COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000820-D

THE BOARD OF REGENTS OF
NORTHERN KENTUCKY UNIVERSITY — APPELLANT

v.

On Discretionary Review From Kentucky Court of Appeals
Case No. 2011-CA-002111-MR and Campbell County Circuit Court
Case No. 2009-CI-0432

ANDREA WEICKGENANNT — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

It is hereby certified that the original and ten copies of the foregoing was served upon the following named individual via Federal Express, on February 24, 2015: Hon. Susan Stokely Clary, Clerk of the Supreme Court, Room 235, 700 Capital Avenue, Frankfort, Kentucky, 40601; and one copy of the foregoing was served via United States mail this 24th day of February, 2015, upon: Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Fred A. Stine, Chief Circuit Judge, Campbell County Circuit Court, 330 York St., Newport, Kentucky 41071; Randolph H. Freking, Esquire, and Kelly Mulloy Myers, Esquire, Freking & Betz, LLC, 525 Vine Street, Sixth Floor, Cincinnati, Ohio 45202.

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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. The Prima Facie Case Set Forth by the Court of Appeals Was Incorrectly Articulated and Applied

It appears that Appellee agrees that the Court of Appeals failed to articulate and apply the proper elements of a traditional *prima facie* case of discrimination (Ct. App. Opinion at pg. 10). In fact, Appellee states that the Court of Appeal's analysis was "inconsistent" in its application of the traditional *McDonnell Douglas* burden-shifting framework. (Appellee's Br. at pg. 20-21). Furthermore, Appellee acknowledges that both Appellant and Appellee previously argued the application of the traditional framework at the Circuit Court where the fourth prong of the *prima facie* case requires proving the plaintiff was "replaced by someone outside her protected class or treated less favorably than similarly situated male employees." (Appellee's Br. at pg. 21).

However, Appellee suggests that the Court of Appeals use of an alternative *prima facie* analysis, what she calls a "failure to promote" framework, is sufficient and cures the deficiencies created by the Court of Appeals. (Appellee Br. at pg. 22). Even if this Court were to rely on the "failure to promote"[1] standard, the Court of Appeals still inaccurately described and applied the fourth prong. As Appellee urges, the fourth prong should be stated as, "other employees of *similar qualifications* who were not members of the protected group were indeed promoted *at the time* plaintiff's request for promotion was denied." (Appellee's Br. at 22, emphasis added). The same modified framework as stated by the Appellee has been articulated in other Kentucky "failure to promote" cases. See *Ky. Dep't of Corr. v. McCullough*, 123 S.W.3d 130, 135 (Ky. 2003)

[1] Employees applying for tenure at universities are not typical employment promotions or failure to hire cases. Each candidate is judged independently of any other candidate and only based on their specific scholarship, university service, and teaching. **(TR 195, Exhibit 5, Wells Affidavit, ¶10).** Therefore such positions are non-competitive and each applicant may be eligible for promotion at any given time. See *Zahorik v. Cornell*, 729 F.2d 85, 92-93 (2nd. Cir 1984).

Yet, the Court of Appeals recited the fourth prong as, "(4) that a person outside the protected class was given a similar promotion." (Ct. of Appeals, pg. 7). Therefore regardless of what version of the *McDonnell Douglas* framework is used, either the traditional or failure to promote, the Court of Appeals still overlooked the most essential component of the fourth prong: that it must be a person outside the protected class *with similar qualifications* or *similarly situated*, and if using the failure to promote standard, who was promoted at *the same time* the plaintiff's request for promotion was denied. Neither of these elements was reviewed appropriately by the Court of Appeals at either the *prima facie* stage or at the pretext stage of the analysis.

Therefore, Appellant's previous arguments critical of the Court of Appeal's broad definition of a similar comparator is just as applicable under a failure to promote standard as it is under the traditional *McDonnell Douglas* standard. Appellee did not respond to the numerous denial of tenure cases that emphasize the difficulty in finding comparators, nor did she address the case law, which she used to support her other arguments, that clearly support the Circuit Court's definition of a similarly situated comparator. For instance, in *Rajaravivarma v. Board of Trustees for Connecticut State Univ. Sys.*, 862 F.Supp. 127 (D. Conn. 2012) the Court found that attempting to compare tenure candidates in other departments would not be "meaningful" and a denial of tenure by an English department simply cannot be compared with a grant of tenure in physics or history departments. *Id.* at 162.

