuits in an attempt to get this Court to clarify a rule that is already clear and followed by the lower courts. However, in seeking such relief, he does not explain the alleged confusion or inconsistency between the circuits such to prompt the necessity for this Court to hear his Petition. Rather, he makes a broad sweeping assertion which he then tries to support with factual arguments rather than arguing why the law, as relied upon by the lower court and affirmed by

the Fourth Circuit, is in contrast with those from other circuits.

Importantly, the two cases relied upon by Petitioner in support of his contention of confusion among the circuits both utilize the framework set forth in *McDonnell Douglas*. See, *Byrnie v. Town of Cromwell, Bd. of Educ,* 243 F.3d 93, 101 (2nd Cir. 2001); *Scott v. University of Mississippi,* 148 F.3d 493, 505 (5th Cir. 1998). Likewise, in the instant matter, the lower court found the framework set forth in M*cDonnell Douglas* appropriate to analyze the discrimination claims made by Petitioner for purpose of evaluating said claims to determine if Petitioner were a victim of intentional discrimination. Pet. App. 44-45, citing *Reeves,* supra. Thus, there is no confusion, or incongruence, among and between the circuits as to whether or not *McDonnell Douglas* applies.

2. Petitioner did not produce evidence of prima facie case under *McDonnell Douglas*

Title VII claims, or those brought under 42 U.S.C. §2000e, et seq. as maintained by Petitioner, utilize the *McDonnell Douglas* framework. A plaintiff alleging a violation of this statute must establish, by a preponderance of the evidence, a prima facie case consisting of four elements: (1) that plaintiff falls within a protected group; (2) that plaintiff applied for a position for which he was qualified; (3) that plaintiff was subject to an adverse employment decision and (4) that the adverse employment decision was made under the circumstances that give rise to an inference of unlawful discrimination. See, *McDonnell v. Douglas*, 411 U.S. at 802.

In the instant matter, Respondents concede that Petitioner falls within a protected group and that he was subject to an adverse employment decision. He also applied for a position at Marshall University for which, based upon his education and experience, was qualified to apply, although the evidence shows that he was not qualified for the position to which he applied as he did not meet the requirements and criteria for the same. In fact,

through countless evaluations by Drs. Niles and/or Primerano and Mid-Tenure and Pre-Tenure reviews by Drs. Fenger, Claudio, Hardman and Yu, the undisputed evidence shows that Petitioner was not qualified for the tenured position to which he applied. Thus, when Petitioner applied for tenure in October 2015, the evidence shows a pattern finding that he had not achieved excellence in either teaching or research, a requirement for tenure. As such, he was not qualified for the position that he sought.

As to his claim for disparate salary, Petitioner fails to create a prima facie case that he was subject to an adverse employment action, i.e., lower pay. See, *McDonnell v. Douglas*, 411 U.S. at 802. Petitioner negotiated his salary before accepting the same at Marshall. Petitioner compares himself to Drs. Koc and Denvir, both of whom were hired to work in the same department but with differences which "are manifold, ranging from their difference backgrounds, training, and fields of experience." Pet. App. 87.

Petitioner does not address the fact that his salary was higher than several other Caucasian faculty members in his department. In fact, his salary of about $76,000 per year "fell comfortably in the middle of other salaries in his department." Pet. App. 88. Additionally, Marshall's explanation, that it pays employees based on market forces, specialization, budgetary considerations and current institutional needs, was never shown to be pretextual by Petitioner. *Id.*

To save face, Petitioner now changes his position to argue only a disparity in <u>starting</u> salary. However, even this fails, as several Caucasian faculty members in Petitioner's department hired at about the same time earned less than Petitioner. Dr. Travis Salisbury, also hired in 2009 and Dr. Maria Serrat, who started her position with Marshall on the same day as Petitioner, both earned less than what Petitioner earned.[3],[4]

---

[3] Publicly-available information shows Dr. Salisbury's salary in 2010 at $68,040, 2011 at $68,338, 2012 at $74,882, 2013 at $75,801, 2014 at $73,802, 2015 at $75,227 and 2016 at $76,536. <u>www.openpayrolls.com</u>

Meanwhile, Dr. John Wilkinson, who started working at Marshall in 2007 and who, like Petitioner, also failed to earn tenure, had an initial 2008 salary less than Petitioner's and which remained lower than Petitioner's salary but for a two-year time span in 2010 and 2011 when his salary was supplemented with federal grants.[5] Thus, Petitioner has not made a prima facie case that his salary was actually less than others; rather, his salary fell comfortably in line with other salaries in his department. Pet. App. 88.

