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May 25, 2006

The Honorable Chief Justice Ronald M. George
The Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Letter Supporting Review of *Washington v. Trustees of the California State University*
DCA4, Div. One, No. D046471:

To the Court:

Pursuant to Rule 28(g), California Rules of Court, the Lambda Letters Project (LLP), a California nonprofit corporation, submits this amicus curiae letter to request that the California Supreme Court grant Pat Washington's petition for review of the ruling of the Court of Appeal, Fourth Appellate District, affirming the judgment of the trial court granting a motion for summary judgment in the above case.

Review of this matter is warranted under Rule 28(b) in order to secure uniformity of decision and to settle an important question of law. After reviewing the decision of the Court of Appeal, Fourth Appellate District, Division One, in this matter, LLP urges the Supreme Court to grant the Petition for Review in this case because 1) the Appellate Court did not apply the appropriate standard in reviewing the evidence in this case; and 2) the Appellate Court misconstrued the burden on the plaintiff in connection with a motion for summary judgment in the context of an employment discrimination case, and there is a need to settle an important question of law.

Interest of LLP

The mission of LLP is to promote the social, economic and human rights of lesbian, gay, bisexual, transgender and intersex individuals, couples and families, people affected by HIV/AIDS, people of color, women, and people of low economic status. We do this by urging elected officials to enact and support legislation that accomplishes this goal. Once such legislation has been passed and becomes law, LLP maintains a continuing interest in the ability of members in our interest groups to secure protection through the courts pursuant to the provisions of the legislation. Many of our members are members of protected groups under the Fair Employment and Housing Act (Gov. Code sec. 12940 et seq.). In this case, LLP is concerned that the standard of review applied by the Court of Appeal conflicts with that mandated for motions of summary judgment in general and for motions for summary judgment involving employment discrimination cases in particular.

1) The Court should Grant Review in Order to Secure Uniformity of Decision Related to the Standard of Review in Motions for Summary Judgment

In considering whether to affirm a motion for summary judgment, the settled rule is that the Court is required to view the evidence in the light most favorable to the party opposing the motion. (*Slatkin v. University of Redlands*, (2001) 88 Cal.App. 4th 1147, 1150.) In this case, that party is Dr. Pat Washington, the plaintiff and appellant.

While the decision of the Appellate Court 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

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summary 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 standard 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.

A summary of the standard of review in the case of a motion for summary judgment would have explained that such motions are to expedite litigation and eliminate only needless trials. (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323.) They are granted only "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., sec. 437c, subd. (c); *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App. 4th 1023, 1028. A defendant meets its burden upon such a motion only if it proves "one or more elements of the cause of action ...cannot be established, or if there is a complete defense to that cause of action." (Code of Civ. Proc., sec. 437c, subd. (o)(2).) In deciding whether this burden has been met, the reviewing court must construe the moving party's affidavits "strictly," and the opponent's affidavits "liberally," and must "resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

The Court's failure to adhere to the standard summarized is evident in its analysis of the evidence. For example, 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:

"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."

These passages illustrate that the evidence in Dr. Bannan's declaration was not 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.

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 connection with her claim of retaliation, Dr. Washington presented evidence that she engaged in several acts of protected activity that elicited hostile reactions from her co-workers. Taking just one of these as an example, Dr. Washington protested the Department's initial decision not to hire an Asian woman as a teaching assistant in April 1999. Dr. Washington presented evidence in her declaration, that, in response to her protest, the Department's

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Chairperson, Dr. Susan Cayleff, criticized Dr. Washington for being “uncollegial” and “too fixated on the rules” in demanding that the same criteria be applied to all applicants for the teaching assistant position.

Far from construing this evidence “liberally,” the Appellate Court criticized its relevance, stating, on p. 20 of its ruling, that:

“...there is no evidence in the record that criticisms of Dr. Washington lacking “collegiality,” as reflected in her reappointment and tenure evaluation letters in 2000 and 2001, were based on Dr. Washington’s protest of the Department’s failing to initially appoint the Asian graduate student in 1999.”

In *Walsh v. Walsh*, (1941) 18 Cal. 2d 439, 441 the Supreme Court analyzed Civil Code section 437c and concluded:

“Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived.”

The Supreme Court acknowledged the principle that “issue finding rather than issue determination is the pivot upon which the summary judgment law turns.”

In a rush to dispose of this case, the Appellate Court repeatedly failed to construe the moving party’s affidavits “strictly,” and Dr. Washington’s affidavits “liberally.” Only by failing to properly construe the affidavits was the Court able to reach the conclusion that there is no triable issue as to any material fact. In doing so, it strayed from its duty of “issue finding” into the arena of “issue determination.” By doing so, it prejudiced the outcome of this case.

2) The Court should Grant Review in Order to Secure Uniformity of Decision and to Settle an Important Question of law in Connection with a Motion for Summary Judgment in the Context of an Employment Discrimination Case

Code of Civil Procedure section 437c provides that, on summary judgment, the moving party must establish entitlement to “judgment as a matter of law.” (Subd. (c).) The moving party may do so by showing that the plaintiff’s action “has no merit.” (Subd. (a). This may be done by showing that “one or more elements ... cannot be established” or “there is a complete defense.” (Subds. (o)(1) and (2).)

In its ruling, the Appellate 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 production has been adopted in California. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317.) The Appellate Court acknowledged:

“The *Guz* court noted that there is a conflict among decisions in the Court of Appeal regarding the appropriate manner in which to apply the McDonnell Douglas framework under California law to an employer’s motion for summary judgment pertaining to a claim of discrimination. (*Guz, supra*, 24 Cal.4th at p. 356.) Specifically, 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 (*Id.* At pp. 356-357.) Although the *Guz* court did not resolve this conflict, the court held that it is clear that if the defendant employer presents sufficient evidence of nondiscriminatory reasons, the employee must present evidence that would permit a trier of fact to find that intentional discrimination occurred. (*Id.* at p. 357.)”

