No.

IN THE

Supreme Court of the United States

PETER JOKICH, PETITIONER

v.

RUSH UNIVERSITY MEDICAL CENTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. The "demanding standard" of proof the Panel imposed on petitioner to show waiver of a contract condition under Illinois law has *no* foundation in that State's jurisprudence. The Panel's version denies relief if *just one fact* is inconsistent with waiver while Illinois law provides relief even when some facts are inconsistent with waiver. Did the Panel's unsupported standard unfairly deprive petitioner of his ability to show a triable fact issue whether respondent waived a contract condition and so skewed summary judgment as to deny him due process of law?

2. Does the Panel's misreading of Illinois law in exercising its supplemental jurisdiction to impose upon petitioner a more onerous burden of proving waiver than Illinois law requires violate the federalism principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), causing a substantial variation in outcomes between State and federal litigation, influencing the choice of a forum for future litigants and depriving petitioner of property rights he otherwise enjoys in State court?

3. Did the court of appeals irredeemably mishandle the summary judgment record by refusing to view the reasonable inferences drawn therefrom in the light most favorable to petitioner, the nonmoving party, when assessing his claim that after engaging in protected activity, he was discharged because of his protected activity?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

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The published Opinion of the United States Court of Appeals for the Seventh Circuit in *Peter Jokich, M.D. v. Rush University Medical Center*, C.A. No. 21-2691, decided and filed July 28, 2022, and reported at 42 F.4th 626 (3rd Cir. 2022), affirming the District Court's entry of summary judgment against petitioner on his claims of retaliatory discharge and breach of contract, is set forth in the Appendix hereto (App. 1-19).

The unpublished Opinion and Order of the United State District Court for the Northern District of Illinois in *Peter Jokich, M.D. v. Rush University Medical Center*, Civil Action No. 18 C 7885, decided and filed August 9, 2021, and reported at 2021 WL 3487350 (N. D. Ill. August 9, 2021), granting respondent summary judgment on petitioner's claim under Illinois law that his discharge breached his employment contract, is set forth in the Appendix hereto (App. 20-39).

The unpublished Opinion and Order of the United State District Court for the Northern District of Illinois in *Peter Jokich, M.D. v. Rush University Medical Center*, Civil Action No. 18 C 7885, decided and filed May 11, 2021, and reported at 2021 WL 1885984 (N. D. Ill. May 11, 2021), granting respondent summary judgment on petitioner's claim that he was terminated in retaliation for his complaints about workplace discrimination in violation of federal statutes, is set forth in the Appendix hereto (App. 40-69).

The unpublished order of the United States Court of Appeals for the Seventh Circuit in *Peter Jokich, M.D. v. Rush University Medical Center*, C.A. No. 21-2691, filed on September 12, 2022, denying petitioner's timely filed petition for panel rehearing and/or for rehearing *en banc*, is set forth in the Appendix hereto (App. 70).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit affirming the District Court's entry of summary judgment against petitioner on his claims of retaliatory discharge and breach of contract, was entered on July 28, 2022; and its order denying petitioner's timely filed petition for panel rehearing and/or for rehearing *en banc* was decided and filed on September 12, 2022 (App. 1-19;70).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals' denied petitioner's timely filed petition for panel rehearing and/or for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 1367(a):

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

29 U.S.C. § 623(a) [The Age Discrimination in Employment Act of 1967]:

§ 623(a):
Employer practices
It shall be unlawful for an employer----
(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees 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 age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

42 U.S.C. § 1981(a) & (c):

(a) Statement of equal rights 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.

....

(c) Protection against impairment The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. §§ 2000e-2(a); (m) & 3 [Title VII of the Civil Rights Act of 1964, as amended]:

2. UNLAWFUL EMPLOYMENT PRACTICES

(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.

....

(m) An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

....

3. OTHER UNLAWFUL EMPLOYMENT PRACTICES.

(a) It shall be an unlawful practice for an employer to discriminate against of his employees or applicants for employment...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.

Fed. R. Civ. P. 56 (SUMMARY JUDGMENT):

(a) **Motion for Summary Judgment....**

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary

judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law..

Illinois Constitution, Article I, § 12:

RIGHT TO REMEDY AND JUSTICE

Every person shall find a certain remedy in the laws for all injuries and wrongs which he received to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Illinois Constitution, Article I, § 13:

TRIAL BY JURY

The right of trial by jury as heretofore enjoyed shall remain inviolate.

STATEMENT

Petitioner Peter Jokich ("petitioner" or "Jokich") is a distinguished, nationally recognized physician specializing in breast imaging in the Chicago area. Respondent Rush University Medical Center ("respondent" or "Rush") is a not-for-profit tax-exempt corporation whose governing Board of Trustees conducts business through its standing committees, including a Compensation and Human Resources Committee ("the Comp Committee" or "the Committee").

In 1989, Rush recruited petitioner from the University of Chicago to be the first Director of its Breast Imaging Section as part of a private radiology group. During his tenure, his Section became the preeminent breast imaging unit in Chicago. In 1999, petitioner returned to the University of Chicago as its Chief of Breast Imaging. But in 2001, Dr. Larry Goodman of Rush asked petitioner to return to rescue Rush's struggling breast imaging operation.

Petitioner agreed to return but only if he were employed directly by Rush rather than as a member of a private radiology group. He wanted total control over the technical and administrative aspects of breast imaging as well as the power to hire everyone including physicians. In essence, petitioner asked that he be given free rein"to build the best breast-imaging operation...in the country" (App. 42-43). Dr. Goodman agreed with petitioner's proposal.

By 2017, as the Director of Rush's Division of Breast Imaging ("DBI"), petitioner "was a prized member of [its] medical faculty...," having established the Division as one of the best breast imaging operations in the nation (App. 21;42-43). He was the recipient of excellent annual performance reviews by his superior, Dr. Sharon Byrd, the Department Chair and head of Rush's Diagnostic Radiology and Nuclear Medicine Department. Byrd's review of June 20, 2018, described petitioner's patient care and patient satisfaction as "excellent...as determined by [a] medical audit and...internal patient surveys." On July 1, 2018, Rush renewed petitioner's clinical privileges based on consistently positive assessments of his medical skills and his good medical citizenship.

Since returning to Rush, petitioner was employed pursuant to a series of multi-year Letter Agreements with Rush's Board of Trustees through its Comp Committee. Other Rush physicians, however, were employed under a standard one-year Faculty Employment Agreement ("FEA") that was terminable for cause and provided a fixed set of rights and benefits together with a specified salary. Reflecting petitioner's extraordinary role in developing Rush's DBI, these Letter Agreements provided benefits for all DBI physicians which exceeded those provided under the FEA. They contain a unique bonus structure, including liberal vacation time. These features, some of which required petitioner and staff to work Saturdays, were "unusual" within Rush's employment structure.

On August 12, 2016, petitioner's then-existing multi-year Letter Agreement was expiring. By August 18, 2016, petitioner and Dr. Ranga Krishnan of Rush Medical College had signed a new long-term Letter Agreement for petitioner's work at the DBI going forward. It provided for a new four-year term for petitioner to June 30, 2020, with the option of extending it two more years upon the achievement of certain annual and five-year fiscal goals. There were also bonus opportunities and other enhanced benefits for DBI staff together with a separate Medical Service Plan to distinguish the DBI from other practices within the Department of Diagnostic Radiology and Nuclear Medicine.

Although Dr. Krishnan signed the Letter Agreement on behalf of Rush, a condition precedent to its consummation was approval by Rush's Comp Committee. The Committee in October of 2016 without

approving its terms requested that certain Division-wide productivity benchmarks called "relative value units" ("RVUs") be added. Petitioner disagreed with imposing these metrics on the DBI and negotiations ensued through April of 2017. An amended offer letter containing more demanding conditions and performance metrics was approved by the Committee and sent to petitioner for his signature in June of 2017; but he refused to sign it or to return it to the Committee.

As the district court later found, "[t]here was no other communication to [petitioner] that explicitly said the 2016 Letter Agreement was void or superseded by the amended offer letter" (App. 25). Moreover, "[n]o one in management reached out to [petitioner] about the letter and, according to Krishnan, he assumed that [petitioner] had signed [it];" and Rush never followed up in 2017 or 2018 with any further revisions to the 2016 Letter Agreement (*Id.*).

Petitioner continued his work at Rush for more than a year after June of 2017 with both he and Rush acting in accord with the terms of the 2016 Letter Agreement. That is, until August of 2018, petitioner and other DBI physicians successfully completed a five-year strategic plan for their Division while Rush duly paid all their bonuses for the 2017 fiscal year with all such bonuses being calculated and paid pursuant to the formula contained within the 2016 Letter Agreement. Rush as required under the 2016 Agreement also continued to grant DBI physicians liberal vacation time and other enhanced benefits in excess of those provided other employees under the FEA. By providing these "unusual" benefits to petitioner and his DBI colleagues throughout 2017 and 2018, Rush was performing

consistent with its obligations under the 2016 Letter Agreement rather than under the different terms of the proposed 2017 amended offer letter.

Amidst these ongoing contractual relations, petitioner in 2016 clashed with Dr. Robert DeCresce ("DeCresce"), the Acting Director of the Rush Cancer Center. He first disagreed with DeCresce's failure to renew a contract with a nationally known radiation oncologist (Dr. Katherine Griem). Second, petitioner supported a Title VII lawsuit brought against Rush by Norma Melgoza, its only female Hispanic executive, who claimed gender and national origin discrimination. One of her claims was that DeCresce acted inappropriately when he put on a Trump mask during her interview for an internal promotion which she did not receive. Petitioner sided with Melgoza and he was identified during discovery in her lawsuit as a potential witness on her behalf.

Another flashpoint between petitioner and Rush occurred in February of 2018 when he authored an internal email suggesting that unnamed staff surgeons repeatedly missed localized lesions during surgery (App. 46-47). The physicians, both female, were contacted by Rush's HR departments which commissioned an investigation by Ms. Patience Nelson, a private attorney, to determine whether petitioner had engaged in disruptive conduct or whether gender discrimination was in play (App. 48). Petitioner denied any gender discrimination and claimed that Rush encouraged the surgeons to fabricate complaints against him in retaliation for (a) his support of Dr. Griem; (b) his support of Melgoza's lawsuit; and (c) to deter him from going public with his longstanding

opinion that Rush was exposing ethnic minority women to increased levels of radiation by using 3D Tomosynthesis without their consent (*Id.*).

On April 9, 2018, Nelson reported that petitioner had not engaged in disruptive conduct or acted with bias toward any of these women surgeons. But she rejected his claims of retaliation as "speculative" or that he had suffered any "adverse action" (App. 48-49). She recommended that the involved Departments meet to address the underlying tensions (App. 49).

On April 20, 2018, eight days after seeing this report containing petitioner's statement that he might testify in Melgoza's lawsuit, DeCresce, without informing petitioner, stripped him of all supervisory responsibility for breast imaging at Rush's four offsite locations, two operating and two about to open, placing in charge one of the women physicians (Dr. Grabler) who had complained about him (*Id.*). Considering this a demotion, petitioner emailed Ms. Shanon Shumpert, the HR official who oversaw Nelson's investigation, requesting a meeting to file a complaint of retaliation (*Id.*).

On May 22, 2018, petitioner emailed Drs. Goodman (now Rush's CEO), Krishnan and DeCresce complaining that Rush was pursuing procedures like 3D Tomosynthesis at the expense of patient care (App. 51-52). By May 26, 2018, DeCresce decided "to terminate" petitioner the next week and sought the help of HR and Goodman in doing so (App. 52-53). Before that event, however, petitioner on June 11, 2018, emailed Goodman and a Rush Senior Vice President requesting a meeting about "serious discrimination issues and unfair

employment practices that have occurred, and are occurring, at Rush involving at least gender, age, and national origin" (App.53-54).

On June 18, 2018, petitioner filed a formal complaint alleging gender/age and national origin discrimination as well as retaliation with regard to his support of Dr. Griem and Ms. Melgoza; and discrimination stemming from false accusations of gender discrimination made against him arising from his email about the women surgeons (App. 54-55). He identified Drs. Goodman and DeCresce as well as the head of HR, among others, as culpable parties (App. 55). On June 19, 2018, Rush retained an attorney who after interviewing only petitioner, concluded that petitioner alone could not substantiate his allegations (App. 55-56).

On August 8, 2018, less than two months after petitioner's June emails accusing Rush of discriminatory conduct, DeCresce and Krishnan met with and told petitioner that he could either resign or face termination (App. 56). They tendered him a separation agreement which would pay him his then-current salary under the 2016 Letter Agreement until June 30, 2020, a tender petitioner rejected in its then present form (*Id.*). The next day, August 22, 2018, Rush removed petitioner as Director of the Division of Breast Imaging and told him that pursuant to the FEA—an employment agreement under which he had *never* been employed during his tenure at Rush—his salary would now be substantially reduced by more than $200,000; it would expire on June 30, 2019; and it would not be renewed (App. 56-57). He was further directed to not

communicate with patients or staff or face immediate termination for cause (*Id.*).

All this was contrary to petitioner's employment under the 2016 Letter Agreement which did not expire until June 30, 2020, at the earliest (App. 56-57). It was only *after* Rush decided to terminate petitioner in August of 2018 that it asserted that the 2016 Letter Agreement—under which both parties had been operating since August of 2016—was *never in effect.* According to Krishnan, he learned only in late July of 2018 that petitioner had not signed the proposed 2017 amended offer letter; but Rush had at all times from July of 2016 to August of 2018 performed consistent with its obligations under the 2016 Letter Agreement, *not* the proposed 2017 amended offer letter.

In fact, Rush's draft termination letter to petitioner of June 6, 2018 (which was never sent) reflected Rush's understanding that the 2016 Letter Agreement *was, in fact, still in effect and would continue to be in effect until June 30, 2020.* Yet upon petitioner's effective termination, DeCresce now asserted that because petitioner had not agreed to Rush's proposed 2017 amended offer letter, his compensation would now be determined *not* by the 2016 Letter Agreement but instead by the FEA and his term of employment would end in June of 2019 instead of June 2020.

On November 29, 2018, petitioner began this civil action against Rush in the federal district court for the Northern District of Illinois (App. 40). Asserting federal jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. §§ 2000e-5(f)(3), as well as supplemental

jurisdiction over his State law claims under 28 U.S.C. § 1367, petitioner alleged that Rush had unlawfully retaliated against him for complaining about its unlawful discrimination based on age, gender and national origin (App. 40-41). He also asserted contract claims under State law based on his employment agreements (*Id.*).

Rush moved for summary judgment on all claims (App. 40-41). On May 11, 2021, the district court, Lefkow, J., granted summary judgment on petitioner's federal claims and relinquished jurisdiction over his contract claims under State law (App. 40-69). It ruled that petitioner engaged in protected activity only when he emailed Rush on June 11, 2018, and then complained formally one week later to HR asserting discrimination/retaliation because he supported Melgoza's pending Title VII lawsuit (App. 59-60). But the district judge saw no but-for causative link between this protected activity and his subsequent termination in August of 2018: "A reasonable jury could believe that DeCresce's documented disapproval of [petitioner's] behavior toward management and peers was the reason for the termination" rather than his support of Melgoza's discrimination lawsuit (App. 61-63).She accordingly dismissed all federal claims and declined to exercise supplemental jurisdiction over the remaining State-law contract claims, dismissing them without prejudice to their renewed filing in state court (App. 64-65).

On June 7, 2021, petitioner moved to alter and amend the judgment to retain jurisdiction over his State-law contract claims because he was procedurally barred from refiling the claims in state court (App. 37).

On August 9, 2021, Judge Lefkow granted the motion and immediately entered an opinion and order granting Rush summary judgment on petitioner's remaining contract claims (App. 20-39). She rejected petitioner's claim that Rush by allowing him to continue to work from June 30, 2016, until he was terminated in August of 2018, all consistent with the 2016 Letter Agreement, impliedly waived approval by its Board of Trustees of the 2016 Letter Agreement causing Rush to be bound by it (App. 31-32). She saw no evidence—other than Rush's bonus payment—that it thought the 2016 Letter Agreement was still in force; and there was no proof that when it paid these bonuses, Rush "was unequivocally acting pursuant to the 2016 Letter Agreement" (App. 32). Thus she concluded that no reasonable jury could believe that Rush's conduct was inconsistent with any intention other than to waive the requirement of Board approval (App. 33). Nor was Rush estopped from enforcing it for the same reasons (*Id.*).