Based upon this, the Court of Appeals incorrectly found Richard Gilson was similarly situated because his "application materials evinced only three scholarly articles published in peer-reviewed journals, and all were co-authored." Yet Dr. Gilson was a

member of a different department, had a different supervisor, a different committee and most importantly, different scholarship contributions. (Ct. App. Opinion at 13.) Appellant noted that there was a presentation of the similarities of the scholarships' "quantity and quality" but provided no meaningful evidence as to the *quality* of Gilson's articles or how the substance of his articles was judged by his RPT committee, the Department Chair, the Dean, or the Provost. (Appellee's Br. at pg. 31). Hence, Appellant admits quality is important to a similarly situated review, but the Court of Appeals completely failed to recognize or analyze this important element. If they had properly done so it would be apparent that Gilson and Appellant are clearly not "nearly identical" in all respects as required under the law.

Furthermore, the failure to promote standard requires the plaintiff to produce evidence that those similarly situated comparators were promoted at the same time she was denied promotion. See *Everroad v. Scott Truck Sys.*, 604 F.3d 471, 480 fn3. (7th Cir. 2010) ("In the context of a failure-to-promote case, when the comparator is the person who was promoted instead of the plaintiff, the "same time" analysis is important to the consideration of whether the comparator is similarly situated to the plaintiff.") There is no dispute that only one of the comparators offered by Appellee, Stephen Mueller, applied for tenure and promotion to associate professor at the same time as she applied for such a position in September 2007.[2] Similar to Dr. Gilson, Mueller was

[2] Peter Theuri applied for tenure and promotion to associate professor in September 2004, 3 years prior to Appellee. (Appellee Br. pg. 14). Kenneth Rhee applied for tenure and promotion to associate professor in 2004 (Appellee Br. pg. 15). Likewise, Richard Gilson, Matthew Ford and Vassilis Dalakas applied for tenure and promotion to associate professor in September 2006. (Appellee Br. pg. 11, 16). Bob Russ applied for tenure and promotion 3 years after Appellee, in September of 2010. (Appellee Br. pg. 17) Vincent Owhoso never applied for tenure or promotion to an associate professor position. He was hired at NKU as a associate professor with full tenure and only later applied for a promotion to full professor later[2]. (Appellee Br. pg. 19). Finally Ken Ryack never applied for tenure or promotion to any position at NKU and resigned in 2010 before he was eligible

teaching in a different department than Appellee, Management and Marketing, and had a different direct supervisor. Unlike Appellee Mueller had been formally awarded two years of prior service credit by the University for his prior 10-years as an assistant professor at two other universities. (TR 200-201, Att. F-Pl. Memo in Opp to MSJ Pl. Ex. 4 at 2913, 2985). Appellee cites to Mueller's lack of articles in the "years" he sought tenure but fails to explain that he was only at NKU for two years before applying for promotion and that prior to coming he had multiple publications that could be taken into consideration for tenure purposes. Id. Appellee was at NKU for six years still and had a lack of publications. (Appellee Br. pg. 14). Mueller is not similarly situated in all relevant respects.

A. There is No Evidence to Support an Inference of Discrimination.

While Appellee attempts to explain away the Court of Appeals' error with inserting a different "failure to promote" standard, she later attempts to argue that the *prima facie* standard should be altered to yet another approach with the fourth prong mandating a plaintiff to present evidence of *(4) circumstances giving rise to an inference of discrimination.* (Appellant's Br. at 24). At no point has Appellee previously articulated this standard. (Appellee's Br. at 21). However, even in the cases cited by Appellee that reference "*circumstances giving rise to an inference of discrimination*" the "similarly situated" analysis is of prime importance in establishing that there may be circumstances giving rise to an inference of discrimination. See *Doucet v. Univ. of Cincinnati*, 2006 U.S. Dist. LEXIS 49022, 39 (S.D. Ohio July 19, 2006) (In order to raise an inference of discrimination, Doucet must show -- among other things -- that UC

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to do so. (Appellee Br. pg. 19). It is important to note that none of these alleged comparators applied for tenure with the same set of reviewers of Beehler, Wells, and Votruba and therefore all had different supervisors.

favored "similarly situated" faculty members).

B. There Is No Evidence of Discriminatory Bias By Wells and Votruba.

Appellee devotes part of her response in analyzing the Supreme Court case *Staub v. Proctor Hospital,* 131 S. Ct. 1186, 2011 U.S. LEXIS 1900. *Staub* explicitly acknowledges that an "independent investigation" into employment decisions can be used to show the employer was not liable. *Id.* at 17. Appellant provided no evidence contradicting Appellant's well-documented position that Wells and Votruba independently reviewed Appellee's application for tenure without reliance on Dr. Beehler's recommendation. (Appellant's Br. at pg. 10-19). Merely because they considered Dr. Beehler's recommendation, isn't enough to impute liability of alleged animus to Wells and Votruba. (Appellee's Br. pg 45-46). In *Rajaravivarma* 862 F.Supp. 127 (D. Conn. 2012), the Court addressed the plaintiff's burden in similar circumstances:

> It is undisputed that President Miller read and reviewed Dr. Zanella and Dr. Tracey's negative recommendations as part of his decision making process. However, without more, the fact that President Miller read their recommendations and also concluded that [Plaintiff] had deficiencies in load credit and creative activity is not sufficient to demonstrate that a direct relation exists between their negative recommendations and President Miller's ultimate decision.