The *Guz* court bypassed the issue of whether the plaintiff is required to present evidence sufficient to

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demonstrate a prima facie case because the employer in that case set forth “competent, admissible evidence” of its reasons for its actions. The court held that the employer’s explanation of nondiscriminatory reasons was “credible on its face,” and that Guz had “largely conceded the truth” of the proffered reasons. Under these circumstances, the Court said, Guz had the “burden to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred.”

In establishing this standard, the Court imported *dicta* from the recent decision of the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*(2000) 530 U.S. 133. That *dicta* described a subset of cases where the record “conclusively revealed some other, nondiscriminatory reason for the employer’s decision, or if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. Under such circumstances, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory.” (*Guz, supra*, at pp. 361 and 362.) *Guz* was such a case, the Court concluded.

However, the actual holding in *Reeves* was that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a “prima facie case,” as that term is used in *McDonnell Douglas Corp v. Green* [citation omitted]; and, second, evidence from which a rational factfinder could conclude that the employer’s proffered explanation for its actions was false. As Justice Ginsburg stated: “Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide.”

In this case, the Court of Appeal assumed for purposes of its discussion, with respect to both Dr. Washington’s discrimination claim and her retaliation claim, that Dr. Washington has satisfied any applicable burden to present sufficient evidence of a prima facie case of discrimination. The Court also found that the employer had advanced a nondiscriminatory reason for its denial of tenure: i.e., that Dr. Washington’s record in the area of professional growth was “insufficient.”

However, this proffered nondiscriminatory reason, when considered in light of all the evidence, is neither a “complete” defense, as is required by Code of Civil Procedure 437c, nor “credible on its face” as discussed in *Guz*, nor “conclusive” as discussed in the subset of *Reeves* cases.

Here, the evidence demonstrated that during Dr. Washington’s six-year period of employment in the Women’s Studies Department at San Diego State University, the procedures pertaining to tenure changed twice. When she was hired in 1996, departmental procedures pertaining to tenure provided “[A]t least two refereed scholarly publications since appointment to SDSU normally will be necessary for recommendation for tenure...” In 1997, the departmental procedures were revised to state, “[A]lthough no hard and fast rule exists for the number of publications required, at least three refereed scholarly publications since appointment to SDSU normally will be necessary for recommendation for tenure...” In 2001, before its decision on tenure for Dr. Washington in May 2002, the Department revised its procedure to state, “[N]o hard and fast rule exists for the number of publications required; instead a consistent record of refereed publications is expected...The primary consideration in evaluating professional growth shall be publications based upon original research and contributing to the advancement of knowledge in women’s studies.”

At the time of her tenure review, Dr. Washington had published two research-based, peer-reviewed articles, and had a total of eight papers and articles accepted for publication. Dr. Washington introduced evidence from Dr. Helen M. Bannan, a tenured Women’s Studies professor at the University of Wisconsin, that her publication dossier was equal in quality to another candidate being considered for tenure at SDSU at the same time as Dr. Washington. The other candidate, who was not African-American, was awarded tenure, but Dr. Washington was not.

There is also considerable evidence in the record that Dr. Washington, who is African-American, suffered ongoing hostility from other members of the SDSU Women’s Studies Department as the result of her protests of

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discrimination against herself and others. For example, at a mediation on May 15, 2000, Dr. Cayleff, the Department's chairperson, and professors Kathleen Jones, and Olivia Espin responded to Dr. Washington's expression of her concerns about racial discrimination by yelling at her! In July 2001, an investigator hired to investigate Dr. Washington's concerns found, among other things, that Dr. Cayleff's assessment of the same article written by Dr. Washington had declined in successive reappointment recommendation letters, and that members of her 2000 retention, tenure and promotion (RTP) committee were angry about being accused of racial discrimination and were not fully consistent in their recollection whether the May 2000 mediation had been discussed in their deliberations regarding Washington's reappointment.

This evidence, taken together, is sufficient for a rational factfinder to conclude that the employer's proffered explanation for its actions was false, and that the real reason Dr. Washington was denied tenure was animosity toward her related to her protests against perceived racial discrimination.

Thus, in this case, Dr. Washington has presented evidence, establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp v. Green* [citation omitted]; and, evidence from which a rational fact-finder could conclude that the employer's proffered explanation for its actions was false. She thus has met both categories set forth as necessary in *Reeves*.

Despite this showing, the Court of Appeal ruled against Dr. Washington. In doing so, he said:

"In summary, Dr. Washington failed to present evidence sufficient to permit a trier of fact to find that CSU denied her tenure because of her race. (Emphasis added.) Accordingly, we conclude that CSU is entitled to summary judgment on Dr. Washington's claim of employment discrimination."

By insisting on evidence that would permit a trier of fact to find that CSU denied Dr. Washington tenure because of her race, the Court of Appeal has demanded more than he may require in connection with a motion for summary judgment. To paraphrase Justice Ginsburg in *Reeves*: whether the defendant was in fact motivated by discrimination is for the finder of fact to decide. Whether Dr. Washington was the victim of intentional discrimination is a material issue of fact in dispute in this case. Therefore, summary judgment should be denied in this case, and this material issue of fact should be resolved at trial.

We strongly urge the Court to reverse the ruling of the Appellate Court and remand this case for trial.

Respectfully submitted,

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Lambda Letters Project

Proof of Service Attached

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