Petitioner appealed and on July 28, 2022, the court of appeals affirmed the district court's rulings (App. 1-19). In denying petitioner's claim of waiver, the Panel agreed that some of Rush's actions—providing petitioner and his DBI colleagues certain benefits and paying them an annual bonus—were consistent with the 2016 Letter Agreement (App. 17). But it determined that under Illinois law, waiver of a contract condition "requires more than just some actions consistent with the performance of the contract;" it requires conduct "wholly inconsistent" with the condition (*Id.*). As the Panel concluded, the record "does not satisfy this demanding standard" (*Id.*). Thus whatever the reasons for Rush's providing petitioner

with compensation consistent with the 2016 Letter Agreement, i.e., whether by mistake or an act of grace, "those actions cannot establish waiver [under State law] where Rush otherwise demonstrated an unwillingness to waive the condition" (*Id.*).

As for retaliation, the Panel concluded that petitioner failed to establish a but-for causal nexus between his protected activity and either DeCresce's transfer of oversight of the offsite breast-imaging facilities in April of 2018 to Dr. Grabler or Rush's decision to remove him as Director later in August (App. 11;12-14). It saw only "suspicious timing" for the earlier transfer of authority "and without more a reasonable factfinder could not infer a retaliatory motive for the action" (App. 13). As for his later removal, "[t]he only evidence of a retaliatory motive would be arguably suspicious timing between his June 2018 complaints and Rush's August 2018 actions...[but t]hat's not enough to make his case" (App. 14).

On September 12, 2022, the Panel denied petitioner's petition for panel rehearing and/or for rehearing *en banc* (App. 70).

REASONS FOR GRANTING THE PETITION

1. Illinois Law Does Not Require That Conduct Be "Wholly Inconsistent" With A Contract Condition In Order To Prove A Waiver Of That Condition, Only That *Some* Conduct Be Inconsistent With The Condition. By Imposing This "Wholly Inconsistent" Standard On Petitioner, The Panel Denied Him The Right To Show A Triable Fact Issue That Respondent Under State Law Waived Board Approval Of The Contract, So Skewing Summary Judgment As To Deny Petitioner Due Process By Depriving Him Of The Property Rights He Would Otherwise Enjoy In State Court.

The "demanding standard" of proof the Panel imposed on petitioner to show waiver of a contract condition under Illinois law has *no* foundation in that State's jurisprudence. Its "wholly inconsistent" version of the standard to show waiver—gleaned from only federal decisions—denies its recognition if *just one fact* is inconsistent with a waiver of a contract condition. Illinois law, on the other hand, recognizes waiver of a contract condition *even if* some facts exist that are inconsistent with a waiver of the condition.

By relying on this wrong interpretation of State law to conclude that Rush's conduct from 2016 to 2018 cannot establish waiver, the Panel deprived petitioner of his property rights under Illinois law, his procedural rights under Rule 56, and the constitutional right provided every federal litigant by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) that the rights he would otherwise enjoy in State court shall not be diminished. In this regard, certiorari should be granted because "a United States court of appeals has decided an

important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." Supreme Court Rule 10(c).

The parties' conduct between 2016 and 2018 demonstrates that the 2016 Letter Agreement was in full force and effect throughout. After August 18, 2016, when petitioner and Rush's Dr. Ranga Krishnan signed the new long-term Letter Agreement for petitioner's work at the DBI going forward, both parties proceeded as if the Letter Agreement governed petitioner's work. Petitioner and other DBI physicians successfully completed a five-year strategic plan for their Division while Rush duly paid their bonuses for the 2016 and 2017 fiscal years, *all* of them calculated and paid pursuant to the formula contained within the 2016 Letter Agreement.

As required under the 2016 Agreement, Rush also continued to grant DBI physicians liberal vacation time and other enhanced benefits in excess of those provided other employees under the FEA. By providing these "unusual" benefits to petitioner and his DBI colleagues throughout 2016, 2017 and 2018, Rush was performing consistent with its obligations under the 2016 Agreement. In fact, Rush's draft termination letter to petitioner of June 6, 2018, reflects Rush's understanding that the 2016 Letter Agreement was *still* in effect and would continue to be in effect until June 30, 2020.

That Rush's Comp Committee sought to import into petitioner's Letter Agreement new conditions

including performance metrics in their amended offer letter in June of 2017—one petitioner refused to sign or return to the Comp Committee—does not dilute the established fact on this record that until then and thereafter, the parties continued to comport themselves as if the 2016 Agreement was in effect and would continue to govern petitioner's terms of employment until June 30, 2020. Even the district court later found that "[t]here was no other communication to [petitioner] that explicitly said the 2016 Letter Agreement was void or superseded by the amended offer letter" (App. 25). Moreover, "[n]o one in management reached out to [petitioner] about the letter" and Rush never followed up with any further revisions to the 2016 Letter Agreement in 2017 or 2018 (*Id.*).

It was only *after* Rush decided to terminate petitioner in August of 2018 that it cynically asserted that the 2016 Agreement—under which both parties had been operating since August of 2016—was *never really in effect* because its Board never approved it. As DeCresce claimed, because petitioner had not agreed to Rush's proposed 2017 amended offer letter—a fact Rush claimed not to know until July of 2018—his compensation would now be determined *not* by the 2016 Agreement but by the less robust FEA; and his employment would end in June of 2019 instead of June 2020.

But the fact remains on this summary judgment record that Rush had at all times from July of 2016 to August of 2018 conducted itself consistent with the 2016 Agreement, *not* the proposed 2017 amended offer letter. In these circumstances where most, if not all, of

the parties' conduct from 2016 through 2018 hewed to the provisions of the 2016 Agreement, it was a jury question under State law whether Rush by its conduct waived approval by its Board of the 2016 Agreement. This is so because under Illinois law, there may well be *some* conduct by a party which is consistent with a contract right but if there is *more* conduct consistent with a waiver of that right, then the potential for waiver of a condition precedent through a party's action or deeds "involves a question of fact" for a jury which prevents a resolution of the issue by summary judgment.

The Panel's substitution of this State law with its own more demanding "wholly inconsistent" standard, one which refuses to recognize waiver if *just one fact* is contrary to waiver, has *no* support in Illinois law. More important, its misreading of State law deprived petitioner of property rights he would otherwise enjoy in State court, i.e., the right to show the existence of a triable fact question whether Rush by its conduct waived approval by its Board of the 2016 Agreement.

This exceptionally important question of federalism deserves to be resolved by the Court. If the Panel's ruling is allowed to stand, it creates unprincipled federal common law that applies to future federal litigation involving State law claims of waiver, a result at odds with *Erie's* concept of a pragmatic federalism. The Panel's new and demanding standard will likely generate substantial litigation to define the dimensions of this new "waiver exception," one not cabined by just contract law but extending logically to tort law and other areas of civil practice. Federal litigants pressing State law claims implicating waiver

issues deserve a fair hearing on their proof and the instant ruling by the Panel paves the way for a denial of that fundamental right. The Court should accordingly grant certiorari, identify the Panel's error and remand to the lower court for further discovery and trial.

In Illinois, a party to a contract may waive performance of a condition precedent by the other party where the condition is intended to benefit the waiving party. *Downs v. Rosenthal Collins Grp., L.L.C.*, 963 N.E.2d 282, 290-291 (Ill. App. 2012) citing *Catholic Charities of the Archdiocese of Chicago v. Thorpe*, 741 N.E.2d 651, 655 (Ill. App. 2000). See *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 202 (7th Cir. 1985) (applying Illinois law).

Waiver may be proven by words or deeds of the party against whom waiver is invoked where those words or deeds "are inconsistent" with an intention to insist on that party's contractual rights. *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, *supra*, citing *John Kubinski & Sons, Inc. v. Dockside Development Corp.*, 339 N.E.2d 529, 533-534 (Ill. App. 1975). Under Illinois law, conditions precedent may be waived when a party to a contract intentionally relinquishes a known right either expressly or by conduct indicating that strict compliance with the conditions is not required. *MBC, Inc. v. Space Center Minnesota, Inc.*, 532 N.E.2d 255, 259-260 (Ill. App. 1988). *Geldermann, Inc. v. Fenimore*, 663 F. Supp. 590, 592 (N.D. Ill. 1987) (applying Illinois law).

Such conduct might include continuing to accept the breaching party's performance and the benefits thereof after learning of the breach. *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d

at 204. Thus substantive Illinois law holds that a party seeking to prove an implied waiver may show that "the conduct of the person against whom waiver is asserted *is inconsistent* with any intention other than to waive the right." *Downs* citing *Whalen v. K Mart Corp.*, 519 N.E.2d 991 (Ill. App. 1988) (emphasis supplied).

However, there is *no* requirement in Illinois that such conduct be"*wholly* inconsistent" with an intention other than to waive the right. Under Illinois law, there may well be *some* conduct by a party which is consistent with a contract right but if there is *more* conduct which is consistent with a waiver of that right, then a waiver of a condition precedent through action or deeds "involves a question of fact" which would prevent the entry of summary judgment. See *Downs* at 291; *Liberty Mut. Ins. Co. v. Westfield Ins. Co.*, 703 N.E.2d 439, 441-442 (Ill. App. 1998); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d at 202-203.

The Panel's substitution of this law with a more demanding "wholly inconsistent" standard to show waiver is flat wrong. It cites as authority for this proposition *Sphere Drake Ins. v. American General Life Ins. Co.*, 376 F.3d 664, 679 (7th Cir. 2004) and *Downs*, 963 N.E.2d at 290-291 (App. 17). But *Downs* contains *no* such language as "wholly inconsistent" and *Sphere Drake* cites a Bankruptcy Court decision (*In re Midway Airlines*, 180 B.R. 851, 919-920 (N.D. Ill. 1995))for this phrasing. *Id.* at 679. *Midway*, in turn, relies on three Illinois decisions for the proposition that a waiving party's conduct must be "wholly inconsistent" with the condition to show waiver. *Id.* at 920.

Yet *none* of the Illinois decisions cited in *Midway* contain any requirement that the conduct be "wholly inconsistent" with the contract condition in order to prove waiver. Instead, all three decisions hold, like *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d at 202, that a party seeking to prove an implied waiver must show only that the conduct of the person against whom waiver is asserted "is inconsistent" with that party's intention to insist on its contract rights. See *Ryder v. Bank of Hickory Hills*, 585 N.E.2d 46, 49 (Ill. 1991); *Kelly v. Economy Fire & Cas. Co.*, 553 N.E.2d 412, 414-415 (Ill. App. 1990); *Kane v. American Nat. Bank & Trust Co.*, 316 N.E.2d 177, 182 (Ill. App. 1974).

Because this standard of proof under State law to prove waiver accommodates the idea that if there is *more* conduct which is consistent with waiver than there is with non-waiver, then waiver of a contract condition becomes a triable question of fact—and the entry of summary judgment foreclosed—on a record where the bulk of Rush's conduct from 2016 through 2018 shows, as here, that it hewed to the 2016 Agreement. By making up their own, more demanding, test for proving waiver, the Panel ignored the substantive law of Illinois to petitioner's detriment, refusing to hold Rush accountable for the legal consequences of its own conduct.

Had the Panel properly applied State law, petitioner could have survived summary judgment. His opposition materials proved that the bulk of Rush's conduct was inconsistent with its later claim that Board approval was necessary before the 2016 Agreement could govern the terms of petitioner's employment.

Those materials showed that in accordance with the 2016 Agreement:

- Rush paid *every single member* of the DBI—*not* just petitioner—their bonuses in 2016 and 2017 (petitioner's suspension in 2018 was effective before the 2018 bonuses were due);

- Rush asked petitioner in 2017 whether Dr. Grabler was covered by the 2016 Agreement's bonus plan (she was);

- Rush provided *the entire DBI team—not* just petitioner—more days off for continuing medical education and enhanced vacation benefits in 2016, 2017 and 2018;

- Rush's CEO (Dr. Goodman) stated in June of 2018 that petitioner was employed under a "multi-year employment agreement," i.e., the 2016 Agreement, a fact not contradicted by Rush's General Counsel;

- Rush admitted in its June 2018 draft termination letter to petitioner that the 2016 Agreement still controlled his terms of employment;

- Rush's Krishnan and DeCresce both told petitioner at his termination meeting in August of 2018 that they were "surprised" he had not signed Rush's 2017 amended offer, an admission that Rush was still bound by and

was performing the 2016 Agreement as it was written;

- Rush *never* told petitioner that the 2016 Agreement was void or superseded by its 2017 amended offer letter; and

- Rush *never* followed up with petitioner in 2017 or 2018 as to any further revisions of the 2016 Agreement.

All these facts created a triable issue whether Rush had waived Board approval of the 2016 Agreement. These same facts, if believed, also show that Rush's conduct induced petitioner to believe that Rush regarded the 2016 Agreement as in full force and effect from June of 2016 to and beyond his termination in August of 2018 and thus should be estopped to claim otherwise.

The Panel's mistake about State law irremediably tainted the summary judgment protocol so that petitioner was unfairly prevented from showing the existence of a triable issue of fact regarding waiver. Because it believed that *even one fact* inconsistent with waiver was enough to deny petitioner relief, the Panel's *de novo* review of petitioner's opposition materials was fatally skewed. Instead of drawing all reasonable inferences against Rush and in favor of petitioner, the non-moving party, and rather than resolving credibility questions in favor of petitioner, see *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (*per curiam*); *Beard v. Banks*, 548 U.S. 521, 529-530;534 (2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000), the Panel determined that the lone fact that Rush and

petitioner had negotiated over the terms of the proposed 2017 amended offer letter (which never resulted in an agreement),was *alone* enough to defeat petitioner's proof of waiver (App. 17). But had it read petitioner's materials with the deference they deserved, had it chosen to focus on petitioner's "most persuasive story possible," *Joll v. Valparaiso Cmty. Sch.*, 953 F.3d 923, 928 (7th Cir. 2020), and had it properly applied State law, the Panel would have concluded that a triable fact issue exists whether Rush waived Board approval or should be estopped from claiming otherwise.

The Panel's creation of a more "demanding standard" for petitioner to prove waiver under State law also conflicts with *Erie*. Under that decision, when a federal court exercises supplemental jurisdiction over State law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109 (1945). Avoiding judge-made rules in federal court which undercut a litigant's rights he otherwise enjoys under State law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are expressions of their own sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742 (2000) (Rehnquist, C.J., concurring). All these concerns of *Erie* are undermined by the result here.

In State court, petitioner would have received a jury trial under Article I, §§ 12 & 13 of the Illinois Constitution on the issue of whether Rush waived

Board approval. Denying this jury trial right in the federal forum because of the Panel's"wholly inconsistent" standard is a violation of petitioner's seventh amendment right to trial by jury. As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306 (2004), the right to a jury trial in civil cases is not a procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed.1981). Petitioner was entitled to a jury trial in federal court on the evidence of waiver he adduced. The Panel's misreading of Illinois law and its distortion of Rule 56(a) deprived him of that right.

Finally, the Panel's demanding standard which allows *just one fact* supporting non-waiver to overcome multiple facts supporting waiver turns Rule 56(a) on its head. The Rule contemplates a process whereby the parties collect facts which, when taken together, provide the basis for a jury to find that a given event has taken place. But when *one fact* is predetermined as a matter of law to trump all other facts— regardless of the inferences those other facts create—the summary judgment process has been fatally distorted, making petitioner's coherent factual proof of waiver meaningless. This short-circuiting of petitioner's evidence is *not* how summary judgment was intended to operate; it denies him due process on his proof, all founded on the Panel's wrong interpretation of State law.

This Court has the responsibility in its superintendency role over the federal courts and the federal system to formulate the controlling rules for

hearings and proof, especially the Federal Rules of Civil Procedure, so that these rules provide all parties with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341 (1943). See *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). The Court should exercise this power to hold that the Panel's wrong interpretation of State law has, in turn, fatally undermined Rule 56's summary judgment machinery to petitioner's detriment.

2. The Panel's Flawed "But-For" Causation Analysis Focuses Only Upon "Suspicious Timing" But Refuses To Consider Petitioner's Circumstantial Evidence That His Protected Activity Was One But-For Cause Of Rush's Decision To Terminate Him, That Its Serial Justifications For Termination Were Pretextual And That Title VII's Remedies Were Therefore Triggered.