Finally, as to his teaching assignment which he labels an "employment privilege" none of Petitioner's annual contracts with Marshall provide that he will teach the Immunology course at issue, just as those contracts

---

[4] Publicly-available information shows Dr. Serrat's salary in 2010 at $74,580, 2011 at $74,809, 2012 at $75,292, and 2013 at $75,319. www.openpayrolls.com

[5] Publicly-available information shows Dr. Wikinson's salary from 2008 to 2015 to be $68,599; 68,599; $82,670; 83,636; $73,118; $69,970; $71,704 and $52,492, respectively. www.openpayrolls.com

also did not set forth any other classes which Petitioner taught. Instead, the faculty appointments only talk about teaching in general.

Once again, applying the *McDonnell Douglas* factors to Petitioner's claim that he was discriminated against through a teaching assignment,[6] whether he is or is not selected to teach a particular course is not an adverse employment decision. Further, even Petitioner acknowledges that he was not aware of the opening to teach Immunology until after Dr. Gullo had already been appointed and makes no mention that he ever applied for that position. In essence, then, Petitioner takes issue with not being appointed to teach a course for which he did not apply nor request to be considered, akin to not getting hired for a job to which no application was sent.

3. Respondents produced evidence of a legitimate, non-discriminatory reasons for its employment decisions to which Petitioner provided no evidence to rebut legitimate, non-discriminatory reasons for

[6] There is no evidence adduced which supports a claim that the perceived refusal to not be assigned to teach this course had any impact on his tenure applications or recommendations flowing from the same.

employment decisions showing pretext for intentional discrimination

Even assuming Petitioner satisfied his burden of establishing a prima facie case of discrimination under *McDonnell Douglas*, Respondents still have the right to produce evidence that the decisions made were based on non-discriminatory reasons justifying the same. As to his tenure, Petitioner consistently fell short of the requirement for tenure starting in 2012. Indeed, every annual review from 2012-2015, and both the Mid-Tenure review in 2012 and Pre-Tenure review in 2014, found Petitioner to lack in excellence in either teaching or research. Thus, his body of work leading up to his tenure application was simply insufficient to earn tenure. Unfortunately, this did not change between his last evaluation and his tenure application. As such, and without a finding of excellence in at least one of these areas, Petitioner's tenure application was denied.

This then shifts the burden back unto Petitioner to show that his historical lack of excellence which carried

over to his tenure application was simply a pretext as to why all four members of the DPTC and all thirteen members of the PAC, as well as Drs. Primerano and Shapiro, voted unanimously that Petitioner had not met the level of excellence required for tenure. Petitioner provided no such evidence of pretext.

Similarly, as to his salary, Respondents pointed out that a number of Caucasian faculty members hired near the time as Petitioner, and some even within months or on the same day as him, were paid less than him. Respondents also provided that market forces and budgetary concerns explained the basis for Petitioner's salary. Petitioner failed to produce any evidence showing how these explanations were pretextual.

As to his teaching, Respondents explained how Petitioner's teaching scores were low and, on top of that, he had not seemingly sought to teach the Immunology class, instead focusing on developing his research which formed his primary job function at Marshall. As before,

Petitioner failed to show how these explanations were pretextual.

B. Petition is Incorrect to Suggest There is Conflict Between the *McDonnell Douglas* Framework and Restriction on Courts to Sit as Super Personnel Departments as to Employment Decisions

Petitioner tries to create a conflict, where no conflict exists, between the *McDonnell Douglas* framework and the court's self-imposed restriction to refrain from acting as a "super personnel department" regarding employment decisions. Rather, while these principles stand separate and distinct, without conflict, a court refraining from acting as a "super personnel department" complements the *McDonnell Douglas* framework by removing any factual inquiry as to whether the employment decision was smart or well-taken and returning it, instead, to the root of the issue: whether the employment decisions were motivated by intentional discriminatory animus.

As explained above, *McDonnell Douglas* established generally the procedure for analyzing

discrimination claims, creating a standard for what a plaintiff must show to establish a prima facie case. The Court's holding went on to explain how the employer may produce evidence defending its reasoning for taking the adverse employment action against the plaintiff. The focus throughout is whether the employment decision made was intentionally discriminatory.

