



May 9, 2006

Regarding No. DO46471
In the Court of Appeal of the State of California
Fourth Appellate District, Division One

Pat Washington, Plaintiff and Appellant

vs.

Trustees of the California State University and Colleges, Defendant and Respondent

Honorable Justices:

The Lambda Letters Project (LLP) is a California nonprofit corporation concerned with, among other issues, the interpretation of legislation related to women and people of color. I am writing on behalf of LLP in support of the Petition for Rehearing filed in the above-referenced case now pending before you. After reviewing your decision, LLP urges you to grant the Petition for Rehearing and to reverse your decision affirming the judgment of the Superior Court of San Diego County granting summary judgment in this case for the following reasons:

The Court did not Apply the Appropriate Standard in Viewing the Evidence in the Case

In considering whether to affirm a Motion for Summary Judgment, the Court is required to view the evidence in the light most favorable to the party opposing the motion. In this case, that party is Dr. Pat Washington, the plaintiff and appellant.

While the decision purports--in a footnote--to comply with this requirement, a fair reading of the Court's discussion leads to the inevitable conclusion that it did not, in fact, view the evidence in the light most favorable to Dr. Washington. The decision is deficient, in the first place, because there is no full and fair analysis of what it means to view the evidence in the light most favorable to the party opposing the motion. Had there been such a summary, it would have clarified the standards to which the Court's later discussion of the evidence would have had to conform. The absence of such a summary had the effect of obscuring the Court's deviation from that required standard in its actual discussion of the evidence.

The Court's failure to adhere to the requirement that, for purposes of the motion for summary judgment, it must view the evidence in the light most favorable to Dr. Washington, is evident in its analysis of the evidence. For example, referring to Dr. Washington, the Court states, on page 21 of its decision:

“With respect to the purported “false denigration” of her teaching record, Dr. Washington presented no evidence to support this assertion. In the evidence she cites in her brief in support of this contention, Dr. Washington appears to suggest that because Provost Marlin's final decision to deny Dr. Washington

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tenure was based solely on her inadequate record of professional growth, all other criticisms of her teaching record in her tenure file were false. However, simply because Provost Marlin did not cite Dr. Washington's teaching record in denying her tenure does not mean that criticisms of Dr. Washington's effectiveness as a teacher, reflected in evaluations throughout her tenure file, were false."

Could anyone, reading this passage conclude that the Court was viewing the evidence in the light most favorable to Dr. Washington? On the contrary, the Court even asserts at the outset, that there was no evidence, and then, inexplicably, given this assertion, goes on to evaluate the evidence in an unfavorable light.

Although the Court's decision is replete with examples of where its reasoning fails to apply the legally mandated standard in the case of motions for summary judgment, perhaps one other will suffice to illustrate this point. In evaluating the declaration of Dr. Helen M. Bannan, a tenured Women's Studies professor at the University of Wisconsin, Oshkosh, the Court states, on p. 23:

"Dr. Bannan stated in her declaration that she had reviewed the publication dossiers of Dr. Mattingly and Dr. Washington as of the time the two were considered for tenure. Dr. Bannan provided a quantitative and qualitative assessment of the articles authored by the two, and concluded, 'Based upon my review of the two dossiers and reading of the articles written by Dr. Mattingly and Dr. Washington at the time each was considered for tenure, my opinion is that the dossiers are equal in quality and that Dr. Mattingly and Dr. Washington each met the standards for tenure in the department.'"

Despite this declaration, the Court concludes that it did:

"...not constitute substantial evidence that CSU denied Dr. Washington tenure on the basis of her race. Although both Dr. Washington and Dr. Bannan reviewed the publications of Drs. Washington and Mattingly, neither Dr. Washington nor Dr. Bannan declared that she had reviewed the entire tenure files of both Dr. Mattingly and Dr. Washington. CSU presented evidence that a professor's tenure file may include, among other items, previous reappointment letters, awards, commendations, student evaluations, course materials, in addition to five examples of professional growth in the form of published or accepted articles, seminars, or other speaking engagements. At most, the declarations reflect a "second-guessing of [a] legitimate academic judgment" [citation omitted], rather than evidence that CSU denied tenure to Dr. Washington because of her race."

Could anyone conclude, from a reading of these passages, that the evidence in Dr. Bannan's declaration was viewed in the light most favorable to Dr. Washington? On the contrary, the Court goes out of its way to cast the declaration of Dr. Bannan in an unfavorable light by referring to evidence presented by the university of what "may" be included in a (hypothetical) professor's tenure file.

The Court Misconstrues the Burden on the Plaintiff in the Context of a Motion for Summary Judgment

In its decision, the Court outlined the shifting burden in employment discrimination cases as articulated in the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, and noted that, because of the similarity of federal and state employment discrimination law, this shifting burden of proof has been adopted in California, but that "the courts have differed with regard to whether a plaintiff is required to present evidence sufficient to demonstrate a prima facie case of discrimination in opposing a defendant's motion for summary judgment." The Court indicated that, while not resolving this issue, the California Supreme Court "held" that it is clear that "if the defendant employer presents evidence of nondiscriminatory

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reasons for its actions, the employee must present evidence that “would permit a trier of fact to find that intentional discrimination occurred.” In other words, in the context of a motion for summary judgment, when an employer presents evidence of nondiscriminatory reasons for its actions, the employee must, at least, present a prima facie case, which, when viewed in the light most favorable to the plaintiff, would permit a trier of fact to find that intentional discrimination occurred.

Any attempt to apply the shifting burden of proof, in the context of motion for summary judgment, as it would be applied at trial, e.g., allowing the presumption of discrimination to “disappear” if the employer produces evidence sufficient to raise a genuine issue of fact which could justify a judgment for the employer, would be contrary to the mandate that the evidence be viewed in the light most favorable to the person opposing the motion for summary judgment.

The Court “assumed” that Dr. Washington “has satisfied any applicable burden to present sufficient evidence of a prima facie case of discrimination, and that CSU has presented sufficient evidence of a nondiscriminatory reason for denying Dr. Washington tenure.” Viewed in the light most favorable to Dr. Washington, what is left is at least a triable issue of fact, and not a matter that can be disposed of by summary judgment.

This case, where it is unquestioned that Dr. Washington has presented evidence sufficient to establish a prima facie case, is distinguishable from the *Slatkin* case cited by the Court in its decision. As the Court stated in its decision, the *Slatkin* court “explained that it ‘question[ed]’ whether the professor had introduced sufficient evidence to establish even a prima facie case of discrimination...”

In concluding that Dr. Washington failed to present sufficient evidence that CSU’s denial of academic tenure on the ground of deficient scholarship was a pretext for illegal discrimination, the Court moves to the third stage of the shifting burden as if the university’s articulated reasons for its actions had indeed dissolved the prima facie case, and then proceeds to weigh Dr. Washington’s evidence on the issue of pretext as if it were trying the case. In proceeding to the issue of pretext, the Court attempts to dispose of the case on its merits without giving plaintiff the benefit of a full trial.

In sum, in ruling on this Motion for Summary Judgment, the Court of Appeal has:

- 1) Failed to apply the standard applicable to such rulings by straying from its duty to view the evidence in the light most favorable to Dr. Washington; and
- 2) Applied the shifting burden of proof as it was designed to be applied at trial, and not as is appropriate in the context of a Motion for Summary Judgment.

We strongly urge the Court to correct this error now.

Sincerely,

Boyce Hinman
Lambda Letters Project

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