42 U.S.C. §§ 2000e-3(a) makes it unlawful for an employer to retaliate against an employee "*because* he has opposed any practice made an unlawful employment practice by this subchapter...." (emphasis supplied). This "because of" causation standard obligates a plaintiff to prove that his Title VII complaints actually played a role in the employer's decisionmaking process to terminate him and had a determining influence on the outcome. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-177 (2009) quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

In *Burrage v. United States*, 571 U.S. 204, 211-213 (2014), Justice Scalia likened the phrase "because of" to "results from" with both invoking a "but for" requirement which "is part of the common

understanding of cause." *Id.* at 211. Thus when interpreting a statute that prohibits adverse employment action "because of" an employee's complaints of unlawful workplace discrimination, the ordinary meaning of the word "because" requires proof that the desire to retaliate was "a but-for cause of the challenged employment action." *Id.* at 212. That is, the employer would not have taken the adverse employment action *but for* a design to retaliate. *Id.* at 213-214.See *Bostock v. Clayton Cnty.*, 590 U.S.___, ___; 140 S.Ct. 1731, 1739 (2020); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350; 360 (2013).

However, "but-for" causation does *not* mean that *sole* causation is required. In *Bostock v. Clayton Cnty.*, *supra*, Justice Gorsuch observed that the "because of" standard of causation incorporates the "simple" and "traditional" standard of but-for causation, a type of causation established whenever "a particular outcome would not have happened 'but for' the purported cause." *Id.* citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. at 176. It directs a jury to change one thing at a time and then determine if the outcome changes; if it does, then a but-for cause has been identified. *Id.* So long as petitioner's complaints about workplace discrimination were one but-for cause of respondent's decision to terminate him, *even if accompanied by other legitimate or illegitimate causes*, that is enough to trigger Title VII's remedies. *Id.* citing *Nassar*, 570 U.S. at 350.

The Panel saw only "suspicious timing" for the transfer of satellite imaging authority to another physician in early May of 2018 "and without more a reasonable factfinder could not infer a retaliatory

motive for the action" (App. 13). As for petitioner's later removal as Director of DBI in August, "[t]he only evidence of a retaliatory motive would be arguably suspicious timing between his June 2018 complaints and Rush's August 2018 actions...[but t]hat's not enough to make his case" (App. 14). Petitioner submits, however, that his evidence permitted the inference that the "suspicious timing" of these adverse actions was corroborated by other circumstantial evidence which permitted a trier of fact to find that his protected activity was one but-for cause of Rush's decision to terminate him, that its serial justifications for the adverse actions he suffered were pretextual and that Title VII's remedies were therefore triggered.

Where an adverse employment action takes place "soon after" the employee's protected activity, *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110 (1st Cir. 1988), "just after" the employee advocated for the rights of a co-employee, *E.E.O.C. v. Navy Federal Credit Union*, 424 F.3d 397, 408 (4th Cir.2005), within one and one-half months of such activity, *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999), or even within four months of the employee's protected activity, see *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994), the inference is strong that the adverse employment action is retaliatory and therefore actionable. *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 115 (2nd Cir. 1987). See generally *EEOC v. PVNF, L.L.C.*, 487 F.3d 790, 802 (10th Cir. 2007).

Rush stripped petitioner of his authority over its satellite imaging facilities only *eight days* after DeCresce read in Nelson's report that he might testify

in Melgoza's Title VII lawsuit; and DeCresce and Goodman took *less than two months* after the filing of his HR complaints in June of 2018 to terminate him as the Director of DBI. This temporal proximity alone is "strong" *prima facie* proof that the adverse employment action is retaliatory and therefore actionable.

But this temporal proximity was also coupled with probative proof of pretext: Rush justified its actions at different times on petitioner's negative attitude, his inability to work cooperatively, his low productivity, and his opinionated stance on internal hospital issues. But these reasons were at odds with petitioner's longstanding excellent job performance reviews, his sterling medical citizenship and his June 18, 2018 annual performance review together with his staff privilege re-accreditation—completed just weeks *after* DeCresce had decided to terminate him for cause— concluding that petitioner "has run an excellent breast imaging service."

These shifting, contradictory reasons by Rush for terminating petitioner were themselves good reasons to infer a pretext or a coverup for invidious discrimination. *Reeves*, 530 U.S. at 147-149 (a *prima facie* case together with sufficient evidence to reject the employer's explanations permits a finding of liability by the factfinder). Accord, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-511 (1993); *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) ("when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual."); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808,

813 (10th Cir. 2000) (same); *E.E.O.C. v. Ethan Allen, Inc.* , 44 F.3d 116, 120 (2nd Cir. 1994) (same).

The Panel, however, sanitized all this proof of retaliation and pretext by creating a one-sided narrative by which Rush simply parted ways with a nettlesome physician for business reasons and understandable personality clashes rather than because of discriminatory workplace animus. Instead of perceiving a classic case of retaliation against a prominent whistleblower complaining of illegal discriminatory employment practices, it read the summary judgment record *not* in petitioner's favor but instead *against* him to conclude that he had failed to navigate his job responsibilities properly and therefore no reasonable jury could find Rush's decision to discharge was illegal retaliation.

The Panel disregarded this Court's cautious approach about granting summary judgment to employers in a discrimination case, especially when intent and credibility are in issue. *See Pollar v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). "[A]dded rigor" is called for because direct evidence of discriminatory intent will rarely be available; "affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 101 (2nd Cir. 2010). *Gallo v. Prudential Residential Services, Ltd. Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994). Put another way, "[i]f there is any evidence in the record that could reasonably support a jury's verdict for the nonmoving party, summary judgment must be denied." *Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH*

, 446 F.3d 313, 315-16 (2d Cir. 2006) (internal citation and quotation omitted).

Contrary to these principles, the Panel believed and adopted every one of Rush's reasons for petitioner's termination, construing all reasonable inferences from the materials *in favor of* Rush and *against* petitioner as the non-moving party, *the reverse* of its obligations under this Court's decisions. It also resolved credibility questions *against* petitioner, the non-moving party, the *reverse* of the treatment required under summary judgment protocol. None of this appellate factfinding comports with *Reeves* or *Tolan*. Petitioner's proof made a *prima facie* case for retaliation, Rush's incompatible and pretextual explanations notwithstanding, and created a genuine issue of material fact for trial whether he suffered an adverse employment action "because of" his protected activity.

Federal jurists and legal commentators have noted that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). The Panel's blanket adoption Rush's incompatible and pretextual explanations for petitioner's termination usurped the jury's role and deprived him of his day in court. As Professor Miller concludes, "[g]iven the existing, convoluted jurisprudence [which surrounds the proper

use of summary judgment], it is imperative that the Supreme Court provide some clarity rather than leaving the matter [of petitioner's right to a jury trial] to the genial anarchy of trial court discretion." *Miller* at 1134.

This Court should seize this opportunity to provide renewed guidance to inferior federal courts on the exceptionally important question of whether summary judgment is being misused to weigh evidence, make credibility determinations, find facts and impose on the non-moving party a more onerous burden of proof than the process demands in order to dispose of employment discrimination claims without a trial.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit, reverse its judgment, and remand the matter to the District Court for the Northern District of Illinois for further discovery and an eventual trial of the issues of waiver, estoppel and retaliation; or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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United States Court of Appeals, Seventh Circuit.

Peter JOKICH, M.D., Plaintiff-Appellant,
v.
RUSH UNIVERSITY MEDICAL CENTER,
Defendant-Appellee.

No. 21-2691
Argued February 23, 2022Decided July 28, 2022

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 18 C 7885 — Joan H. Lefkow, *Judge.*

Attorneys and Law Firms

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Before Sykes, Chief Judge, and Flaum and Kanne[*], Circuit Judges.

Opinion

Sykes, Chief Judge.

Rush University Medical Center fired Dr. Peter Jokich, a distinguished radiologist who had worked at the hospital for nearly two decades. Dr. Jokich sued Rush, asserting claims under Title VII of the Civil Rights Act of 1964 and Illinois law. He contends that

his termination and other actions taken by Rush were unlawful retaliation for his participation in a colleague's Title VII lawsuit and his opposition to discriminatory practices at Rush. He also contends that Rush's actions violated the procedures set out in his employment contract and that Rush failed to adhere to an agreement guaranteeing his employment for an additional year.

The district judge entered summary judgment for Rush on all claims. We affirm. The record supports Rush's contention that its actions were taken because of Dr. Jokich's clashes with his colleagues; it does not support Dr. Jokich's claim that he was fired because of his participation in activity protected by Title VII. Nor does the record support Dr. Jokich's claims for breach of contract. Rush's actions comported with his employment contract, and the agreement extending his employment was subject to a condition precedent—approval by the hospital's Board of Trustees—that was never satisfied and that Rush did not waive.

I. Background

Dr. Peter Jokich is an accomplished radiologist who specializes in breast imaging. He was recruited to Rush in 2001 by Dr. Larry Goodman, then the hospital's Dean, to improve Rush's struggling breast-imaging practice. Over the next two decades, Dr. Jokich built a highly successful practice and until his final year of employment, served as the director of the hospital's Division of Breast Imaging. That changed in August 2018 when Rush stripped him of this role, cut his pay by over $200,000, and provided notice that his employment contract would not renew when it expired in June 2019. Dr. Jokich contends that these actions resulted in

several breaches of contract and were unlawful retaliation for his participation in activity protected by Title VII.

A. The Employment Contract

Dr. Jokich and Rush had an employment contract called a "Faculty Employment Agreement." The agreement, standard for doctors employed by Rush, set Dr. Jokich's duties and base salary and provided for a one-year employment term. The agreement automatically renewed on July 1 each year unless one party provided 120 days' notice of the intent to terminate the agreement. Rush could terminate the agreement mid-term only for cause. However, Rush could modify Dr. Jokich's pay and duties with 60 days' notice.

In addition to the Faculty Employment Agreement, Dr. Jokich's employment was at times governed by "letter agreements," which were written on Rush letterhead and sent to Dr. Jokich for his signature. Dr. Jokich specially negotiated for the letter agreements, which provided for multiyear employment terms—superseding the Faculty Employment Agreement's one-year term—and annual bonuses and special benefits for him and his breast-imaging team. Absent an active letter agreement, Dr. Jokich's employment was governed solely by the Faculty Employment Agreement.

In August 2016 Dr. Jokich signed a letter agreement extending his employment through June 30, 2020. (We call this the "2016 letter agreement" or "2016 agreement.") The enforceability of the agreement was subject to a condition precedent: approval by Rush's Board of Trustees. The Board of Trustees had to

approve the pay of very highly compensated doctors like Dr. Jokich because the hospital, a tax-exempt, not-for-profit entity, risked liability under anti-kickback laws if it overcompensated a physician relative to his clinical productivity.

At an October 2016 meeting, the Board of Trustees considered and declined to approve the 2016 letter agreement. It worried that Dr. Jokich's clinical productivity was too low to warrant the bonus compensation, exposing Rush to the risk of liability. After the Board's decision, Rush tried to craft an amendment to the 2016 agreement acceptable to both Dr. Jokich and the Board. Dr. Jokich personally participated in the negotiations, sending several e-mails in March 2017 suggesting changes that he hoped might assuage the Board's legal concerns.

In April 2017 Rush sent Dr. Jokich a proposed amendment to the 2016 agreement. The proposal, drafted with recommendations from the Board of Trustees, sought to add productivity benchmarks for Dr. Jokich's practice. He would be eligible for the bonus compensation set out in the 2016 agreement only if the benchmarks were met. Dr. Jokich found the productivity requirements unacceptable and immediately sent an e-mail rejecting the offer.

In June Rush returned with another proposed amendment to the 2016 agreement. This offer (which we call the "2017 amendment") likewise added productivity benchmarks, albeit less demanding ones, limiting Dr. Jokich's eligibility for the bonus compensation set out in the 2016 agreement. The amendment invited Dr. Jokich to accept with his signature. But Dr. Jokich did not sign or otherwise signal acceptance, and unlike his rejection of the first proposed amendment, this time he told no one about his

decision. At his deposition he agreed that he had not accepted the 2017 amendment because "[i]t was basically the same letter that [he] had earlier said [that he] wouldn't sign."

Although the Board of Trustees had not approved the 2016 agreement and although Dr. Jokich had not accepted the 2017 amendment, Rush provided Dr. Jokich and his team bonuses and benefits consistent with the 2016 agreement. This included paying Dr. Jokich a yearly bonus in October 2017. Dr. Ranga Krishnan, Rush's Dean and the person responsible for approving Dr. Jokich's bonuses, explained in a declaration that he signed off on the bonus because he mistakenly believed that Dr. Jokich had accepted the 2017 amendment.

B. Conflict and Termination

The parties have entered a mountain of evidence cataloging a series of conflicts between Dr. Jokich and his colleagues. We will simplify where we can and focus on the key events. In February 2018 Dr. Jokich e-mailed Dr. Krishnan, Dr. Larry Goodman (who by then was Rush's CEO), and Rush's head of surgery to complain about the hospital's breast surgeons. Dr. Jokich urged the administrators to find an adequate replacement for a recently retired breast surgeon and criticized the performance of the remaining breast surgeons, two of whom are female.

The head of surgery showed the e-mail to the two surgeons so they could gather evidence to rebut Dr. Jokich's suggestion that their performances were subpar. After learning of the e-mail, the two female surgeons and Dr. Paula Grabler, a radiologist who worked under Dr. Jokich, raised concerns about him

with the hospital's human-resources department. They complained about their working relationship with him generally and suggested that he may have engaged in sex discrimination.

Rush's response to the complaints was twofold. First, Dr. Krishnan made changes to the reporting hierarchy. Dr. Grabler would now report to Dr. Robert DeCresce, the acting director of the Rush Cancer Center, rather than Dr. Jokich. Dr. Jokich would now report to Dr. DeCresce as well rather than Dr. Sharon Byrd, the chair of the Department of Diagnostic Radiology and Nuclear Medicine, which housed Dr. Jokich's Division of Breast Imaging. Second, Rush hired an outside investigator to assess whether Dr. Jokich had violated hospital policy or engaged in sex discrimination. In April 2018 the investigator returned a report concluding that Dr. Jokich had done neither.

Eight days after the investigator submitted her report, Dr. DeCresce, who had received a copy of the report, placed Dr. Grabler in charge of supervising breast-imaging facilities at Rush's satellite locations. The responsibility formerly belonged to Dr. Jokich, and he considered the change a demotion. At his deposition Dr. DeCresce explained that he made the change because others involved in planning the satellite facilities had said that Dr. Jokich had been difficult to work with.

Dr. Jokich claims that it was really the investigator's report that motivated Dr. DeCresce to make the change. Specifically, the report took note of Dr. Jokich's theory that his female colleagues had ginned up their complaints at the urging of Rush leadership for the purpose of dissuading him from testifying in another employee's discrimination lawsuit against Rush. That suit, filed in November 2017 by

Norma Melgoza, a Hispanic administrator, asserted claims under Title VII and the Equal Pay Act. During discovery, Melgoza had named Dr. Jokich (along with 111 others) as a potential witness. Other than appearing on the witness list, Dr. Jokich was not involved in Melgoza's case.

According to Dr. Jokich, Dr. DeCresce would have been unhappy to learn about Dr. Jokich's potential involvement in Melgoza's lawsuit. The previous year Dr. DeCresce had interviewed Melgoza for an internal promotion, and she claimed that he put on a "Trump mask" during the interview. Melgoza told Dr. Jokich about the incident, and he encouraged her to complain to human resources. In December 2017 after Melgoza had filed her lawsuit, Dr. Jokich told human-resources personnel who were investigating the incident that he had told Melgoza that he thought the conduct was "unbelievable and unprofessional." He did not, however, say that Dr. DeCresce had discriminated against her.

Returning to 2018 in the timeline, Dr. Jokich's conflicts with Dr. Grabler continued. On May 21 she gave a presentation on a breast-imaging technology called "tomosynthesis" (or 3D mammography). Dr. Jokich attended the presentation and made no comments while there. But the next day he criticized the presentation in an e-mail sent to 60 colleagues, including Drs. DeCresce, Goodman, and Krishnan, but not including Dr. Grabler. Dr. Jokich suggested that tomosynthesis was a gimmick to increase revenue at the expense of patient safety and expressed broader concerns that money was improperly driving the hospital's decisions regarding patient care.