However, should a court sit as a super personnel department, it deflects the focus away from the actual issue, discrimination, and looks more towards not whether the decision was factually supported but, rather, whether the decision was smart or in the best interest of the company. This is precisely why a host of court decisions hold that courts are not to substitute their business decisions with that of the employer and, in the process, sit as super-personnel departments second-guessing the employer's personnel decisions. See, i.e., *Adeyemi v. District of Columbia*, 525 F.3d 1222 (D.C. Cir. 2008) (Kavanaugh, J.); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 332 (2nd Cir. 1995);

DeJarnette v. Corning, Inc., 133 F.3d 293, 299 (4th Cir. 1998) ("it is not [the court's] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination); *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000) ("it is inappropriate for the judiciary to substitute its judgment for that of management"); *Stockwell v. City of Harvey*, 597 F.3d 895, 905 (7th Cir. 2010); *Arraleh v. Cnty of Ramsey*, 461 F.3d 967 (8th Cir. 2006); *Simon v. City & Cty. Of Denver*, 781 F. Appx. 793, 797 (10th Cir. 2019); *Flowers v. Troup Cnty. Ga., Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015). The court's job is not to determine whether the employment decision was good or bad; rather, the court focuses on whether the decision was illegally motivated by discriminatory intent.

Thus, the issue is not whether Marshall made the best decisions or made the decision that the court would have made had the court been in charge of making the same. Further, the issue is not whether Marshall made sound decisions regarding Petitioner's employment.

Rather, the issue is whether the decision was based upon illegal discriminatory animus. This expounds on the premise set forth in *University of Michigan v. Ewing*, 474 U.S. 214 (1985) which held that courts must defer to universities in reviewing the "substance of a genuinely academic judgment" made in "good faith."

Because this issue is already well-settled both within the circuits as well as with this Court, it needs no further discussion or clarification. The rule against courts acting as super personnel departments does not contradict *McDonnell Douglas* but, merely, explains that the Court does not second-guess employment decisions unless those decisions were made with discriminatory intent. In doing so, the Court imposes upon a plaintiff the burden of persuasion to prove his case of discrimination which remains, at all times, with the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. at 507-08.

C. Petition's Claim of a Retaliatory Employment Action Before the Event Against Which Respondents Allegedly Retaliated Had Occurred Defies Logic

Petitioner's third Question presented is whether an "unauthorized" warning of potential termination of employment instead of the termination itself is the adverse employment action for the purpose of determining an unlawful retaliation. He addresses this issue at pages 48-54 of his Petition, although for some reason he spends nearly four pages (45-48) discussing a breach of contract issue which was not reserved on appeal and to which Respondents object to now being raised.

Claims brought under Title VII are generally broken down into two categories – status-based discrimination claims such as those based upon an individual's race, color, religion, sex and national origin, 42 U.S.C. §2000e-2(a), and situational-based claims such as those based upon retaliation. See, 42 U.S.C. §2000e-3(a). Unlike status-based discrimination claims, Title VII retaliation claims require proof that the employer's desire to retaliate against the employee was the but-for cause of the challenged employment action. *University of Texas*

Southwestern Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

To succeed on his claim, Petitioner would need to show that, but for his filing the EEOC complaint and grievance in which he alleged discrimination, he would not have been terminated on June 30, 2016. Unfortunately, all of the evidence shows that the Respondent, by enforcing the end date to Petitioner's seventh annual faculty appointment which had been set forth and established well in advance of his filing the complaint and grievance, did not without any racial animus to Petitioner whatsoever.

1. March 2015 Notice provided to Petitioner advising him of his last day of employment if tenure was not granted was issued far in advance of his filing an EEOC complaint or university grievance

On March 24, 2015, Drs. Shapiro and Primerano provided notice to Petitioner that he was required to submit his tenure application (if he desired to do so) by October 1, 2015 and that, if he did not earn tenure, his last day of employment would be June 30, 2016. In

response to this letter, in May 2015, Petitioner reached out to Dr. Primerano to seek additional time to submit his tenure application and also question the potential end date of his employment. While Dr. Primerano granted Petitioner nearly three extra weeks to submit his tenure application packet, there was no change to the potential end date of his employment in the event Petitioner did not earn tenure. As such, by March 2015, and certainly by the time he signed his seventh annual faculty appointment in August 2016 noting effective dates of July 1, 2015 through June 30, 2016, Petitioner was aware that the last day of his seventh, and final, faculty appointment was June 30, 2016 unless he earned tenure.

The March 2015 notice was provided to Petitioner far before he even contemplated filing a complaint or grievance. Further, this notice provided in clear, unambiguous language that Petitioner's last day of employment would be June 30, 2016 if he did not earn tenure. Thus, and as the lower court found, "[i]t belies basic logic to conclude that enforcement of a pre-set

termination date is the product of retaliation for protected activity that has not already occurred." Pet. App. 99.