Id. at 150. *Staub* also requires that the supervisor "perform an act motivated by an [discriminatory] *animus*..." *Id.* at 1194. Consequently, only if this Court finds that Beehler based his decision on unlawful *gender animus*, would the Defendant need to show that Provost Wells and President Votruba determined that denial of tenure was entirely justified apart from Beehler's recommendation. Appellee has failed throughout her response to articulate or put forth any evidence how Beehler (and especially Provost Wells and Dr. Votruba) was motivated by unlawful *gender animus* or how the Circuit Court erred in that regard. Appellant's failure to illustrate this gender animus also causes

her argument that there was evidence of discriminatory intent to fail.

II. NKU is Entitled to Constitutional Deference For Its Tenure Decisions, the Application of Which Bars Appellee's Pretext Argument

As a foundational premise, it is important to recognize that universities enjoy constitutional protection to academic freedom under the First Amendment, which includes a university's right "to determine for itself on academic grounds who may teach." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). If, as conceded by Appellee, tenure decisions are different from general employment decisions, and the nature of that difference is both constitutional in nature and practical in effect, then NKU is entitled to deference for its decision to deny Appellee's tenure application. When afforded that deference, through the imposition of a "clearly discriminatory" test, Appellee cannot meet her burden of establishing pretext.

A. Title VII's Legislative History Is Irrelevant to an Analysis of the Constitutional Nature of NKU's Right to Academic Freedom

This legislative history of Title VII is immaterial. Simply stated, Title VII is a federal *statute* while a university's right to academic freedom and the accompanying right to decide who may teach is *constitutional* in nature. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."). To the extent the application of the statute impedes a university's constitutional interest, the statute and its corresponding legislative history are irrelevant and the Court should view this argument with equal skepticism.

B. Leading Case Law Recognizes the Difference between Tenure Decisions and Typical Employment Decisions

Since Title VII's enactment, courts have routinely held that tenure decisions are

different than typical employment decisions and, as a result, require a different analysis. Judge Posner, writing for the Seventh Circuit, recently wrote, "courts tread cautiously when asked to intervene in the tenure determination itself." *Blasdel v. Northwestern Univ.*, 687 F.3d 813, 816 (7th Cir. 2012). He then endorsed the opinions of Judge Friendly and Justice Frankfurter as providing well-reasoned rationale for such caution: "[courts] must be mindful that, . . . 'to infer discrimination from a comparison among candidates is to risk serious infringement of first amendment values. A university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our academic freedom.'" *Id.* (quoting *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980). Multiple courts have reached the same conclusion: tenure decisions should only be subject to a discrimination challenge if the decision was obviously discriminatory. *See Goswami v. Depaul Univ.*, 8 F. Supp.3d 1019, 1023 (N.D. Ill. 2014)

Appellee concedes the difference between a university and other employers without recognizing how it impacts the pretext analysis. The Court of Appeals made the same error. Despite their failure to appreciate it, case law is clear that the difference is significant. "[I]n the tenure context, . . . the plaintiff's evidence of pretext must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously unsupported." *Kobrin v. University of Minnesota*, 121 F.3d 408, 414 (8th Cir. 1997); *see also Thrash v. Miami Univ.*, 549 Fed. Appx. 511, 521 (6th Cir. 2014); *Adelman-Reyes v. St. Xavier Univ.*, 500 F.3d 662, 667 (7th Cir. 2007).

The cases cited by Appellee support the proposition that tenure decisions are different than typical employment decisions and, as a result, are due a degree of deference. In both *Powell v. Syracuse Univ.* and *Jalal v. Columbia Univ.*, the courts

either granted the university's motion for summary judgment or affirmed the trial court's decision to do so. *See* 580 F.2d 1150, 1156-57 (2d Cir. 1978); 4 F.Supp.2d 224, 242 (S.D.N.Y. 1998). Indeed, the *Jalal* Court even noted that it is "proper" for courts to be reluctant "to act as 'Super-Tenure Committees.'" *Jalal*, 4 F.Supp.2d at 241.[3] If distinction in tenure decisions is to mean anything at all, then universities should receive deference in their tenure decisions over and above what a typical employer receives.