A few hours later, Dr. DeCresce e-mailed Dr. Krishnan about "Dr. Jokich's latest outburst concerning

his colleagues." He raised concerns about Dr. Jokich's behavior, concluding: "I believe it is time for a change in mammography.... If we want to be a leading cancer center[,] we need individuals who will work together to achieve the goal. Pete is not one of those people." Dr. Krishnan added Dr. Goodman to the e-mail chain, and Dr. Goodman responded to both, saying: "I totally support your judgement [sic] concerning the individuals that report to you."

Later that week on May 26, 2018, Dr. DeCresce contacted human resources and explained the decision to terminate Dr. Jokich's employment. The hospital engaged outside counsel to help carry out the termination, and by June 6 a draft termination letter was ready.

June 11, however, brought another e-mail from Dr. Jokich. This time he wrote to three Rush executives, including Dr. Goodman, saying that he was aware of "serious discrimination issues and unfair employment practices that have occurred, and are occurring, at Rush involving at least gender, age, and national origin." He then filed a formal complaint with human resources alleging specific instances of unlawful practices. The only ones relevant here are the alleged discrimination underlying Melgoza's already pending lawsuit and retaliation against Dr. Jokich for his supposed involvement in the case.

Dr. Goodman wanted to learn more about the issues raised by Dr. Jokich before moving forward with the termination. To that end, Rush hired an outside investigator to look into the claims. On July 29 the investigator returned a report concluding that Dr. Jokich's complaints were meritless. With that, according to Rush, it was time to proceed with the previously planned termination.

On August 8 Drs. DeCresce and Krishnan met with Dr. Jokich and presented a choice: resign under a special agreement or face termination. The special agreement was essentially a severance package that would pay Dr. Jokich his salary of nearly $660,000 through June 2020 and leave him free to take any other job. It also included mutual non-disparagement provisions and a positive recommendation from Dr. Goodman. On August 21 Dr. Jokich declined the offer.

The next day Dr. DeCresce informed Dr. Jokich by letter that he was removed as the director of the Division of Breast Imaging and provided notice that in 60 days his salary would be reduced to about $450,000 to reflect the change in duties. The letter also provided notice that Rush would terminate the Faculty Employment Agreement at the end of its term in June 2019, ending Dr. Jokich's employment at Rush.

C. Proceedings Below

Dr. Jokich responded with this lawsuit. He sued under Title VII, asserting that Rush's actions were unlawful retaliation for his participation in Melgoza's lawsuit and his opposition to discriminatory practices at Rush. He also brought contract claims under Illinois law. His primary contention is that Rush breached the 2016 letter agreement by employing him through only June 2019, not June 2020. He also claimed that Rush violated the Faculty Employment Agreement by terminating him mid-term without cause and by allowing Dr. DeCresce, rather than Dr. Byrd, the head of his department, to remove him as a division director.

The district judge entered summary judgment for Rush on all claims. On the Title VII claim, she determined that some of the challenged actions were

not adverse employment actions. For those that were, she determined that the evidence was insufficient to allow an inference that Rush took the actions because of Dr. Jokich's participation in protected activity.

The judge likewise determined that no reasonable factfinder could conclude that Rush breached any contractual obligation to Dr. Jokich. Rush's actions complied with the Faculty Employment Agreement, and the 2016 letter agreement was subject to a condition precedent—approval by Rush's Board of Trustees—that was never satisfied. The condition was not waived by Rush, nor was the hospital estopped from enforcing it.

II. Discussion

We review a summary judgment de novo, reviewing the record in the light most favorable to Dr. Jokich, the nonmoving party, and drawing all reasonable inferences in his favor. *Hansen v. Fincantieri Marine Grp., LLC*, 763 F.3d 832, 836 (7th Cir. 2014). Summary judgment is appropriate if there is no genuine dispute of material fact and Rush, the moving party, is entitled to judgment as a matter of law. *McCurry v. Kenco Logistics Servs., LLC*, 942 F.3d 783, 788 (7th Cir. 2019).

A. Title VII Retaliation

Title VII makes it unlawful for an employer to retaliate against an employee because he opposes any employment practice proscribed by Title VII or because he participates in an investigation or proceeding under Title VII. 42 U.S.C. § 2000e-3(a). To survive summary judgment on his retaliation claim, Dr.

Jokich needed to provide evidence that (1) he engaged in activity protected by Title VII; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *Boston v. U.S. Steel Corp.*, 816 F.3d 455, 464 (7th Cir. 2016).

To attempt to make his case, Dr. Jokich points to two sets of actions taken by Rush. The first is Dr. DeCresce's decision to transfer oversight of the satellite breast-imaging facilities to Dr. Grabler, which came about a week after an outside investigator's report noted Dr. Jokich's theory that his female colleagues had sought to dissuade him from testifying in Melgoza's lawsuit. Dr. Jokich claims that the report revealed his "participation" in Melgoza's lawsuit, prompting Dr. DeCresce to retaliate against him.

The judge determined that the transfer of supervisory responsibility was not a sufficient change to Dr. Jokich's duties to constitute an adverse employment action. Rush advances the same argument on appeal. For present purposes we put the dispute aside and focus on the other two elements of a retaliation claim.

Dr. Jokich's case falls short on both. First, he presented no evidence that he engaged in protected activity prior to the challenged action. In relevant part, § 2000e-3(a) protects an employee who "ma[kes] a charge, testifie[s], assist[s], or participate[s]" in a Title VII "investigation, proceeding, or hearing." To say that appearing with 111 others on a list of potential witnesses counts as "participation" in a lawsuit stretches the statutory language too far. *Cf. Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 746–47 (7th Cir. 2010) (analyzing the text of § 2000e-3(a) and concluding that

participating in an internal investigation is generally not protected activity).

Insisting that he engaged in protected activity, Dr. Jokich emphasizes that he spoke with Rush's human-resources department about Dr. DeCresce wearing a "Trump mask" when interviewing Melgoza. That conversation was not protected activity because Dr. Jokich did not claim that Dr. DeCresce had discriminated against Melgoza at all, let alone on the basis of a protected characteristic. *See Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006) ("Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient."). Nor does the conversation with human resources do anything to transform Dr. Jokich's mere appearance on a witness list into protected participation in Melgoza's suit.

Even if we assume that Dr. Jokich engaged in protected activity, he would still need evidence that doing so motivated Rush to take the challenged action. Specifically, Dr. Jokich must show that Rush would not have transferred his duties to Dr. Grabler but for his supposed participation in Melgoza's lawsuit. *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 483 (7th Cir. 1996). But-for causation may be inferred from circumstantial evidence, although Rush may rebut the inference with evidence of a nondiscriminatory explanation for the challenged action. *See Tomanovich*, 457 F.3d at 663. If Rush does so, the burden returns to Dr. Jokich to show that the hospital's nondiscriminatory explanation is pretextual. *McKenzie*, 92 F.3d at 483.

Temporal proximity between protected activity and an adverse employment action can support an inference of causation between the two. *Castro v.*

DeVry Univ., Inc., 786 F.3d 559, 565 (7th Cir. 2015). Suspicious timing alone, however, is generally insufficient to establish a retaliatory motivation. *Daugherty v. Wabash Ctr., Inc.*, 577 F.3d 747, 751 (7th Cir. 2009) (per curiam). Moreover, any inference of causation supported by temporal proximity may be negated by circumstances providing an alternative explanation for the challenged action. *See, e.g., Parker v. Brooks Life Sci., Inc.*, No. 21-2415, 39 F.4th 931, 936–37 (7th Cir. July 14, 2022); *Sun v. Bd. of Trs.*, 473 F.3d 799, 816 (7th Cir. 2007).

In this case, there is insufficient evidence to infer a causal link between the supposed protected activity and the transfer of responsibility to Dr. Grabler. Suspicious timing, at most, is all there is, and without more a reasonable factfinder could not infer a retaliatory motivation for the action. This is especially so in light of the competing explanation that those working at the satellite locations found Dr. Jokich difficult to work with, which Dr. Jokich has not shown to be a pretext.

The second set of actions that Dr. Jokich challenges are the August 2018 decisions to remove him as a division director—with an associated pay cut of over $200,000—and to not renew his Faculty Employment Agreement. Dr. Jokich claims that these actions were taken in retaliation for his June 2018 complaints about discriminatory practices at Rush. The pay cut and termination are plainly adverse employment actions. *See Barton v. Zimmer, Inc.*, 662 F.3d 448, 453–54 (7th Cir. 2011). And we assume for present purposes that Dr. Jokich's formal complaint about alleged discrimination was a "step in opposition to a form of discrimination that [Title VII] prohibits" qualifying as protected activity. *Ferrill v. Oak Creek-*

Franklin Joint Sch. Dist., 860 F.3d 494, 501 (7th Cir. 2017) (quotation marks omitted).

Dr. Jokich's trouble, again, is establishing a causal link between his protected activity and Rush's actions. Rush says that it decided to terminate Dr. Jokich in May 2018—when Dr. Jokich sent an e-mail to 60 colleagues criticizing Dr. Grabler's presentation and Rush generally—before his June complaints. A paper trail confirms this account: Dr. DeCresce told human resources about the decision on May 26, and by June 6 a draft termination letter was ready. The termination was halted, according to Rush, in response to Dr. Jokich's complaints about discrimination, which came shortly after the draft termination letter had been completed.

Dr. Jokich urges us to reject Rush's timeline, suggesting that the true decision to fire him was made after his June 2018 complaints. That would require an improbable series of events such as this: Rush decided in May 2018 to fire Dr. Jokich; engaged outside counsel to do so; drafted a termination letter; then—for reasons unexplained—had a change of heart and decided to keep him on; finally, Dr. Jokich lodged his complaints, provoking Rush to fire him (again, and to follow through this time). The story is tough to swallow in theory, and it's impossible to credit in fact because there is no evidence for it.

Even if we fully accept this unsupported back-and-forth-and-back-again hypothesis, Dr. Jokich still cannot win. The only evidence of a retaliatory motive would be arguably suspicious timing between his June 2018 complaints and Rush's August 2018 actions. That's not enough to make his case. Pushing back, Dr. Jokich insists that his positive performance reviews evince pretext on Rush's part. They don't. Rush agrees that

Dr. Jokich is an excellent doctor and has always maintained that it fired him because of his conflicts with colleagues. The judge properly granted Rush's motion for summary judgment on the retaliation claim.

B. Breach of Contract

Dr. Jokich contends that Rush's actions resulted in several breaches of contract under Illinois law. The district court had supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367(a) because they form part of the same "case or controversy" as the Title VII retaliation claim. Like the retaliation claim, the state-law claims center on Rush's August 2018 actions against Dr. Jokich.

Dr. Jokich's primary contention is that Rush breached the 2016 letter agreement, which extended his employment through June 2020, by employing him through only June 2019 when the Faculty Employment Agreement terminated. The 2016 agreement, Dr. Jokich concedes, was subject to approval by Rush's Board of Trustees, a condition precedent that was never satisfied. Nonetheless, he argues that Rush waived the condition precedent or is estopped from enforcing it.

A condition precedent may be waived by the party whom it was intended to benefit. *Downs v. Rosenthal Collins Grp., L.L.C.*, 357 Ill.Dec. 329, 963 N.E.2d 282, 290 (Ill. App. Ct. 2011). Waiver may occur either "expressly or by conduct indicating that strict compliance with the condition[ ] is not required." *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628, 633 (7th Cir. 1992). Conduct implies waiver only when it is "wholly inconsistent with the clause or condition, thereby

indicating [the] intent to abandon the contractual right." *Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co.*, 376 F.3d 664, 679 (7th Cir. 2004) (quotation marks omitted). Put differently, "[a]n implied waiver of a right may be shown when the conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive the right." *Downs*, 963 N.E.2d at 290–91.

A party to a contract may likewise lose a contractual right by virtue of estoppel. Estoppel occurs when a party's "statement or conduct misleads another into the belief that a right will not be enforced and cause[s] him to act to his detriment in reliance on that belief." *Sphere Drake Ins.*, 376 F.3d at 679 (quoting *Old Sec. Life Ins. Co. v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 740 F.2d 1384, 1392 (7th Cir. 1984)). The statement or conduct causing detrimental reliance need not be fraudulent in the legal sense or even done with the intent to mislead. *Ceres Ill., Inc. v. Ill. Scrap Processing, Inc.*, 114 Ill.2d 133, 102 Ill.Dec. 379, 500 N.E.2d 1, 7 (1986). But the reliance of the party acting to his detriment must be reasonable. *Schwinder v. Austin Bank of Chi.*, 348 Ill.App.3d 461, 284 Ill.Dec. 58, 809 N.E.2d 180, 192 (2004).

No express statement from Rush supports waiver or estoppel, so Dr. Jokich's arguments rely on Rush's conduct. The hospital provided him benefits and a bonus consistent with the 2016 agreement. Dr. Jokich argues that these actions implied waiver by indicating that Rush intended to abandon the condition that the Board of Trustees approve the contract. He further argues that Rush is estopped from enforcing the condition because, he claims, he would have left the hospital if not for the belief, induced by Rush's conduct, that he had the assurance of a multiyear agreement.

Beginning with waiver, we agree that a party's performance or its acceptance of another party's performance may sometimes establish waiver of a condition precedent to the formation of a contract. *E.g.*, *Whalen v. K-Mart Corp.*, 166 Ill.App.3d 339, 116 Ill.Dec. 776, 519 N.E.2d 991, 994 (1988); *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1545–46 (8th Cir. 1989). We also agree that some of Rush's actions—providing certain benefits and paying an annual bonus—were consistent with the 2016 agreement.

Waiver of a condition precedent, however, requires more than just some actions consistent with the performance of the contract. It requires conduct "wholly inconsistent" with the condition. *Sphere Drake Ins.*, 376 F.3d at 679; *see also Downs*, 963 N.E.2d at 290–91. The record does not satisfy this demanding standard. After the Board of Trustees rejected the 2016 agreement, Rush worked to craft an amendment that the Board would accept. It did so openly with Dr. Jokich himself participating in the negotiations. Rush also entered unrefuted evidence that for several months in 2013 and 2014, it had provided Dr. Jokich benefits consistent with a prior letter agreement even though a new letter agreement had not been reached. Whatever the reason for Rush's provision of compensation consistent with the 2016 agreement—whether a mistake or an act of grace for a valued doctor—those actions cannot establish waiver where Rush otherwise demonstrated an unwillingness to waive the condition.

Dr. Jokich's estoppel argument fares no better. He could not have been misled into thinking that Rush would not enforce the condition precedent because, as just explained, the hospital openly worked to gain the Board of Trustees' approval. What's more, he cannot

show that he reasonably and detrimentally relied on a misrepresentation to stay at Rush. He learned that the Board had rejected the 2016 agreement and silently chose not to accept the 2017 amendment. He stayed at Rush anyway.

With the waiver and estoppel arguments knocked out, there is no basis for the enforceability of the 2016 agreement. And Dr. Jokich provides no argument for the enforceability of the 2017 amendment. (Indeed, he affirmatively disavows it.) Thus, the Faculty Employment Agreement controlled the employment relationship. It ran through June 2019, and consequently, Rush did not breach any contract by employing Dr. Jokich through only that date.

Dr. Jokich has two additional arguments for breach of contract. The first is that Rush breached the Faculty Employment Agreement by terminating him mid-term without identifying cause for doing so. The argument has no merit because Rush did not terminate Dr. Jokich mid-term. Rather, the hospital declined to renew the Faculty Employment Agreement (with 120 days' notice) at the end of its term. No cause was required for that nonrenewal. Rush did modify Dr. Jokich's duties and pay (with 60 days' notice) in the middle of the term. But the Faculty Employment Agreement specifically allowed the hospital to make these changes without cause; they are not, in any event, a "termination."

Second, Dr. Jokich argues that Rush violated its medical-staff bylaws by allowing Dr. DeCresce to remove him as a division director. (Rush concedes that the Faculty Employment Agreement incorporated the bylaws.) Bylaw 10.3-2(c) provides that a division director serves in the position "solely at the discretion" of the chair of the department in which the division sits.

By Dr. Jokich's reading of the bylaw, his removal as a division director could occur only if Dr. Sharon Byrd, the department chair, initiated the action.

