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

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

QUESTIONS PRESENTED FOR REVIEW (IN THE PETITION)

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.

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I. Employment Discrimination (Question 2)

A. At this stage *McDonnell Douglas* framework is unnecessary

Respondents argued that Question 2 presented for review must be dismissed because the cases from different circuits used the same *McDonnell Douglas* framework analysis therefore are not without uniformity. (Brief in Opposition p15).

However, at the summary judgment stage and appeals, inquiry into the elements of the *McDonnell Douglas* framework is unnecessary, instead, the court must focus on the ultimate question of discrimination vel non. *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 294 (4th Cir. 2010); *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008).

Even if arguendo this Court must revisit the elements of the *McDonnell Douglas* framework to decide whether Petitioner had established a prima facie case, Petitioner had. Respondents misconstrued the legal standard by arguing that Petitioner did not establish a prima facie case because Respondents did not consider him qualified for promotion to tenured position. (Brief in Opposition pp16-8).

"The burden of establishing a prima facie case of disparate treatment is not onerous."... "The phrase "prima facie case" ... denote[s] the establishment of a legally mandatory, rebuttable presumption". *Texas Dept. of Community Affairs v. Burdine*, 450 US 248, 253, nt7.

> "[A]ll that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer. The qualification prong must

> not, however, be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his prima facie case, the employer's proffer of a legitimate, non-discriminatory basis for its decision." *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 (2d Cir.2001).

Thus, in this case, Petitioner did not have to disprove Respondents' claim/proffered reason that he was not qualified for tenure to satisfy the qualification prong to establish a prima facie case. Petitioner showed ample evidence that he was qualified for teaching or research: he taught 3 medical courses with evaluation scores well above 4.0 and published high quality research articles. As such, Petitioner had established a prima facie case. Once a prima facie case is established and Respondents provided a proffered reason for their action(s), "the McDonnell Douglas framework ..... disappeared, and the sole remaining issue was

discrimination vel non" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 142-3 (internal citations omitted).

B. Circuits differ in determining discrimination vel non or pretext

Contrary to Respondents' argument that Petitioner made only "a broad sweeping assertion", (Brief in Opposition p15), the difference among circuits that Petitioner asks this Court to consider is very specific: how to determine pretext based on disparate treatments of employees in performance evaluation.

The Fourth Circuit in this case took an extreme stance, giving full deference to Respondents' subjective opinions on Petitioner's job performances, ignoring evidence of their intentional lowballing of Petitioner's job performances. For example, the lower courts ignored the facts that the committees

and Shapiro considered Petitioner's 17 hours medical teaching, but not Denvir's 2 hours or Koc's 11 hours, as low teaching load; rated Petitioner's teaching as only satisfactory or good for scores well above 4.0 but rated Koc outstanding for score of 3.69; and rated research in the same disparate manner. This is akin to giving one student a D for correctly answering over 80 or 90% questions in an exam but another student A^+ for 74% correct answers. Such audacious disregard of common sense cannot be said of "good faith" as Respondents argued. (Brief in Opposition p27). Rather, a reasonable jury would easily find egregious discriminatory intent in such behaviors.

Essentially, the Fourth Circuit held that employer can legally rate their employees' performances however it wants regardless of the employees' actual performances. In making this ruling, the lower courts relied on the legal standard

that calls for courts not to sit as a super personnel department to second-guess employer's decision. In contrast, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) teaches that discriminatory intent shall be found in disparate treatment of employee, which would require the courts examine how employer treated employees in evaluating job performances. Thus, there is clearly conflict between these legal standards. Respondents insisted that the only standard is whether employer's decision was based on illegal discriminatory animus, but refused to acknowledge the practical utility of evidence of disparate treatments for determining such animus as if Petitioner had to be able to read Respondents' minds to prove the animus.

Similarly but to lesser degree, in *Scott v. University of Mississippi,* 148 F.3d 493, 509 (5th Cir. 1998), the Fifth Circuit Court held that the court

"will not engage in the practice of second guessing" the employer's subjective opinion that the comparator was better qualified than the plaintiff although the plaintiff showed otherwise.