2. Lower Court did not find the March 2015 notice was an adverse employment action but rather, found that the March 2015 notice established the potential last day of employment, well in advance of Petitioner filing his EEOC complaint and grievance.

Petitioner next tries to contrive a dispute where none exists by stating that the lower court found that the March 24, 2015 notice was an adverse employment action. The only part of the lower court's order which addressed the March 2015 notice was in regard to Petitioner's claims of retaliation for having engaged in protected activities. However, the lower court did not find, as Petitioner suggests, that the March 2015 notice was the adverse employment action. Rather, the lower court essentially found that this March 2015 letter served as notice of Petitioner's employment end date.

In fact, this March 2015 letter simply confirmed information Petitioner already knew about his last day of employment. By August 2014, Petitioner had already

signed his five one-year faculty appointments with Marshall. He would sign his sixth faculty appointment on August 19, 2014.

Shortly before signing his sixth faculty appointment, Petitioner wrote to Dr. Shapiro affirming that the 2014-2015 year was his sixth year in which, if he desired tenure, he was required to apply. By that time, Petitioner also knew that, for each of his first five faculty appointments, each had an end date of June 30 of the corresponding year. With his seventh year spanning July 1, 2015 to June 30, 2016, Petitioner was already aware, in August 2014 that his seventh contract would have an end date of June 30, 2016.

As such, the March 24, 2015 letter to Petitioner from Drs. Shapiro and Primerano merely confirmed what Petitioner already knew: the 2015-2016 faculty appointment was his seventh year and West Virginia's Higher Education Policy Commission regulations limited his tenure-track status to seven years pursuant to 133 C.S.R. § 9-10.3. Thus, that letter was not an adverse

employment action any more so than was the annual appointment he signed in 2015 which also noted the June 30, 2016 end date of his seventh faculty appointment.

3. Petitioner is not entitled to employment beyond June 30, 2016.

Petitioner next contends that the retaliation claim is premised upon his assertion that he is entitled to employment beyond June 30, 2016 and that, because Dr. Shapiro and Marshall's general counsel attempted to negotiate claims asserted by Petitioner which would extend his employment beyond June 30 in exchange for dismissal of his claims, this equates to retaliation for having filed those same claims. He also claims that the end date of June 30, 2016 changed his contractual agreement with Marshall. Petitioner's positions regarding these arguments both fail factually and legally.

a. Offer to resolve a dispute is not evidence of retaliation

Petitioner asserts that the offers extended by Dr. Shapiro and Marshall to delay his last day of employment evidence their retaliation when he rejected those offers

and he was then subsequently terminated. In actuality, this common scenario is similar to the attempted resolution of nearly every civil dispute – the first party offers something of value to the second party in exchange for the second party extending something of value to the first party. In most civil cases, that equates to a defendant offering a compromise settlement in the form of monetary consideration to the plaintiff in exchange for dismissal of the lawsuit and release from any and all claims.

Likewise, in many civil employment cases, attempted resolution often involves dismissal of claims in exchange for continued employment or promotion. Such is the case here where Marshall, first through Dr. Shapiro and subsequently through university counsel, offered Petitioner employment beyond June 30, 2016 for a specific period of time. However, in exchange for this consideration, Petitioner would be required to dismiss any complaints, and forego filing any future complaints, against Marshall and its employees regarding his tenure

and employment. Thus, while Petitioner hangs his hat on this "evidence," these attempts to try to resolve the dispute or any potential dispute is actually inadmissible pursuant to Rule 408 of the *Federal Rules of Evidence.*

b. There was no agreement to extend his employment beyond June 30, 2016

Petitioner next goes off on a bit of a tangent arguing that his employment arrangement was modified by Dr. Niles, the former department chair. In doing so, he relies upon the misconception that Dr. Niles, as the former department chair, could unilaterally change Petitioner's start date of his employment. See, *Pet. for Writ of Cert.* at 46. He then asserts that because Dr. Niles changed his effective start date to February 2010, he had less than half a year during his first year which would not then be considered time in probationary status. *Id.*

Petitioner's position erroneously relies upon a mistaken proposition. To rely upon some contract or agreement for an extension of time, Petitioner must show

that the state actor, in this instance Dr. Niles, had actual authority to change the effective start date of Petitioner's employment. The Petition fails to even address this issue which, as shown through the facts, is fatal to his position.

> "Anyone entering into an agreement with the Government takes the risk of having ascertained that he who purports to act for the Government stays within the bounds of his authority . . . And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority."