Dr. Jokich's reading of the bylaw is far too stringent. Dr. DeCresce made the decision to remove Dr. Jokich as a division director with the support of Dr. Krishnan, Rush's Dean, and Dr. Goodman, Rush's CEO. Dr. Byrd later learned about the decision but did not seek to change it. Indeed, she explained at her deposition that she hardly interacted with Dr. Jokich in practice and was content for those who did to handle the situation. Whatever level of discretion the bylaw required Dr. Byrd to exercise, her decision to hand off the matter to others satisfied it.

The evidence was insufficient to prove a breach of contract on any theory. Accordingly, the judgment of the district court is AFFIRMED.

Footnotes

*Circuit Judge Kanne died on June 16, 2022, and did not participate in the decision of this case, which is being resolved under 28 U.S.C. § 46(d) by a quorum of the panel.

2021 WL 3487350
United States District Court, N.D. Illinois, Eastern Division.

Peter JOKICH, M.D., FSBI, FACR, Plaintiff,
v.
RUSH UNIVERSITY MEDICAL CENTER, Defendant.

Case No. 18 C 7885
Signed 08/09/2021

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OPINION AND ORDER

Joan H. Lefkow, United States District Judge

Peter Jokich, M.D., asserts claims for breach of contract based on his employment agreements (Counts IV and VI of First Amended Complaint) and the Rush Medical Staff Bylaws (Count V). Before the court is Rush's motion for summary judgment on these[1] claims. For the following reasons, the motion is granted.

BACKGROUND[2]

Rush is a not-for-profit tax-exempt corporation whose governing Board of Trustees conducts business through roughly a dozen standing committees, including a Compensation and Human Resources Committee. (For purposes of this decision this committee may be referred to as "the Board" as well as the "Comp Committee.") The Comp Committee reviews contracts for highly paid physicians.

From 2001 until his termination, Jokich was employed by Rush in the Division of Breast Imaging (the DBI). By 2017, he was Director of the DBI. Throughout the years, Jokich, along with other faculty, had standard employment agreements with Rush. Beginning in 2012, Rush initiated the "Faculty Employment Agreement" (FEA) for its physicians. The FEA was a standard "evergreen" contract that renewed annually unless either party gave 120 days advance written notice of termination. The FEA covered base compensation and standard benefits.

In 2001, 2007, and 2013–14 (Jokich signed this letter on January 24, 2014), Jokich negotiated additional agreements providing multi-year terms. The terms were set out in an offer letter from Rush to Jokich, which upon Jokich's signature of acceptance became what is referred to as a "letter agreement."

The 2001 letter agreement was for a seven-year term. The 2007 letter agreement was for a four-year term. In 2013–14, the term was three years, ending June 30, 2016. The 2013–14 letter agreement specified that Rush would begin discussions at the beginning of the third year (July 1, 2015) regarding a further extension. The various letter agreements included

bonuses and enhanced benefits for the DBI physicians and for Jokich that were not included in the FEA.

Rush consults Sullivan, Cotter & Associates to advise the Comp Committee. According to Sullivan Cotter, anti-kickback laws require that financial relationships between tax-exempt institutions and physicians be fair market value and commercially reasonable. If not, the institution can incur treble-damage penalties.

Sullivan Cotter uses a three-step test to judge whether compensation is fair market value. First, if proposed compensation for a physician within his or her specialty is at the 75th percentile or below by national standards, it will opine, absent unusual circumstances, that compensation is fair market value. Second, if the compensation is above the 75th percentile, there must be a strong relationship between pay and the physician's clinical productivity. Third, if the physician's compensation fails the first or second test, Sullivan Cotter offers no fair market value opinion and tells Rush it must present "business judgment factors" for the Board to decide whether the proposed compensation is a sound business judgment.

Because of these rules, Rush management's policy is that any proposed contract whose compensation is over the 75th percentile may be submitted to the Comp Committee for approval, while anything over the 90th percentile must be submitted to it. Sullivan Cotter uses "Work Relative Value Units" (RVUs) to measure productivity. It considers this metric the "industry standard."[3]

Rush tracks RVUs of its employed physicians[4] and uses them to determine significant parts of their compensation and to judge their performance. Rush also assigns each a "Full Time Equivalent" percentage

(FTE), i.e., the percentage of full time the physician is supposedly spending treating patients. Other things being equal, a lower FTE would lead to a lower expectation on what number of RVUs is expected from a given clinician.

Although, according to Sullivan Cotter, Jokich's compensation in the 2013–14 letter agreement exceeded the benchmark at the 95th percentile by national standards and his productivity level was below 10 percent by those standards, Rush management argued to the Comp Committee that its "business rationale ... was highly supportive of [Jokich's] compensation level." The Comp Committee approved it and informed Jokich that the three-year letter agreement had been approved. That letter agreement included the statement, "As you are aware, your total achievable compensation benchmarks above the 90th percentile and has been approved by the Board."

During the seven-month period between June 30, 2013 and January 24, 2014, a period from when the previous letter agreement had expired and until a new letter agreement was signed by Jokich, Rush did not change Jokich's salary and benefits or the benefits for the breast imaging faculty that had been part of the 2013–14 letter agreement.

In January 2016, Dr. Ranga Krishnan, Dean of the Medical College, sent Jokich a proposed two-year letter agreement which stated that its proposed compensation arrangement "will have to be approved by the Compensation Committee of the Board of Trustees."

On August 12, 2016, Krishnan and Jokich signed a letter agreement keeping him as Director of the DBI through at least June 30, 2020. The letter was different in some respects from the January letter, but it

contained the sentence about approval by the Comp Committee of the Board of Trustees.

Management submitted the signed August 12, 2016 letter agreement to the Comp Committee for approval. At its meeting of October 21, 2016, based on advice from Sullivan Cotter, the Comp Committee declined to approve the agreement, asking management to develop and embed pre-determined qualitative metrics into the contract for further Comp Committee review.

Thereafter, management and Jokich engaged in negotiations in efforts to reach an agreement that would be acceptable to the Comp Committee. Management insisted that the agreement would have to include productivity metrics according to Sullivan Cotter's recommendations.[5] These negotiations continued into April, 2017, but Jokich would not agree to any of Rush's proposed metrics.

On April 19, 2017, after further discussions within management, Krishnan authorized Dr. Antonio Bianco, then president of the practice group of employed Rush physicians, to send Jokich an amended offer letter, which Bianco emailed to Jokich the following day, April 20. Bianco referred to it as "a letter that amends and restates" the 2016 letter agreement. This amended offer letter included specific productivity metrics and a stipulation that "[f]ailure to meet the productivity goal during Fiscal Years 2018–20 will trigger automatic review of your base salary, which will be subject to renegotiation upon renewal in Fiscal Years 2021–22."

The same day, Jokich wrote Krishnan, copying Dr. Larry Goodman, Rush's CEO and Board president, stating, "The amended offer is unacceptable to me and

is insulting and disrespectful to me and to all of the senior breast imaging physicians in the group."

Nonetheless, with a couple of concessions to Jokich from the April 20 draft offer letter, management presented the amended offer letter to the Comp Committee at its June 14, 2017 meeting. The Comp Committee approved the amended offer letter, and it was sent to Jokich for his signature. The amended offer letter set out the reason the 2016 letter agreement had not been approved and set out the terms of what had been approved. There was no other communication to Jokich that explicitly said the 2016 letter agreement was void or superseded by the amended offer letter.

Jokich neither signed nor returned the letter. He did not communicate to management that he would not sign. No one in management reached out to Jokich about the letter and, according to Krishnan, he assumed that Jokich had signed. In the fall of 2017, Krishnan approved Jokich's FY 2016 bonus (for the year ending June 30, 2017).

Jokich disputes that Krishnan did not know that he had not signed the amended offer letter until after the decision to terminate him had been made the following Spring.[6]

The 2013–14 letter agreement, the 2016 letter agreement, and the amended offer letter contained the same bonus and benefit provisions for Jokich, although the amended offer letter had new, more demanding performance metrics.[7] Jokich's salary under the FEA remained the same for these years.

In any event, things went along until, as described in the May 2021 Opinion, Jokich's relationship with Rush deteriorated to the point that Dr. Robert DeCresce, Acting Director of the Cancer Center, to whom Jokich had been told to report,[8] recommended to

Goodman and Krishnan that Jokich's employment be terminated.

DeCresce and Krishnan met with Jokich on Wednesday, August 8, 2018. They presented a separation agreement that, upon mutual release, would pay him at his then-current salary of $659,815 until June 30, 2020. The offer would let him take any other job, provide an agreed-on departure announcement, give him a good recommendation from Goodman, and include a mutual non-disparagement provision. Jokich was given 21 days to consider the severance offer.

On August 21, Jokich's attorney wrote Rush's counsel that his client would not accept the offer "in its present form," asking for a 30-day standstill for further negotiations.

Rather than informing Jokich's counsel that it was Rush's last and best offer, on August 22, 2018, DeCresce wrote Jokich that, in light of his rejection of Rush's offer, he was removed from his position; that pursuant to section 7 of his FEA his salary would be lowered after 60 days to $448,802; and that when his then-current one-year term under the FEA expired on June 30, 2019, it would not be renewed.

Rush lowered Jokich's salary 60 days later to $448,802 and did not renew his FEA when its term expired on June 30, 2019. Rush did not pay Jokich any bonus for the fiscal year 2018 or for the fiscal year 2019.

Under the 2016 letter agreement, Jokich's term did not expire until June 30, 2020 at the earliest and he would have been entitled to his salary of $659,815 and eligible for bonuses for FY 2017 through its expiration.

Section 6 of the FEA provides for annual automatic renewal "unless (i) one Party provides the other Party with notice of its intent not to renew at least one hundred twenty days prior to the end of any

term or (ii) this Agreement is terminated in accordance with Section 7 ...." Section 7 provides,

> **Amendment or Modification.** ... Rush may modify [services] or [compensation] of this Agreement by providing the Faculty Member with at least sixty (60) days prior written notice of the modification. Unless Faculty Member provides Rush with a written objection within fifteen (15) days of the modification notice, then the modification is deemed accepted. If Faculty Member objects to a modification, the Parties will use good faith efforts to reach agreement regarding the Exhibit modification within thirty (30) days of the Faculty Member's objection. If agreement is not reached within this time period, then either Party may terminate the Agreement upon fifteen (15) days notice to the other Party.

Rush is a "matrix" organization in which a person may report to more than one person. The DBI was within the Department of Diagnostic Radiology, chaired by Dr. Sharon Byrd. As such, Jokich administratively reported to both Byrd and DeCresce. Broadly stated, however, the DBI functioned independently of Byrd's department.[9]

Byrd performed biannual evaluations known as OPPE and annual performance reviews of all radiologists in her department, including Jokich and the breast imagers who worked in the DBI.

Other than these tasks, Byrd had no regular contact with Jokich or his physicians. When Jokich submitted a five-year plan in 2016 for the DBI, he did not submit it to Byrd, although he may have discussed

it with her at an annual review. Similarly, Jokich did not have regular contact with DeCresce, and he did not submit his five-year plan to DeCresce.

Byrd was not involved in the decision to terminate Jokich in the Spring of 2018 (according to Rush) or at any time thereafter. Indeed, Byrd was on vacation at the time Krishnan and DeCresce met with Jokich on August 8 until sometime after August 22, 2018. Upon her return, some physicians in the DBI contacted her about why Jokich had not been present for two weeks, so she placed a phone call to DeCresce.

DeCresce returned the call on or about August 26 and told her that Jokich "was not coming back." He said he would meet with the breast imagers to explain what was going on. Byrd did not ask and was not told whether he had left voluntarily or involuntarily. She also attended a meeting where Krishnan explained to some of the DBI physicians that Jokich was not coming back but assured them their jobs were safe. Krishnan did not reveal the reason, and Byrd stated at her deposition that she still did not know the reason in any detail.[10]

While he was Dean, Krishnan was the direct supervisor of all clinical Department Chairs, including Byrd, and had frequent meetings and conversations with them.

ANALYSIS

To prevail on a claim for breach of contract under Illinois law, a plaintiff must prove four elements: "(1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages." *Reger Dev., LLC* v. *Nat'l City Bank*, 592 F.3d 759, 764 (7th Cir.

2010) (quoting *W.W. Vincent & Co.* v. *First Colony Life Ins. Co.*, 814 N.E.2d 960, 967 (Ill. App. Ct. 2004)). The parties here agree that they had a valid, enforceable contract but do not agree on its terms. Ascertaining those terms determines whether a breach occurred.

Ordinarily, "contract interpretation is a subject particularly suited to disposition by summary judgment." *Metalex Corp. v. Uniden Corp. of Am.*, 863 F.2d 1331, 1333 (7th Cir. 1988). At the summary judgment stage, the court determines "whether the contract is ambiguous or unambiguous as a matter of law." *Id.* Under Illinois law, which the parties agree applies in this case, if a contractual term is susceptible to reasonable alternative interpretations, it is ambiguous. *See Thompson v. Gordon,* 948 N.E.2d 39, 47 (Ill. 2011). At that point, contract interpretation "generally becomes a question for the jury." *Harmon v. Gordon*, 712 F.3d 1044, 1051 (7th Cir. 2013).

An exception to this rule allows for the consideration of undisputed extrinsic evidence to determine the parties' intent. *See Citadel Grp. Ltd. v. Wash. Reg'l Med. Ctr.*, 692 F.3d 580, 587 (7th Cir. 2012). If the extrinsic evidence is undisputed and leads to only one reasonable interpretation, the court may decide the matter on summary judgment. *See id.*

Rush rests on two arguments: (1) The 2016 letter agreement was not approved by Rush and does not bind Rush; and (2) the Rush Medical Staff Bylaw providing that a division director "serves at the discretion of" the department chair does not mean that only a chair could remove a director. Jokich responds: (1) the 2016 letter agreement is binding because Rush impliedly waived the condition precedent of Board approval; Rush made misrepresentations to him on which he relied, invoking equitable estoppel; or Rush

breached its duty of good faith and fair dealing; (2) an issue of material fact exists as to whether Jokich's removal from his director position without cause violated the FEA; and (3) only the department chair had authority to terminate Jokich as Director of the DBI.[11]

I. Whether Rush Impliedly Waived Board Approval of the 2016 Letter Agreement or Is Otherwise Bound to It.

The court understands the FEA plus the various letter agreements to comprise the entire employment contract between the two parties for the respective terms. Jokich concedes that the Board did not approve the 2016 letter agreement and that approval was a condition precedent to forming a contract. He bases his waiver argument on the fact that Rush allowed him to continue to work at Rush from the time the 2013–14 letter agreement expired on June 30, 2016 until he was terminated in October 2018. In his view, Rush fully complied with the terms of the 2016 letter agreement, not only by paying his base salary, but also his staff's FY 2016 bonuses and benefits. Rush concedes these facts but argues its conduct did not amount to waiver.

Under Illinois law, "[c]onditions precedent may be waived when a party to a contract intentionally relinquishes a known right either expressly or by conduct indicating that strict compliance with the conditions is not required." *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd.* v. *Paradigm Ins. Co.*, 962 F.2d 628, 633 (7th Cir. 1992) (citing *MBC, Inc.* v. *Space Ctr. Minn., Inc.*, 532 N.E.2d 255, 259–60 (Ill. App. Ct. 1988)). "Such conduct might include continuing to

accept the breaching party's performance and the benefits thereof after learning of the breach." *Id.* "Although waiver may be implied, the act relied on to constitute the waiver must be clear, unequivocal and decisive." *Levin v. Grecian*, 974 F. Supp. 2d 1114, 1125 (N.D. Ill. 2013) (citing *Galesburg Clinic Ass'n v. West*, 706 N.E.2d 1035, 1037 (Ill. App. Ct. 1999)). An implied waiver arises when conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it. *Home Ins. Co. v. Cincinnati Ins. Co.*, 821 N.E.2d 269, 282 (Ill. 2004) (citing *Liberty Mutual Insurance Co. v. Westfield Insurance Co.*, 703 N.E.2d 439, 441 (Ill. App. Ct. 1998)).

In general, waiver presents an issue of fact. *See Downs v. Rosenthal Collins Grp., LLC*, 963 N.E.2d 282, 291 (Ill. App. Ct. 2011) ("The potential for waiver of a condition precedent through actions or deeds involves a question of fact[.]"). Of course, to survive summary judgment, Jokich's evidence must at least permit an inference that waiver occurred. *See Home Ins. Co.*, 821 N.E.2d at 282 ("Where there is no dispute as to the material facts and only one reasonable inference can be drawn, it is a question of law as to whether waiver has been established.").