On the other hand, the Second Circuit was more reluctant to give deference to employer's subjective opinion, cautioning:

> "an employer may not use wholly subjective and unarticulated standards to judge employee performance for purposes of promotion. This is because any defendant can respond to a [discrimination charge] with a claim of some subjective preference or prerogative and, if such assertions are accepted, prevail in virtually every case." *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 104-5 (2nd Cir. 2001).

Therefore, even just having considered three circuits, one can find varying degrees to which the courts give deference to employer's opinion on employee's job performance. To Petitioner's knowledge, this Court has not ruled on the issues of

under what conditions and to what degrees a court must give deference to the employer's subjective opinion.

C. Petitioner presented truthful and specific objective evidence to rebut Respondents' proffered non-discriminatory reasons

Petitioner must stress that he did not manipulate any data; Respondents and the lower courts did not identify a single incident where Petitioner presented false information in his pleadings.

Job evaluation for tenure. Unlike *Scott*, supra, where the plaintiff and defendant used different sets of criteria to assess job candidates' qualifications, in this case Petitioner's evidence to show pretext was based the same criteria the Respondents used to evaluate Petitioner's performances. For teaching, teaching load and score were the primary criteria. Petitioner taught more courses, longer hours and

achieved higher scores than his comparators. (Appendix pp397-400). For research, it was the university's not Petitioner's policies that required "evidence of establishment/continuation of research/scholarly program substantiated by publications in peer review journals" and consideration of publication impact factor. (Exhs. Z8 p4; Z39). Only research publications where a professor is the corresponding and/or first author are from his/her own research programs. Accordingly, Petitioner showed that the quantity (total, per-annum or per-dollar output) and quality of his publications were superior to his comparators'. (Appendix pp404-5; USCA4 20-1481 Doc 22-1 p7; 3:17-CV-03008 ECF No. 332 pp24-25).

Pay disparity. Respondents were incorrect to say that Petitioner changed "his position to argue only a disparity in starting salary". (Brief in

Opposition p19). Petitioner maintains that the pay disparity remained throughout his employment, but was caused by the disparity in the starting salaries.

Respondents argued that several faculty members were paid similarly to Petitioner. However, these individuals were hired as assistant professors after finishing their postdoctoral training and paid much more than they were before, whereas Petitioner was hired as an associate professor and paid less than before. (3:17-CV-03008 ECF 344 pp18-9). The fact that Petitioner as an associate professor was paid essentially the same as the assistant professors is evidence of unfavorable treatment.

Employment privilege. Respondents argued that Petitioner's contract did not include teaching Immunology because the annual "Notice of Faculty Appointment" (the Notice) did not state such. (Brief in Opposition pp20-1). This argument is misleading.

The Notice was a generic document that every faculty member received. Teaching Medical Immunology was included in Petitioner's offer letter, and Petitioner was specifically hired to succeed Dr. Jackman to teach Medical Immunology, (Exhs. Z6 p2 Z85 ¶3), therefore did not have to "re-apply" for the position. Even if he did have to reapply, he could not because Respondents did not even inform him Jackman's retirement time, and around the time there was no public announcement of the "position". (Exh. Z85 ¶22). Respondents were also wrong to say that Petitioner's primary function was research. Petitioner was not hired as "research track" faculty, his teaching effort allocation was similar to his comparators'. (Petition p29). Finally, at the time of Jackman's retirement, Petitioner's teaching scores had been above 4.0 for two consecutive years, (Exhs. Z26 pp1-2, 27), much better than 3.69 that was

considered departmental average (Exhs. Z4 pp30-31; Z15 p3).

II. Retaliation (Question 3)

A. The lower courts' legal conclusion regarding the March 24, 2015 letter is wrong

Respondents' argument that the "lower courts did not find the March 2015 notice was an adverse employment action" is false. The relevant fact, i.e., the existence of the March 24, 2015 and June 29, 2016 letters, is undisputed. Therefore, Petitioner does not ask this Court to decide a factual question but a legal question of which of these two letters can be construed as an adverse employment action. As Respondents admitted, the lower courts concluded that the June 29, 2016 actual termination letter was the "enforcement" of the March 24, 2015 letter. (Brief in Opposition, pp30-31). This legal conclusion gave undue legitimacy to the March 24, 2015 letter, and

effectively treated this letter as an adverse employment action. Since the March 24, 2015 letter was in fact illegitimate, the lower courts' legal conclusion is wrong.