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering an arrangement or agreement to do or cause to be done what the law does not sanction or permit"). See also, *Lee v. Monroe*, 11 U.S. 366 (1813); *Hart v. United States*, 95 U.S. 316, 318 (1877) ("The government is not responsible for the laches or the wrongful acts of its officers"). West Virginia has likewise

adopted this same premise as noted in *Hutchison v. City of Huntington*, 479 S.E.2d 649, n. 20 (W. Va. 1996).

Undisputed evidence confirms that the only individuals who could alter or change the terms of Petitioner's employment were Respondents President Gilbert, as President of the University, and Dr. Shapiro, Dean of the MUSOM. A department chair does not have authority to make any changes to a faculty member's employment or the terms thereof. Petitioner does not address, nor refute the legal premise set forth in *Merrill* or *Hutchison*, nor does even attempt an attack on the facts presented.

Not only is Dr. Niles' lack of authority to "re-set" Petitioner's tenure clock established by the testimony of President Gilbert, but other undisputed evidence shows that he did not have the authority to unilaterally make the decision regarding the effective start date of Petitioner's tenure probation. On March 10, 2014, Dr. Niles and Dr. Primerano jointly wrote to Petitioner advising him that if he wished to request a re-set of his

"tenure clock" so that the 2009-2010 year did not count as one of his seven probationary years, such a request would need to be approved by Dr. Shapiro or the PAC. Thus, not only did Dr. Niles disavow any inference that Petitioner's "tenure clock" had already been re-set to February 2010 but advised that if Petitioner wished to try to re-set his tenure clock, his request would need to be approved by Dr. Shapiro or the PAC (which would give its recommendation to Dr. Shapiro to confirm or reject). Clearly then, Petitioner knew that his tenure probationary period included the 2009-2010 and that his tenure clock had not been "re-set" year absent approval from Dr. Shapiro.

This becomes even more apparent when Petitioner wrote to Dr. Shapiro on August 1, 2014 wherein he acknowledged that the 2014-2015 year was his sixth year in which he needed to apply for tenure. Pet. App. 21. Hence, even Petitioner acknowledged that, with 2014-2015 serving as his sixth year, 2015-2016 would be his seventh. This becomes important, as West Virginia's

Higher Education Policy Commission regulations provide, in part, "[t]he maximum period of tenure-track status normally shall not exceed seven years." 133 C.S.R. §9-10.3.

Because his "tenure clock" was not re-set to begin February 2010, his employment for the 2009-2010 year was for 10 months, or more than half the academic year. Thus, the regulatory provision upon which Petitioner relies, 133 C.S.R. § 9-10.9, providing "[t]enure-track appointments for less than half an academic year may not be considered time in probationary status" does not apply in that his appointment for 2009-2010 was for more than half a year.

Because Dr. Niles had no actual authority to alter Petitioner's start date for purpose of calculation of his tenure probationary period, Petitioner's reliance upon the same as a means to try to extend his employment beyond June 30, 2016 is misguided and fails.

IV. CONCLUSION

Based upon the foregoing, the lower court's lengthy and detailed decision, which incorporated the even more detailed Proposed Findings and Recommendations and which granted the appellees' Motions for Summary Judgment, should be affirmed.

MARSHALL UNIVERSITY, ET AL.,
By Counsel,

s/Brian D. Morrison
Brian D. Morrison (WVSB #7489)
OXLEY RICH SAMMONS, PLLC
517 9th Street, Suite 1000
Huntington, West Virginia 25701
Phone: (304) 522-1138
bmorrison@oxleylawwv.com

No. 22-34

IN THE SUPREME COURT OF THE UNITED STATES

----------♦----------

WEI-PING ZENG,
PETITIONER,
v.

MARSHALL UNIVERSITY, DR. JEROME GILBERT, DR. JOSEPH SHAPIRO, DR. W. ELAINE HARDMAN, DR. DONALD PRIMERANO and DR. RICHARD EGLETON,
RESPONDENTS.

----------♦----------

CERTIFICATE OF SERVICE

The undersigned counsel for Respondents, Marshall University et al., served the foregoing "**Brief in Opposition to Petition for Writ of Prohibition**" by electronically filing a true copy of the same with the Clerk of the Court using the CM/ECF system on this 9th day of August 2022 and by serving the same via U.S. Mail, postage prepaid, and via e-mail unto the following:

Wei-Ping Zeng
3128 Ferguson Road
Huntington, WV 25705
weipingzengny@gmail.com

s/Brian D. Morrison
Brian D. Morrison (WVSB #7489)
Oxley Rich Sammons, PLLC
517 Ninth Street, Suite 100
Huntington, WV 25701
(304) 522-1138
bmorrison@oxleylawwv.com