Rush argues that its conduct did not establish a clear, unequivocal, and decisive action on Rush's behalf based on the following claimed-to-be undisputed facts. First, the FEA required payment of the base salary, no matter the existence of a letter agreement. Second, the enhanced benefits were negotiated in 2001 and continued during periods when no letter agreement was in effect.[12] Third, Rush paid Jokich a bonus in October 2017 (for the fiscal year ending June 30, 2016) but Krishnan withheld further bonuses for which he would have been eligible under the 2016 letter agreement.

All of these facts are undisputed but for Krishnan's motivation for authorizing the 2016 bonus. Jokich acknowledges that he told no one that he did not sign the amended offer letter and that no one reached out to him about it. He argues that it is a jury question whether Rush understood that the condition precedent had not been satisfied and was under the impression that the 2016 letter agreement was in effect.

Whatever Krishnan's reason for paying one bonus and withholding two, the issue is whether this conduct is "inconsistent with any other intention than to implement the 2016 letter agreement." *Home Ins. Co.*, 821 N.E.2d at 282. The undisputed facts are that the amended offer letter had been approved by the Board on June 14, 2017. It was given to Jokich for his signature. He did not sign it but did not inform anyone of that. The undisputed facts surrounding the period of negotiations during the Spring of 2017 show that Jokich understood that his employment contract had not been finalized.

At the same time, other than the bonus payment, there is no actual evidence that anyone involved on Rush's side thought the 2016 letter agreement was in force. The facts that the amended offer letter also provided for a bonus and that Krishnan did not authorize subsequent bonuses are consistent with Rush's view that it was not acting pursuant to the 2016 letter agreement.[13] Jokich does not point to evidence that would permit a jury to conclude that Rush was unequivocally acting pursuant to the 2016 letter agreement when it paid his 2016 bonus.

Jokich's only additional support for his waiver argument is that he was never told that his failure to sign the amended offer letter replaced the 2016 letter agreement.[14] In fact, the 2016 letter agreement

specifically stated that Board approval was necessary. The amended offer letter recited that the 2016 letter agreement did not get Board approval. Jokich participated with management in negotiating amendments during March 2017. He also received the amended offer letter and was advised that it had been approved, requesting his signature. Whatever Jokich may have subjectively believed, there is no basis for a reasonable jury to infer that Rush's conduct was inconsistent with any intention other than to waive [the Board approval requirement]. This is so because it's conduct was also consistent with another intention: to implement the amended offer letter (agreement).[15]

Jokich's alternative estoppel theory also lacks evidentiary foundation. As stated in *Schwinder v. Austin Bank of Chi.*, 809 N.E.2d 180, 191–92 (Ill. App. Ct. 2004),

> Estoppel arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his injury. While an intent to mislead is not necessary, the reliance by the other party must be reasonable.

(citations omitted). He seems to rely on Krishnan's signature on the 2016 letter agreement as a misrepresentation but, as set out above, that very document contained the provision that it was subject to Board approval.

Similarly, the argument that Rush violated its duty of good faith and fair dealing when it denied the validity of the 2016 letter agreement is unsustainable.

A duty of good faith and fair dealing requires a party to exercise its discretion "reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Schwinder*, 809 N.E.2d at 193. Relying on Restatement (Second) of Contracts § 205, comment a, at 100 (1981), the court explained:

> The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.

(citations omitted).

Jokich relies on *Schwinder*, in which the Illinois Appellate Court found that the chancery court did not abuse its discretion in finding that the defendant sellers breached the duty of good faith and fair dealing when they refused to convey title to buyers of a condominium unit. There, the sellers contended that the contract provision granting the right to terminate the purchase contract and return the earnest money meant they did not have to convey, even though the buyers had performed their obligations under the contract and the sellers had granted use and occupancy to the buyers. *Id.* at 194–95.

While the principle of *Schwinder* is certainly applicable to Rush, the circumstances are very different. Most importantly, Rush did not finalize the

2016 letter agreement, whereas in *Schwinder* the agreement had been fully executed. The defendants were relying on a clause that, if accepted, would have defeated the intentions of the parties when they entered into the contract to convey title to the property. Reliance on Board approval was always known to be required and intended to fulfill the intentions of the parties to retain Jokich at Rush. Furthermore, there is a good deal of email correspondence between management and Jokich in early 2017 reflecting good faith efforts on both sides to reach a mutually acceptable agreement. Understandably, Jokich is aggrieved by the harsh treatment he received from Rush.[16] But the facts do not support a finding that Rush breached its duty of good faith and fair dealing in rejecting the 2016 letter agreement.

II. Whether Jokich's Removal as Director of the DBI Violated the FEA or Rush Medical Staff Bylaws

These conclusions do not fully resolve the question of what the terms of the employment agreement were at the time Rush demoted and later terminated Jokich. The 2013–14 letter agreement had expired in 2016 and the amended offer letter had not been fully executed. Both parties agree that an FEA was in effect, so, lacking a letter agreement, the terms of employment must be derived from that document.

It is undisputed that the notice of non-renewal was given 120 days in advance, but Jokich argues that Rush breached its obligations under the FEA when it gave him notice of his removal (or termination) as Director of the DBI without a cause as specified in the

FEA's appended General Terms and Conditions. These provisions allow for *immediate* termination of the FEA for specific causes not applicable to Jokich. As this court previously observed in ruling on Rush's motion to dismiss, Section 7 provides that Rush may modify Jokich's services—which include his position as director—by providing at least 60 days prior written notice. (Dkt. 40 at 11–12.) To characterize this change as a termination rather than a demotion does not change the outcome.

However, section 10.3-2(c) of the Rush Medical Staff Bylaws, entitled "Term of Office," provides: "A division ... director shall be appointed and shall serve solely at the discretion of the Department Chairperson." One reasonable interpretation of this bylaw is that Rush violated section 10.3-2(c) by not obtaining Byrd's approval before removing Jokich as Director of DBI. Unfortunately for Jokich, this omission does not seem to lead to relief.

Byrd's deposition makes it clear that she did not consider the matter to be within her wheelhouse. She was a busy clinician and felt she had no reason to become involved other than to attend a meeting when Krishnan spoke with concerned radiologists. The only reasonable inference to be drawn from her conduct is that she exercised her discretion to allow Jokich's removal.

Accordingly, no genuine issue of material fact exists here and the court grants Rush's motion for summary judgment in regard to Count V.

CONCLUSION

For the foregoing reasons, Rush's motion for summary judgment is granted on the breach of contract claims (Counts IV, V, and VI). The case is terminated.

Footnotes

1In an Opinion and Order entered on May 11, 2021 (dkt. 172), the court granted summary judgment in favor of Rush on Jokich's federal claims, relinquished jurisdiction over the state law claims, and entered final judgment in favor of Rush. Jokich moved to alter or amend the judgment, asking the court to retain jurisdiction over the state law claims because he is procedurally barred from refiling in the Illinois courts. The motion was granted. Those claims are the subject of this document.

2The disputed facts in this Background section are stated in a light favorable to Jokich. The procedures and legal standards for summary judgment motions are set out in the May 11, 2021 Opinion.

3Jokich disputes this statement as self-serving and undocumented as a policy or industry standard. This is not a material fact. There is no dispute that these rules were imposed on Jokich.

4Jokich disputes that this practice is universal, but he offers no evidence to the contrary.

5Emails were exchanged between Jokich and management in which Jokich suggested possible workarounds, such as reducing his bonus percentage or making him a department chair.

6Jokich believes Krishnan is not credible on this point, and that is sufficient to create a dispute of material fact in contrast to his own inference from management's silence that Rush had accepted the 2016

letter agreement. The court is unable to find even circumstantial evidence that points to Krishnan's learning at an earlier time. In any event, this is not a material fact, as is explained below.

Jokich also believes that Bianco's use of the terms "amends" and "restates" the 2016 letter agreement when transmitting the amended offer letter, means that Rush accepted the 2016 letter agreement. The court must rely on the amended offer letter to discern what it means.

7Neither party points to evidence of how eligibility for the bonus was measured against performance metrics. Krishnan testified that he "signs off" after the Rush University Medical Group. "takes a look at it. If they find everything is correct, then it comes to me for final approval." Krishnan dep. at 39 (Dkt. 150-2 at 460).

8In February or March 2018, Krishnan told both Jokich and DeCresce that henceforward Jokich would report to DeCresce. Jokich thought it was a temporary change but, temporary or not, the relationship existed at relevant times.

9Rush admits that Byrd came to know and work *closely* with Jokich, but Jokich's citations to Byrd's deposition do not support a "close" relationship.

10She also stated that it was DeCresce's responsibility to name a new DBI director.

11Jokich does not respond to Rush's motion arguing that it is entitled to summary judgment on Jokich's claim for violation of the Illinois Hospital Licensing Act. As such, the court infers that Jokich has abandoned the argument. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument—as [the non-movant has] done here—results in waiver").

12The 2013–14 letter agreement had recently expired (on June 30, 2016) when the 2016 letter agreement was signed (August 18, 2016). Both documents contained the same base salary of $659,814 and 10% bonus opportunity, as well as the benefits and enhanced compensation for Jokich and the DBI faculty. (This also occurred in the period between the 2012 and 2013–14 agreements.) The FEA portion of these agreement also contained the same salary, which the parties agree remained in effect through June 30, 2018.

13It is also consistent with letting the 2013—14 letter agreement remain in place until the new employment agreement was finalized, as occurred between the 2007 and the 2013—14 letter agreements.

14Jokich also points to a draft termination letter written by outside counsel, George Galland. That letter stated that Jokich had a multi-year contract. This is fully consistent with Rush's position that management believed Jokich had signed the amended offer letter.

15Rush's acting pursuant to the amended offer letter could arguably amount to waiver of Jokich's signature, but Jokich does not argue for that outcome.

16Remarkably, rather than responding with a firm "No" to counsel's request for a standstill to permit further negotiations, Rush pulled the severance agreement off the table. This arbitrariness, however, falls into the category of "community standard of reasonableness" and is not within the doctrine.

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United States District Court, N.D. Illinois, Eastern Division.

Peter JOKICH, M.D., FSBI, FACR, Plaintiff,
v.
RUSH UNIVERSITY MEDICAL CENTER, Defendant.

Case No. 18 C 7885
Signed 05/11/2021

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OPINION AND ORDER

Joan H. Lefkow, U.S. District Judge

Peter Jokich, M.D., brings this lawsuit against Rush University Medical Center ("Rush"), alleging that Rush retaliated against him for complaining about discrimination against older workers in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* ("the ADEA") (Count I), women and employees of Hispanic and Mexican national origin

in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII") (Count II), and all these groups in violation of the Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/1-101 ("the IHRA") (Count III). He also asserts claims for breach of contract based on his employment agreements (Counts IV and VI) and the Rush Medical Staff Bylaws (Count V). Before the court is Rush's motion for summary judgment on all remaining[1] claims. For the following reasons, the motion is granted as to all federal claims.[2] The court relinquishes jurisdiction over Counts IV through VI.

BACKGROUND[3]

I. Compliance with Federal Rule of Civil Procedure 56 and Local Rule 56.1

Before summarizing the material facts, the court addresses both parties' accusations that the other has not complied with Federal Rule of Civil Procedure 56 and its local companion, LR 56.1. Jokich understandably complains that Rush's 149 assertedly undisputed facts and 104 exhibits are sufficiently numerous to suggest that this is not a case for summary judgment. Beyond that, however, Rush's Federal Rule 56(c)(1)(A) and LR 56.1(a)(2) statement of facts complies with those rules. Jokich, by contrast, repeatedly fails to respond to Rush's statement of facts as required by LR 56.1(b)(3) and (e)(2). The rules require the party opposing summary judgment to file a "concise response to the movant's statement." Local Rule 56.1 "is not satisfied by evasive denials that do not fairly meet the substance of the material facts asserted." *Bordelon* v. *Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 528 (7th Cir. 2000)

(interpreting the local rule that was later renumbered as L.R. 56.1). Further, LR 56.1 forbids the non-moving party from setting forth non-responsive additional facts in its response to the statement of material facts. *De* v. *City of Chicago*, 912 F. Supp. 2d 709, 714–15 (N.D. Ill. 2012). Jokich's responses are often argumentative, evasive, and replete with additional assertions even though he has filed his own separate statement of additional facts authorized by LR 56.1(b)(3)(C).[4]

District courts are "entitled to expect strict compliance with Rule 56.1." *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 817 (7th Cir. 2004). The court has wide discretion in dealing with non-compliance. *See De*, 912 F. Supp. 2d at 711–16. Here, the court has endeavored to separate wheat from chaff and discern the material facts in order to advance disposition of this aging case. The following facts are undisputed unless otherwise noted.

II. Material Facts

A. Jokich's career at Rush and employment contracts

Rush is a not-for-profit tax-exempt corporation whose governing Board of Trustees conducts business through roughly a dozen standing committees, including a Compensation and Human Resources Committee ("the Comp Committee"). (DSOF ¶¶ 2, 8.)

Jokich is a nationally recognized physician specializing in breast imaging. (DSOF ¶ 1; PSOF ¶ 1.) He was recruited to Rush in 1989, worked there until 1999, left for two years to join the University of Chicago, and returned to Rush in 2001 on the purportedly express condition that he would be given

"free reign [*sic*] ... to build the best breast-imaging operation ... in the country." (PSOF ¶ 1.)

As of 2017, Jokich had received excellent reviews from his Department Chair, Dr. Sharon Byrd, and no negative performance issues were ever noted. (PSOF ¶ 3.) His title at Rush was Director of the Division of Breast Imaging. (DSOF ¶ 1.) In short, he was a prized member of Rush's medical faculty until the controversy at the heart of this litigation arose.

Throughout the years, Jokich maintained employment agreements with Rush, one of which was known as the Faculty Employment Agreement and others known as Letter Agreements that enriched his salary and benefits more than the standard Faculty Employment Agreement. Because the court will dismiss Jokich's contract claims as a result of this Opinion, the details of the contractual relationship need not be explored in detail. Suffice it to say, for the purpose of the federal anti-discrimination laws, Rush was and is an employer and Jokich was employed by Rush at all relevant times.

B. Jokich's controversy at Rush and termination

The parties lay out infinite detail about a deteriorating relationship between Dr. Robert DeCresce, the Acting Director of the Rush Cancer Center, and Jokich that need not be entirely included here. The onset appears at some point in 2016. DeCresce informed Jokich that he would not renew a contract with a company that employed Dr. Katherine Griem, a breast imaging physician who Jokich highly valued. (PSOF ¶ 19.) Jokich vehemently resisted the decision and organized other members of his department to oppose it. (PSOF ¶ 20–26.) DeCresce

was unmoved and, further, refused to disclose to Jokich his reasons for the decision. (PSOF ¶ 23.) Jokich believed this business decision failed to prioritize patient care. (PSOF ¶ 26.) DeCresce disliked Jokich's failure to follow the chain of command. (PSOF ¶ 26.)

Another relevant set of facts concerns another employee, Norma Melgoza, formerly an Associate Vice President at Rush, who (in shorthand terms) had been demoted and in November 2017 filed a Title VII and Equal Pay Act lawsuit in this court. Jokich contends that he supported Melgoza's case and Rush retaliated against him for doing so.

1. Jokich's relationship to Melgoza's case

On November 1, 2017, Melgoza interviewed with DeCresce for a position at Rush. During the interview, DeCresce put on a Trump mask (which DeCresce denies, although he admitted that he had such a mask in his office, and one might wonder why Melgoza would fabricate). Melgoza felt intimidated and very upset by DeCresce's behavior. After the interview, she had a scheduled meeting with Jokich and reported this incident to him. Jokich told her it was offensive and DeCresce should be fired, and he advised her to report the incident to Human Resources. (PRDSOF ¶ 97.)

Melgoza complained to Human Resources, and Lynn Wallace from that department investigated the complaint. Wallace interviewed Jokich on December 7, 2017 and on December 28, 2017 issued a report concluding that the complaint could not be substantiated. According to her report, Jokich told her that (a) he had not been present at the interview between Melgoza and DeCresce, but Melgoza had told him what had happened; (b) he told Melgoza that if

DeCresce had put on the mask as Melgoza claimed, it would have been "unbelievable and unprofessional"; and (c) he and Melgoza had had no further discussion about the incident since that conversation (PRDSOF ¶ 99.)