The factual evidence for the illegitimacy of the March 24, 2015 letter, which purportedly both decided and notified Petitioner of his employment end date, is undisputed. The university policy provided that only the president or his designee had the authority to decide faculty non-retention. (Exh. Z61 §10.6). Primerano and Shapiro wrote the March 24, 2015 letter without authorization from Interim President White. (3:17-CV-03008 ECF 343-18 ¶¶13-15). Without the proper authorization, the March 24, 2015 letter was illegitimate and could not alter Petitioner's employment terms, therefore is not legally qualified as an adverse employment action.

By treating the March 24, 2015 letter as an adverse employment action, the lower courts created a new legal standard. If the lower courts' ruling is not reversed, it will establish a dangerous precedent that allows employers to escape liability for unlawful termination of employment based on unauthorized prior threat of termination by any agent of the employer (notice that the district court's opinion is published). This would deprive workers of rights protected by the Human Rights Act.

B. Petitioner was entitled to employment beyond June 2016

Respondents labeled Petitioner's arguments for his entitlement to employment beyond June 2016 as discussion of "breach of contract issue which was not reserved on appeal". (Brief in Opposition, p28). Respondents' argument is misleading. The issue of entitlement beyond June 2016 is directly related to

unlawful retaliation. Being denied tenure did not mean that Petitioner would immediately lose his employment. As argued in the Petition and in the following, after the denial of tenure Petitioner was still entitled to employment beyond June 2016. The consequence of the unlawful retaliation was the deprivation of this entitlement.

B.1. Petitioner was entitled to employment even without "reset of clock"

The university policy guaranteed tenure-track faculty at least 7 calendar years of employment (the probationary period). (Exh. Z61 §10.3). Since Petitioner started his employment on September 1, 2009, without considering the delay of lab assignment hence the rest of clock (of employment start date), his last day of the 7-year period would be Aug 30, 2016. According to another policy, (Exh. Z61 §3.14), after the academic year ended on June 30,

2016, Petitioner should be given a "Notice of Faculty Appointment" to cover "part of" the next academic or fiscal year from July 1 to Aug 30, 2016.

Respondents did not directly attack Petitioner's argument, but made misleading statement about the "Notice of Faculty Appointment" (the Notice) to suggest that the Notice was the faculty contract, implying that the university could discharge faculty at the end of the period covered by the Notice. The Notice was issued yearly to each faculty member including tenure-track and tenured faculty. The entitlement to employment during the probationary period for tenure-track faculty or until voluntary retirement for tenured faculty, was **not** provided by the Notice but the policies in the faculty handbook, namely Title 133-9. Thus, although the Notice was issued every year, it did not mean that

every faculty member had to worry about losing their job every year.

B.2. Respondents could not deny Niles' authority to "reset the clock"

Because Petitioner was not given a lab until Feb 2010, the former chair and associate dean Dr. Niles decided and told Petitioner both verbally and in writing that Petitioner's employment start date was reset to the time Petitioner's lab was set up (Feb 2010). (Exh. Z57). Title 133-9 provided that "tenure-track appointments for less than half an academic year may not be considered time in probationary status". (Exh. Z61 §10.9). Therefore, after resetting the start date to Feb 2010, the 2009-2010 academic year should not be counted towards Petitioner' probationary time so that Petitioner should continue to have one year of employment after June 30, 2016.