C. Appellee Cannot Show NKU's Tenure Denial Was Obviously Discriminatory

The requisite deference can be shown by requiring disappointed tenure candidates opposing summary judgment to come forward with proof that shows "the denial of tenure was *obviously unsupported*" or otherwise demonstrates "clear discrimination." *See Kobrin*, 121 F.3d at 414 (emphasis added); *Adelman-Reyes,* 500 F.3d at 667. That standard is consistent with the suggested rule of the Amici, which would require proof that there is some reason to disbelieve the authenticity of the legitimate non-discriminatory reason offered by the university[4] – poor scholarship in this case.

Here, Plaintiff has not identified anything close to evidence of "clear discrimination" or an "obvious" lack of support for the tenure denial as required by *Kobrin*, *Adelman-Reyes*, and other federal precedent. Instead, she identified two potential bases from which a juror, she argues, could infer pretext: (1) the weight of the

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[3] The pronouncements in the *Powell* majority opinion cited by Appellee concerning sensitivity to academic discrimination were correctly identified in the concurrence as mere dicta. *See Powell,* 580 F.2d at 1157 (Moore, J. concurring) (concurring in the judgment but noting the "dicta" in the majority opinion concerning increased scrutiny of university tenure decisions runs afoul of most courts' "justified reluctance" to override the informed judgment of universities). That dictum had no bearing whatsoever on the Court's decision and, ultimately, the *Powell* Court ruled *in favor* of the university and upheld summary judgment against the failed tenure candidate.

[4] Appellee's brief points out that the United States Supreme Court has held pretext-plus, the type of evidentiary test suggested by the Amici, is inappropriate in the typical case. The Amici acknowledged that and suggested that it be used as an evidentiary tool only in this narrow class of more nuanced cases. This suggestion appears to be consistent with other courts' holdings that something "more" is necessary for a plaintiff to raise a reasonable inference of pretext in tenure denial cases.

comparator evidence and (2) supposed procedural irregularities in the tenure review process. Both proffered reasons fall woefully short of the "clear" and "obvious" standard of evidence necessary to defeat summary judgment.

As for the weight of comparator evidence, Appellee's argument is deficient because, at best, all she is asking the Court to consider is the weight of her *prima facie* case evidence. While that may be sufficient in the ordinary case at the pretext stage, it is inadequate for a tenure review case, where "clear" or "obvious" evidence of discrimination and pretext are required. Instead of providing something extra or, to use the test suggested by the Amici, something showing that the proffered reason did not actually motivate the decision to deny tenure, Appellee simply rested on her *prima facie* case, a fatal flaw in this type of case. Moreover, as discussed above the weight of the comparator evidence relied on by Appellee is quite weak. Left with one possible comparator, Appellee cannot establish pretext through her comparator argument even if one were to consider this type of argument as viable.

The second basis relied on by Appellee, procedural irregularity, is also insufficient for proof of pretext. Appellee mistakes disagreement at different levels of the tenure review process for some sort of irregularity. The President's disagreement with the faculty chair does not mean there was a procedural irregularity; it only means that there was disagreement, an occurrence which is obviously contemplated by the tenure review process. Appellee's citation of Dean Beehler's comments as proof of irregularity is a classic example of a party trying to make a mountain out of a molehill. Appellee suggests that pretext can be established and summary judgment defeated based on the singular comment of Dean Beehler – who was not even the ultimate decision-maker –

that those who do only the bare minimum are typically not viewed with the same respect as those who do more. (*See* Appellee Brief at p. 42). The case cited by Appellee to support her argument that a procedural irregularity occurred, *Canchu Lin v. Bowling Green State Univ.*, actually undermines Appellee's position. 2012 U.S. Dist. LEXIS 75413 (N.D. Ohio May 31, 2012). In that case, the plaintiff argued that "a discussion that took place at the lowest tenure review level, when [administrator] attempted to raise matters and questions outside Plaintiff's portfolio" was proof of procedural irregularity. *Id.* at *22. The court rejected the argument: "nothing supports the conclusion that [administrator's] statements affected the University's decision to deny tenure." *Id.* Here, Dean Beehler's comment was not even made during the course of the tenure review process but completely outside of it. It is far from the type of comment which supports an inference of procedural irregularity, pretext, or clear discrimination. Appellee cannot show pretext through her procedural irregularity argument.

III. Conclusion

Appellee has failed to provide clear evidence as to why the significant errors committed by the Court of Appeals, many of which she acknowledges, should not require a reversal of the Court of Appeals decision. For the reasons provided by the Appellant, it respectfully requests this Court reverse the Court of Appeals' decision overturning the Circuit Court's Order of Summary Judgment in favor of the University.

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