According to the report, and Jokich does not deny, Jokich expressed no other concerns about DeCresce and told Wallace that DeCresce likes to joke around and is known for his sense of humor. (PRDSOF ¶ 100.) Jokich admits he never told Wallace he thought Melgoza had been discriminated against.[5] (PRDSOF ¶ 100.)

The report reflects that it was sent to Mary Ellen Schopp, Rush's Chief Human Resources Officer. (DSOF, Ex. 53.) Schopp testified that the report would not in the normal course have gone to DeCresce (DSOF ¶ 101–02), and DeCresce denies knowing of it until he was informed in connection with this lawsuit. (Jokich disputes this but has no evidence substantiating his denial). (PRDSOF ¶ 101–02.)

On January 8, 2018, pursuant to Federal Rule of Civil Procedure 26(a), Melgoza's lawyers sent Rush's lawyers their "Initial Disclosures" in Melgoza's lawsuit. They listed 112 specific individuals at Rush who had knowledge of discoverable information about Ms. Melgoza's claims or defenses, including Jokich. (DSOF ¶ 103.) They stated that Jokich had knowledge of allegations in the complaint regarding Melgoza's salary and Rush's payment of salaries to similarly situated employees; her qualifications, experience, and job performance; her requests to advance within the organization; Rush's available opportunities and open executive positions and Rush's procedures for filling same; Rush's demotion of Melgoza and offer of separation package; statements by Dr. (Antonio)

Bianco regarding termination of Melgoza's employment and removal of operational duties that were part of Melgoza's portfolio. (*Id.*) The Initial Disclosures did not specifically assert that either DeCresce or Jokich knew anything about the mask incident.

2. Breast surgeon hiring requests and complaint

On February 9, 2018, Jokich wrote several emails to Dr. Alfonso Torquati, Chair of the Department of Surgery, with copies to Drs. Larry Goodman, the CEO of Rush, and Krishnan, urging them to find a replacement for Dr. Thomas Witt, a breast surgeon who had retired. (DSOF ¶ 50.) In one email, Jokich wrote:

> The breast imaging radiologists work the closest with the breast surgeons (closer than others on the team), since we find and diagnose almost all of the breast cancers at Rush (usually small and early stage) through our imaging efforts[s] ... This is markedly different from the old days, when the surgeons were the only game in town, since they were the only ones who diagnosed and treated breast cancer (before mammography, chemo, RT, and hormonal therapies).
>
> We also know which surgeons are 'good' and which are not, based on how many needle localized lesions they miss in surgery (since we read the specimen mammograms from the OR), how many lesions are at the very edge of the specimen, how many patients end up with positive margins, and how many mastectomy patients have recurrences. Is the Surgery

> Department tracking these things? Are they discussed at your M and M conferences? This almost never happened when Tom Witt was our main breast surgeon. Times have changed. My faculty are very concerned. We could [*sic*] care less about surgical departmental politics. And for the record, our patients take our advice on who to see for breast surgery. We direct most of these referrals, since our patients trust us to send them to the best surgeon ... not their primary care doctor, who has no clue. You need to listen to our concerns, for the good of our patients and for the long-term good of the institution.

I am not stuck on Dean Godellas. Just find us another Tom Witt. Please ... and quickly. I have been speaking on this for more than a year, and am very frustrated (as I'm sure you can tell).

(*Id.*)

At this time, Rush's two main breast surgeons were Dr. Andrea Madrigrano and Dr. Cristina O'Donoghue. (DSOF ¶ 51.) Torquati showed Jokich's email to Madrigrano and instructed her to gather data to refute any implication that their care was substandard. (DSOF ¶ 51.)

Soon thereafter, Madrigrano and O'Donoghue, along with Dr. Paula Grabler, the breast imager at Rush Oak Park Hospital ("the three women physicians"), met with Katharine Struck, a Vice President at Rush, for "guidance"[6] concerning their relationship with Jokich. (PRDSOF ¶ 52.) Although they "had issues" with Jokich, none of these physicians directly attributed Jokich's conduct towards them as

discrimination based on gender. (PSOF ¶42.) Struck then had a conversation with the Human Resources Department. (DSOF ¶ 52.) Human Resources hired an outside investigator, Patience Nelson, to investigate whether Jokich had engaged in disruptive conduct and whether gender discrimination was at play. (PSOF ¶ 43; DSOF ¶ 53.)

During Nelson's interview of him, Jokich stated that he had not discriminated against the three women physicians but, rather, Rush had encouraged them to fabricate complaints against him (a) because he had organized petitions to be signed in support of Griem; (b) to dissuade him from testifying in support of Melgoza's ongoing discrimination lawsuit against Rush; and (c) to deter him from going public with his opinion that Rush Oak Park was exposing ethnic minority women to increased levels of radiation by using 3D Tomosynthesis without their consent. (PRDSOF ¶ 53.) In March 2018, Krishnan informed Jokich to report to DeCresce, rather than Byrd (DSOF ¶ 130) (although Jokich maintained that Byrd remained his supervisor).[7] (PRDSOF ¶ 69.)

On April 9, 2018, Nelson issued her report, which identified the issues as whether Jokich had (1) engaged in disparagement of the three women physicians' reputations by criticizing patient outcomes without supporting data; (2) created a disruptive environment by criticizing the competencies of female breast surgeons to others; and (3) treating one or more of them differently because of gender. (DSOF, Ex. 32.) Nelson concluded that Jokich had not committed "disruptive conduct" as defined by Rush policy or the Medical Staff Bylaws; she was "inclined to believe" Jokich when he claimed he had not meant to disparage the breast

surgeons' competence; and Jokich had not acted out of bias toward women. (DSOF ¶ 54.)

Nelson's report also rejected Jokich's assertion of retaliation, finding that he had not engaged in "protected activity"; his allegations about what motivated the women's complaints were "speculative"; and he had not experienced "adverse action." (*Id.*)[8] She recommended that "the leadership of Surgical Oncology, General Surgery[,] and Breast Imaging meet to determine how they can best provide the remedial actions that Complainants seek and redress underlying tensions." (*Id.*)

Jokich had been in charge of Rush's four offsite breast imaging facilities. (PSOF ¶ 44.) On April 20, 2018, without informing Jokich in advance, Dr. DeCresce placed Grabler in charge of planning for breast imaging at two offsite locations under development, South Loop and Oak Brook. (PSOF ¶ 45; DSOF ¶¶ 56–58.) On April 17, Patricia Nedved, a nurse administrator sent out an email to staff announcing the change. (PSOF ¶ 45.)

Jokich felt humiliated and considered it a demotion. (PSOF ¶ 46.) On April 18 and 20, 2018, he emailed Shanon Shumpert, the Rush human resources official who had overseen Nelson's investigation, to request a meeting. (DSOF ¶ 106.) He attached the email announcing that Grabler would have oversight for all breast imaging sites other than on the downtown campus. (DSOF ¶ 106.)

Thereafter, several emails were exchanged concerning setting a meeting. In one communication, Jokich confirmed that he wanted to meet "about retaliation and other very serious matters that were brought to light during this process." He did not explain what he meant by "retaliation."[9] (DSOF ¶ 108.)

Shumpert replied on April 20, 2018 to Jokich that she could meet with him the next week. (DSOF ¶ 110.) On April 25, 2018, Jokich replied that he could not meet next week but would reach out to set a time. (DSOF ¶ 110.)

On May 8, 2018, Jokich called a special meeting of the physicians in the Division of Breast Imaging. During that meeting, Jokich "told nearly everyone" that he had been demoted after he was cleared of the "meritless gender discrimination claim" and could not be fired on that basis. He told them of Melgoza's report that DeCresce had worn a Trump mask during her interview, that he had recently-acquired information about discrimination laws, and he intended to file a formal complaint with Human Resources. (PSOF ¶ 36.) On May 10, 2018, Jokich again emailed Shumpert (copying Schopp) asking for a meeting and asking that Bill Goodyear, Chair of Rush's Board of Trustees, be there to discuss "retaliation and other very serious matters at Rush." (DSOF ¶ 111.) Again, he did not explain what he meant by "retaliation." (DSOF ¶ 111.) Shumpert indicated her willingness to meet but a date and time were not set. (DSOF ¶ 112.)

3. Jokich's criticism of Grabler's tomosynthesis presentation

On May 21, 2018, at a weekly Rush multidisciplinary breast conference, Grabler gave a talk on tomosynthesis, 3D digital x-ray mammography that creates 2D- and 3D-like pictures of breasts. (DSOF ¶ 64.) She addressed criticisms of the imaging device and presented data from her year of using it at Rush Oak Park. (DSOF ¶ 64.) Jokich attended but said nothing. (DSOF ¶ 64.) Grabler made no personal remarks about

him, and he admits it was a "reasonable presentation." (DSOF ¶ 65.)

Jokich and Grabler had a history of disagreement about the use of tomosynthesis, and she did not consult with him before her presentation. (PSOF ¶¶ 47–49.) Jokich believed Grabler's slide presentation was intended to humiliate him in a public setting because it was known that he was critical of tomosynthesis. (DSOF ¶ 65.)

The next day, on May 22 at 12:19 p.m., Jokich emailed Schopp: "Please let me know when you and I can meet, either next week or the week after. I am available any afternoon except next Tuesday, and can even stay into the evening any day. I have several serious issues to bring to your attention." (DSOF ¶ 113.)[10] Twenty-six minutes later, he sent an email to 60 people at Rush, including Goodman, Krishnan, and DeCresce:

> In response to Grabler's questioning whether 3D/tomo is a business gimmick or marketing gimmick to increase market share, I do believe that it is pushed by community hospital CEO's to increase volume and revenues, with very little patient benefit and potentially patient harm (double the radiation dose).
>
> * * *
>
> It is a sad state of affairs when at the 'new' Rush, administrators, business people, non-clinical nurses and lawyers, and ultimately the Board of Trustees, are making all the major decisions based on money and business concerns, and not the working physicians, who are the only

> ones, it appears, concerned with what is truly best for our patients, and who really have the Rush mission embedded in our hearts, which is to improve the health of the communities that we serve. This is one of the major reasons why the physician burnout rate at RUMG is now at 43% (plan to leave the institution within the next two years).

(DSOF ¶ 66; PSOF ¶ 47.)

At 4:50 p.m., DeCresce wrote an email to Krishnan:

> At this point you may have seen Jokich's latest outburst concerning his colleagues. I attended the conference which was quite well attended, He had ample opportunity to ask questions of Grabler but apparently felt a personal email attack was a better way to address the content of her presentation. I honestly think he's had more than enough opportunity to reflect on his behavior but apparently is unable to change probably because he thinks he is right all of the time. I plan to meet with him tomorrow and tell him that his behavior is unacceptable and an apology is in order. I would say in many ways his behavior is the antithesis of the ICARE values.
>
> I believe it is time for a change in mammography. Pete's attitude is quite negative towards anyone who disagrees with him and that is not going to change. If we want to be a leading cancer center we need individuals who will work together to achieve the goal. Pete is not one of

> those people. Please let me know when we can meet to discuss this issue. I don't think too many people are going to come to his defense.

(DSOF, Ex. 18.)

At 6:37 p.m., Goodman wrote to DeCresce and Krishnan:

> I'm certainly happy to meet, but I totally support your judgement concerning the individuals that report to you. I appreciate the heads up and I'm sorry to hear that Peter continues to display behaviors inconsistent with our values and what we expect from leaders. It really is unfortunate given his important role in developing this service. Nevertheless, those accomplishments do not exempt him from the expectations we have today. I am out of the country this week but can meet next week if you want. Because I am away I thought I should weigh in to be clear that I support holding him accountable - as we would anyone else.

(DSOF, Ex. 18.)

On June 11, Jokich sent an email to Goodman, Schopp, and Dr. David Ansell (Senior Vice President of Health Equity):

> I attended the mandatory Rush anti-harassment training presented by Patience Nelson, J.D., last month.[11] Since I am now very educated on the subject of harassment and discrimination, I feel that it is my duty to inform you that I am aware

> of serious discrimination issues and unfair employment practices that have occurred, and are occurring, at Rush involving at least gender, age, and national origin, which greatly impact our diversity goals. I would, therefore, like to request a meeting with you to discuss these issues, and other serious concerns, which impact quality patient care and organizational morale.
>
> I have made several requests to meet with Shanon Shumpert and Mary Ellen Schopp from Human Resources together, and even asked that Mr. Goodyear, our chairman of the Board of Trustees be present, but there has been no date set for a meeting, despite the fact that my first meeting request was made many weeks ago. Please forward this email to Mr. Goodyear. You know that I love Rush and raise my concerns so that we don't lose what has been created here over the past several decades ... an incredible culture which puts excellence in patient care above all else.

(PSOF ¶ 55.)

According to Goodman, when he received Jokich's June 11 email, he "hit the pause button" on Jokich's termination because he did not know what his complaints were, wanted to understand the detail about them and make sure they heard them, and "if he had true knowledge about incidents of wrongdoing or prejudiced behavior on the part of Rush, that was important to hear." (DSOF ¶ 79.)[12]

On June 18, Jokich filed a formal complaint with Rush, alleging, among other things, (a) gender and age

discrimination against Griem, and retaliation in relation thereto; (b) gender and national origin discrimination and harassment against Melgoza, and retaliation in relation thereto; and (c) false accusations of gender discrimination brought to Rush's human resources department. He named the following individuals as culpable in these and other acts of discrimination and retaliation: Goodman, Krishnan, Schopp, Nedved, Struck, DeCresce, and others. (PSOF ¶ 55.)
Goodman emailed Jokich the following day:

> We take such issues very seriously. Your concerns will be investigated through the appropriate areas which include compliance (Cynthia Boyd) and/or HR (Mary Ellen Schopp, one of your addressees). They will reach out to you to schedule a meeting to follow up and obtain more detail. For your information, our Board is kept informed concerning any compliance issues, our diversity goals and strategies, and Rush's quality of care regularly. I appreciate your thoughts concerning the positive culture and emphasis on high quality patient care which I certainly share.

(PSOF ¶ 80.)

Rush retained an attorney, Thomas Johnson, to investigate Jokich's complaint. Johnson interviewed Jokich several times and reviewed extensive emails and other documents. (DSOF ¶ 81.) On July 29, Johnson reported his conclusion that Jokich had not provided any evidence to support a retaliation claim under the employment discrimination laws. In relevant part, Johnson determined that Jokich had not provided any

specific evidence that he objected to perceived acts of discrimination and therefore did not engage in protected activity. (DSOF ¶ 82.)[13]

C. Jokich's termination

On August 8, 2018, DeCresce and Krishnan met with Jokich and told him it was time to part ways: He could resign under an agreement or face termination. (DSOF ¶¶ 84, 86.) DeCresce and Krishnan tendered Jokich a separation agreement, which he had 21 days to consider, and, among other provisions, offered to pay Jokich his then-current salary of $659,818 until June 30, 2020, allow Jokich to take any other job,[14] agree on a departure announcement, write a recommendation, and agree to mutual confidentiality and non-disparagement provisions. (PRDSOF ¶ 85.)

On August 21, Jokich's counsel wrote to Rush's counsel that Jokich was not accepting the separation agreement in the present form. (DSOF ¶ 87.) On August 22, DeCresce wrote Jokich that, in light of his rejection of Rush's offer, he was removed from his position; that pursuant to section 7 of his Faculty Employment Agreement, his salary would be lowered 60 days after his receipt of the letter to $448,802; and when his then-current one-year term under the FEA expired on June 30, 2019, it would not be renewed. (DSOF ¶ 88.) The following day, Rush's counsel replied to Jokich's counsel, explaining Rush's reasons for declining to negotiate further. (DSOF ¶ 88.)

On August 23, 2018, via letter, DeCresce removed Jokich from his position as Director of the Division of Breast Imaging, reduced his salary by more than $200,000 (on 60 days' notice), placed him on administrative leave, and purported to terminate his

contract as of July 1, 2019 even though his contractual term of employment did not expire until June 30, 2020 at the earliest. (PSOF ¶ 56.)[15]

LEGAL STANDARD

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). To determine whether any genuine issue of material fact exists, the court must look beyond the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed. R. Civ. P. 56(c). In doing so, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769 (2007). The court may not weigh conflicting evidence or make credibility determinations. *Omnicare*, 629 F.3d at 704. At the same time,

> [w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. And although we must, for purposes of summary judgment review, draw any inferences from the record in favor of the plaintiff, we are not required to draw every conceivable inference

> from the record. We need draw only reasonable ones.

Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1146 (7th Cir. 1997) (cleaned up[16]) (citing, *inter alia*, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355–56 (1986)).

The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). In response, the non-moving party cannot rest on their pleadings alone but must designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S. Ct. 2548; *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). If a claim or defense is factually unsupported, it should be disposed of on summary judgment. *Celotex Corp.*, 477 U.S. at 323–24, 106 S. Ct. 2548.

ANALYSIS

I. Retaliation Claims

Jokich claims that Rush retaliated against him for complaining about discrimination against older workers, women, and employees of Hispanic and Mexican national origin, in violation of the ADEA, Title VII, and the IHRA. The Seventh Circuit uses the same standard to evaluate claims of retaliation under all three statutes. To prevail on a retaliation claim, the plaintiff must prove that (1) he engaged in a statutorily protected activity; (2) he suffered from an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action. *Lewis v. Wilkie*, 909 F.3d 858, 866 (7th Cir. 2018);

Wetzel v. *Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 868 (7th Cir. 2018) (noting same test for Title VII and ADEA); *Teruggi v. CIT Grp./Capital Fin., Inc.*, 709 F.3d 654, 659 (7th Cir. 2013) (noting IHRA follows federal statutes).[17] As Rush concedes the second element, to obtain summary judgment, Rush must demonstrate that Jokich has insufficient evidence to go to the jury on the first or third element.

A. Protected activity

Under section 704 of Title VII, 42 U.S.C. § 2000e-3(a), it is "an unlawful employment practice for an employer ... to discriminate against any of his employees ... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title]."

Crediting Jokich's subjective belief and reasonableness thereof, he engaged in protected activity when he wrote to Goodman, Schopp, and Ansell on June 11, 2018 specifically asserting that he was being retaliated against because of his support for Melgoza, who had a pending Title VII claim in this court. *See Beamon v. Hewitt Associates, LLC*, No. 03 C 794, 2004 WL 2038169, at *6 (N.D. Ill. 2004) (Plaintiff's involvement in internal investigation of fellow employee's sexual harassment complaint was protected activity where plaintiff subjectively believed she was participating in a complaint of sexual harassment and her belief was objectively reasonable.)[18] He also engaged in protected activity when he formally complained on June 18. Thus, if there is sufficient evidence to submit to a jury that the decision to terminate was based on the June 2018 protected activity, summary judgment must be denied. And

because Rush contends that it made the decision to "part ways" with Jokich immediately after his May 22 email, the court also must examine whether Jokich's statements before May 22 amount to protected activity.

Rush argues that Jokich's generic averments to retaliation in his emails in April and May 2018, following the Nelson investigation, are not protected activity, citing *Montgomery* v. *Am. Airlines, Inc.*, 626 F.3d 382, 392 (7th Cir. 2010) ("Employers need not divine complaints from the ether, guessing at the subjective suspicions of employees. An aggrieved employee must at least report—clearly and directly—nonobvious policy violations troubling him so that the supervisors may intervene."), and *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1007–08 (7th Cir. 2000) ("An employee, of course, need not use the words 'pregnancy discrimination.' But she has to at least say something to indicate her pregnancy is an issue.").

The question of fact is whether Jokich made statements concerning Melgoza or anyone else who engaged in protected activity that may be viewed as participation in a fellow employee's discrimination complaint. Rush acknowledges that Nelson's April 9, 2018 report, which was transmitted to DeCresce, stated that Jokich claimed during her investigation that he was being targeted for "future retaliation" because "he might be called as a witness in Melgoza's lawsuit." (PRDSOF ¶ 53.) For purposes of this decision, then, the court considers this assertion sufficient to constitute participation in Melgoza's case and therefore protected activity.

B. Causation

As Judge Easterbrook classically framed the causation issue in *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994), an age discrimination case, a jury "must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same." Or, in this instance, could a reasonable jury decide that DeCresce on behalf of Rush would have terminated Jokich if he had not been a potential witness in Melgoza's discrimination case but everything else had been the same?

As set out above, the court first looks to whether Rush has demonstrated that there is no genuine issue of material fact that Jokich was not terminated because of protected activity. The court finds this threshold crossed in that Rush has proffered a mountain of evidence of conflict between Jokich and Rush arising from the conflict between DeCresce and Jokich and to the lack of any evidence, other than Jokich's belief, that the deciding official, DeCresce, was concerned about Jokich's knowledge of or potential support for Melgoza's lawsuit.

Jokich then has the responsibility to designate specific material facts showing that there is a genuine issue for trial. Jokich relies on circumstantial evidence, primarily "suspicious timing" to show the causal link.[19] "Suspicious timing alone rarely establishes causation, but if there is corroborating evidence that supports an inference of causation, suspicious timing may permit a plaintiff to survive summary judgment." *Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 898 (7th Cir. 2015).

It is important to bear in mind that what DeCresce, and those who were required to concur in his decision to terminate, knew of Jokich's protected activity is critical in determining whether the activity was a but-for reason. *See*, *e.g.*, *Garza v. Illinois Institute of Technology*, 2018 WL 264198, at *4 (N.D. Ill. 2018) (holding plaintiff's retaliation claim could not proceed where he had not communicated the alleged discriminatory conduct to employer). In other words, what Jokich was thinking at the time about discriminatory practices at Rush means nothing in this analysis unless he conveyed his thoughts to his employer.

Jokich points to the facts that (1) a "baseless" gender discrimination complaint from the three women physicians was submitted against him (PSOF ¶ 36); (2) he was demoted eight days after Nelson's report came out revealing that he believed he was being targeted because he could be a witness in Melgoza's case (PSOF ¶ 44–46); and (3) he was terminated less than two months after his June 18 email, which again asserted that discrimination was a problem at Rush. (PSOF ¶ 56.)

As for (1), Jokich points to no evidence other than his belief that the three women physicians' meeting with Schopp was instigated by Rush because of his support of Melgoza. Furthermore, the report, even if it went to DeCresce (and there is no evidence it did), merely relayed that Melgoza told him about the mask incident, hardly something to cause DeCresce concern.

These matters aside, the timing of the three women physicians' meeting with Schopp occurred shortly after Jokich's February 9, 2018 email asking his superiors to hire another breast surgeon to replace

Witt, which the women felt diminished them. No reasonable jury would conclude that Jokich's statement to Wallace, rather than Jokich's email, motivated the women to speak to Schopp.

As for (2), Nelson's report came out on April 9, 2018, revealing that Jokich believed he was being targeted because he could be a witness in Melgoza's case. The court finds no indication that Jokich was demoted on or about April 17, however. Although Grabler took over responsibility for breast imaging at satellite sites, Jokich suffered no loss in pay or title. Neither has Jokich pointed to any evidence other than his own speculation that DeCresce was motivated by concern about Jokich in relation to Melgoza's case.

Thirdly, Jokich's reliance on the fact that he was terminated less than two months after his June 11 and 18 emails does relate to whether the decision to terminate him was made in May and whether Goodman's testimony is true that he put a "pause" on the termination pending Jokich's allegations so as to wait until Johnson's investigation was complete. There is undisputed evidence that DeCresce informed his superiors on May 22, 2018 that he had decided it was "time for a change in mammography" and, other than Goodman's supportive response, the record is void of any evidence of why the change was delayed until August 9 other than the "pause" Goodman testified to in response to Jokich's protected activity in June and the ensuing investigation.

A reasonable jury could believe DeCresce's documented disapproval of Jokich's behavior toward management and peers was the reason for the termination, and that Goodman's statement that he paused the termination pending Johnson's investigation was the reason it was delayed until August. A

reasonable jury could not conclude, however, that but for Jokich's June 2018 protected activity he would not have been terminated.

Jokich has proffered his unquestioned competence, at least nine reasons given for his termination, and violation of Rush's own policies for termination of employment to support his argument that Rush's explanation of why it terminated him are pretextual (not true). These are insufficient to create an issue of fact. Rush has not questioned Jokich's competence as a physician. All of the dissatisfaction expressed by Rush's executives (negative attitude, inability to work cooperatively, low productivity, etc.) are not reasonably seen as shifting reasons but, rather, part of a chain of events that culminated in a decision that it would be in the best interest of Rush to part ways with Jokich. Even if Rush has violated its by-laws or the employment contract as Jokich claims, nothing about that points to retaliation for participating in Melgoza's lawsuit.

In sum, the entirety of the record in this case, which this court has examined in laborious detail, leads to the conclusion that Jokich's termination had nothing to do with his allegations of unlawful discrimination at Rush. He was terminated as a result of strong differences of opinion about how Rush, his department, and he as a senior physician, should be managed. The inferences Jokich asks the court to draw in his favor are simply not reasonable inferences.

II. State Law Claims

This case was originally filed in the Circuit Court of Cook County. Jokich, after motions for temporary injunctive relief and an appeal were denied, dismissed

the case without prejudice. He later filed his case as a civil rights action invoking federal jurisdiction. The allegations are essentially the same as the original case, but for additional facts concerning his unlawful retaliation claims. This court, having concluded that Rush is entitled to judgment as a matter of law on those claims, concludes that the remaining claims, which are based on principles of contract construction that are quintessentially matters of Illinois law, should be dismissed without prejudice to filing in the state court.

ORDER

Defendant's motion for summary judgment on Counts I, II, and III of the First Amended Complaint (dkt. 130) is granted. The Clerk is directed to enter final judgment in favor of defendant on those claims. The court relinquishes jurisdiction over the claims set out in Counts IV, V, and VI. The case is terminated.

Footnotes

1The court has already dismissed Jokich's sub-claims under (1) Count IV, alleging Rush lacked contractual authority to lower Jokich's salary and place him on paid leave' and (2) Count V, alleging Rush impinged on Jokich's clinical privileges. (Dkt. 40.)

2The court has jurisdiction over the federal claims under 42 U.S.C. §§ 2000e-5(f)(3) and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. Venue is proper in the Northern District of Illinois pursuant to 28 U.S.C. § 1391. Jokich filed a charge of discrimination on October 22, 2018 and received a right to sue letter on December 14, 2018. (*See* dkt. 17 at 3–4.)

3The disputed facts in this Background section are stated in a light favorable to Jokich. Rush's Rule 56.1 Statement of Facts (dkt. 135) is abbreviated as "DSOF." Jokich's Rule 56.1 Statement of Additional Facts (dkt. 150) is abbreviated as "PSOF." Jokich responded to Rush's Statement of Facts at dkt. 149 ("PRDSOF") and Rush responded to Jokich's Statement of Additional Facts at dkt. 160 ("DRPSOF").

4For example, Rush states, "Dr. [Sharon] Byrd was not involved in the decision to terminate Jokich. She was on vacation in August 2018 when DeCresce removed Jokich from his position and placed him on paid administrative leave. After she returned, DeCresce called her sometime around August 26, 2018 and told her what he had done. She raised no objection." (DSOF ¶ 136.) In response, Jokich attacks the statement as "gross mischaracterization of the record," adding argumentative assertions about the validity of DeCresce's "purported" termination and reasons why Byrd did not object. (PRDSOF ¶ 136.) It would seem simple enough to admit the first and second sentences inasmuch as there appears to be no dispute that Byrd was not involved and was on vacation at the time. And since Jokich alleges that DeCresce unlawfully terminated him (the basis of the lawsuit) and contends that only Byrd had that authority, the failure to give a direct answer is perplexing.

5Jokich disputes Rush's assertion that he never told Wallace he thought Melgoza had been discriminated against. He states that he told Wallace that he believed DeCresce's behavior was "absolutely ridiculous" and was "one of the most inappropriate things [he] ha[d] ever heard of." Jokich asserts that these words "clearly express[ed] his belief that Dr. DeCresce had engaged in behavior that was in fact

discriminatory." (PRDSOF ¶ 100) As explained below, implied complaints of discrimination are insufficient to amount to protected activity. Furthermore, what Wallace reported about the meeting is what matters.

6Madrigrano dep. at 60, ll. 6-13 (DSOF, Ex. 8.)

7Since both he and DeCresce were Directors, thus apparently of the same rank, Jokich likely believed that being told to report to DeCresce was improper.

8The court infers that Nelson was examining the retaliation issue under anti-discrimination laws, even though Jokich thought he was being set up for other reasons as well as a role he might play in Mendoza's case.

9Since Jokich had just received word that Grabler had been reassigned, a reasonable inference is that he was upset about that change. This is not a material fact.

10Schopp, in an email conversation with her colleagues, suggested May 31. (DSOF ¶ 114.)

11The training occurred on April 25, 2018. (PSOF ¶ 53.)

12Jokich disputes this testimony as implausible. (PRDSOF ¶ 79.)

13Jokich implies that Johnson was not impartial because he was on retainer with Rush and argues that his investigation was superficial because he based his opinion only on the emails and documents Jokich provided. (PSOF ¶¶ 60–62.) Johnson's opinion appears only admissible and relevant to the timing of the termination.

14What was meant by "any other job" is not clear, as Jokich understood that he was being "pushed out" at Rush. (PRDSOF ¶ 85.)

15Rush disputes Jokich's interpretation of his employment contract. The court accepts Jokich's version for the purpose of the motion.

16*See Brownback v. King*, 141 S. Ct. 740, 748 (2021) (using "cleaned up" to signify omission of citations, quotation marks, insertions, or parentheses), a much more efficient (and now officially sanctioned) signal to check original text if desired.)

17In *Ortiz v. Werner Enterprises*, 834 F.3d 760, 763 (7th Cir. 2016), the court explained that "direct" and "indirect" methods of proof are "just means to consider whether one fact ... caused another ... and therefore are not 'elements' of any claim." District courts are cautioned "not to split evidence into categories of 'direct evidence' and 'indirect evidence,' but to instead evaluate the evidence as a whole to determine if it "would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Id.* at 764–65.

18He also expressed his opposition to the departure of Griem and that a false allegations of sex discrimination had been made against him by the three women physicians. Concerning Griem, there is no evidence that Jokich's objection to Griem's departure was based on his belief that she was being discriminated against. To the contrary, on April 10, 2017, Jokich, sent an email to Goodman and Krishnan requesting an explanation for Griem's termination. The email stated among numerous possibilities that age and gender discrimination might be a reason but unlikely due to Rush's commitment to diversity. (DSOF ¶ 96.) In addition, Jokich has presented no evidence that Griem's separation was, in fact, discriminatory, nor that Griem made any allegation of unlawful discrimination.

Thus, he could not have participated in any discrimination claim concerning her. Therefore, the evidence does not support a finding that Jokich engaged in protected activity concerning Griem.

Similarly, Jokich's complaint that he was being retaliated against for complaining about the departure of older physicians is not supported. Jokich admitted in his deposition that he did not make any complaints to Rush about age discrimination against older physicians. (DSOF ¶ 91.) He also acknowledged that he did not know that any Rush physicians themselves complained about discrimination. (DSOF ¶¶ 120–121, 123–24.)

Finally, Jokich's statements about his opposition to the use of tomosynthesis as harmful to minority patients is not protected activity. *See Paulos-Johnson v. Advocate Trinity Hosp.*, No. 01 C 3639, 2002 WL 230783, at *4 (N.D. Ill. Feb. 15, 2002) (complaints of discrimination against Hispanic patients are not actionable).

19Circumstantial evidence to support causation can include: "(1) suspicious timing; (2) ambiguous statements or behavior towards other employees in the protected group; (3) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically receive[d] better treatment; and (4) evidence that the employer offered a pretextual reason for an adverse employment action." *Rowlands v. United Parcel Serv. - Fort Wayne*, 901 F.3d 792, 802 (7th Cir. 2018) (citation omitted).

2022 WL 4132067
United States Court of Appeals, Seventh Circuit.

Peter JOKICH, M.D., Plaintiff-Appellant,
v.
RUSH UNIVERSITY MEDICAL CENTER,
Defendant-Appellee.

No. 21-2691
September 12, 2022

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 18 C 7885, Joan H. Lefkow, *Judge.*

Befamenore DIANE S. SYKES, Chief Judge, JOEL M. FLAUM, Circuit Judge

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc,[1] and the judges on the panel voted to deny panel rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

Footnote
1Circuit Judge Rovner did not participate in the consideration of this petition for rehearing.