However, Respondents argued that the reset of clock was invalid because Niles did not have the authority to set the starting date of employment. This argument is false both factually and legally. At the outset, it must be noted that Respondents did not question Niles' authority in all their pleadings in the lower courts. It is also ironic for Respondents to make this argument now while they also argue that the March 24, 2015 letter was legitimate although the authors of that letter undoubtedly had no authority to decide faculty non-retention. However, while there was clear written policy that only the president had the authority to decide faculty non-retention, (Exh. Z61 §10.6), there was no official policy as to who had the authority to set or reset the employment starting date. Absence of an official policy, Niles, long-time chair and associate dean, acted out of the school's custom to reset the clock.

When the clock was reset to Feb 2010, neither Shapiro nor Gilbert worked for the university (Shapiro became dean in July 2012, Gilbert became president in Jan 2016). The custom or practice might have changed after Shapiro took office so that in March 2014 Niles and Primerano decided that they needed to have retrospective approval from the dean or the PAC for the reset of clock. (Brief in Opposition p38). However, Niles and everyone else of the university had been silent about Niles' lack of authority for the prior 5 years. As such, Respondents retrospective claim of Niles' lack of authority must be rejected on the ground of estoppel. *Langenderfer v. Midrex Corp.* 660 F.2d 523, 525 (4th Cir. 1981). For the same reason, Gilbert could not deny that Niles had the authority to reset the clock.

B.3. Petitioner did not "acknowledge" 2014-2015 as his sixth year

Respondents falsely claimed that Petitioner "acknowledged" 2014-2015 as his sixth year in Petitioner's letter to Shapiro to request to postpone tenure application. The letter was dated Aug 1, 2014 and was meant to explain to the new dean why Petitioner should apply for tenure in 2015 instead of 2014 (because of the lab delay). (Exh. Z97). In the letter Petitioner did not say as a fact his sixth year "is" then current 2014-2015, instead said (assuming without the lab delay) his sixth year "would be" 2014-2015. This statement did not present to the dean as a fact but rather an assumption that 2014-2015 "would be" Petitioner's sixth year.

In an email dated May 7, 2015, Petitioner reminded Primerano of Petitioner's unusual employment starting date of September 1 (instead of July 1), 2009. (Exh. Z25 p525). In the Feb 2016 meeting with Shapiro, Petitioner also reminded

Shapiro of Niles' decision to reset the clock. (Exh. Z85 ¶48). Petitioner testified that by making the reminders he was merely trying to find ways to persuade his superiors to abandon their positions regarding his employment end date, but not to claim his full employment rights. (Exh. Z85 ¶49). Such rights were guaranteed by the university's policies, which were also state rules/laws, and employees did not have to reassert them.

B.4. There were no settlement offers or negotiation about employment

In the Feb 2016 meeting between Petitioner and Shapiro, Shapiro told Petitioner if Petitioner would not make "fuss" about the denial of tenure, Petitioner would have employment until June 2017. (Exh. Z10 pp107, 769-70). Later in May 2016, the university associate general counsel demanded that Petitioner forego his rights to appeal and file charges

against the university in order to have employment until Feb 2017. (Exh. Z70 p2). Petitioner did not yield to Shapiro and the counsel's demands and filed grievance with the WV-PEGB and charges with the EEOC. Respondents argued that Petitioner was not entitled to employment beyond June 30, 2016 because he refused Shapiro and the counsel's "settlement offers".

First of all, Petitioner's entitlement to employment beyond June 30, 2016 was not based on Shapiro or the counsel's "offers", but on the university's official policies and the unusual circumstances regarding the starting date of his employment. Nonetheless, by legal standard, Shapiro and the counsel's "offers" were not settlement offers. For something to be a settlement offer, it must be more than what the plaintiff was entitled to. *EEOC v. Nucletron Corp.*, 563 F. Supp.

2d 592 (Dist. Court, D. Maryland, 2008). In the instant case, neither Shapiro nor the counsel offered anything more than what Petitioner was entitled to based on the university's own policies. Undisputed evidence also showed that there were no "negotiations" between Petitioner and Shapiro or the counsel. To the contrary, after the Feb 2016 meeting Petitioner repeatedly requested to further discuss his employment situation with Shapiro but was denied the opportunities. (Exh. Z65 pp3-4).

CONCLUSION

For the foregoing, Respondents' arguments must be rejected; Petitioner's petition be granted.

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