

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

PAT WASHINGTON,

Case No. D046471

Plaintiff and Appellant,

San Diego County GIC 818233

v.

TRUSTEES OF THE CALIFORNIA
STATE UNIVERSITY AND
COLLEGES,

Defendant and Respondent.

PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE:

Pursuant to Rule 25, California Rules of Court, plaintiff-appellant PAT WASHINGTON hereby requests this Court to order a rehearing of this case with respect to its ruling upholding summary judgment on her claim for retaliation forbidden under the California Fair Employment and Housing Act (FEHA), Government Code § 12940, for the following reasons:

1. In its decision filed April 14, 2006, the Court affirmed the judgment of the Superior Court for the County of San Diego following its order granting summary judgment on Dr. Pat Washington's claims that the Trustees of the California State University and Colleges (CSU) discriminated against her on the basis of race and retaliated against her for making complaints of racial bias when it denied her tenure in the Department of Women's Studies (Department) at San Diego State University (SDSU).

2. In making its decision, the Court stated that it had viewed the evidence in the light most favorable to Dr. Washington. Slatkin v. University of Redlands (App. 4 Dist. 2001) 88 Cal.App.4th 1147, 1150, 106 C.R.2d 480. (Decision at p. 2.) However, for the reasons set forth herein, Dr. Washington submits that the Court did not view the evidence in the light most favorable to her.

3. In its discussion of Dr. Washington's retaliation claim, the Court indicated that to establish a prima facie claim for retaliation, Dr. Washington was required to show (1) that she engaged in protected activity; (2) that she suffered an adverse action; and (3) a causal link between the two. (Decision at p. 26.) Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1042, 32 C.R.3d 436; Fisher v. San Pedro

Peninsula Hospital (App.2 Dist. 1989) 214 Cal.App.3d 590, 614, 262 C.R. 842. Here, there is no dispute that Dr. Washington engaged in protected activity. (Decision at p. 27.) Further, there is no dispute that CSU's decision to deny Dr. Washington tenure was an adverse action. (Decision at pp. 29-30.) The disputed issue is whether there was a causal link between Dr. Washington's protected activity and the denial of tenure.

4. In ruling that Dr. Washington failed to establish a causal link between her protected activity and the ultimate adverse action that she suffered when she was denied tenure, the Court failed to apply the proper standard on summary judgment, which required it to view all of the evidence and all of the inferences reasonably drawn from the evidence in the light most favorable to Dr. Washington. Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843, 26 Cal.4th 80A, 107 C.R.2d 841. Here, at the very least, Dr. Washington presented evidence from which inferences must be drawn that (1) members of the Department reacted with anger and hostility to her complaints of racial bias; and (2) she was denied tenure at a time close to the granting of tenure to a person with similar qualifications. At the summary judgment stage this evidence is sufficient to allow the conclusion that

the Department's hostility towards Dr. Washington for complaining about racial bias was a reason for its decision to deny her tenure.

5. In order to demonstrate a causal connection between her protected activity and CSU's adverse action, Washington was required to show a close temporal connection between the two or a pattern of antagonism following her protected conduct. Kachmar v. Sungard Data Systems (3rd Cir. 1997) 109 F.3d 173, 177¹. All of the relevant evidence must be considered "collectively." Yanowitz, supra, 36 Cal. 4th at p. 1056. Here, Dr. Washington has demonstrated that after about three years of employment in the Department, her relations with her colleagues began to change when she first made a complaint about racial bias. Each subsequent complaint on her part led to greater hostility on her colleagues' part, culminating in the denial of tenure. While there is no doubt that CSU has presented its own version of these events, its presentation does no more than demonstrate factual disputes to be resolved at trial.

¹ Lawsuits claiming retaliation under the California Fair Employment and Housing Act are analogous to federal Title VII claims and are evaluated under federal law interpreting Title VII (42 U.S.C. § 2000e-3.). Flait v. North American Watch Corp. (App. 2 Dist. 1992) 3 Cal.App.4th 467, 475, 4 C.R.2d 522.

6. “A plaintiff [in a retaliation case] is not limited to a direct attack on the employer's explanation. At least three types of evidence can be used to show pretext: (1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics.” Iwekaogwu v. City of Los Angeles (App. 2 Dist 1999) 75 Cal.App.4th 803, 816, 89 C.R.2d 505. Here, Dr. Washington has demonstrated that members of the Department reacted with remarkable hostility to every complaint of racial bias that she made and that a similarly qualified person was granted tenure at a time close to her denial. She has also cited statistics that suggest a climate inhospitable to African Americans in the Department.

7. Additionally, in the context of ruling on a motion for summary judgment, it is well established under California law that very little evidence of pretext need be produced beyond that necessary to establish a *prima facie* case in order to preclude summary judgment, and the same evidence may be used to establish a *prima facie* case and to show pretext. Strother v. Southern California Permanente Medical Group (9th Cir.1996) 79 F.3d 859, 870.

8. Dr. Washington submits that when the evidence is viewed as a whole, she has more than met her burden on summary judgment to

produce evidence from which an inference may be drawn that CSU's decision to deny her tenure was tainted by retaliation for her complaints of discrimination.

WHEREFORE, plaintiff PAT WASHINGTON respectfully requests this Court to grant rehearing of its decision in this case.

Dated: April 28, 2006

SIEGEL & YEE

By _____
Dan Siegel

Attorneys for Plaintiff-Appellant
PAT WASHINGTON

ARGUMENT

I. DR. WASHINGTON HAS SUBMITTED EVIDENCE THAT, VIEWED COLLECTIVELY, IS MORE THAN SUFFICIENT TO ESTABLISH A RETALIATORY MOTIVATION FOR HER DENIAL OF TENURE.

Dr. Washington submits that the following evidence, when viewed as required on summary judgment, supports the inference that retaliation was a factor in her tenure denial:

(1) There were no Black tenure track faculty members in the Department of Women's Studies for over 30 years. PSS² 1, 3; App.³ 348, 380.

(2) Dr. Washington and Bonnie Zimmerman, a prominent member of the WSD faculty, were on opposite sides of racial conflicts in the National Women's Studies Association. PSS 7; App. 348-349, 380. These disputes began soon after Washington was hired in 1996. PSS 4; App. 348, 380; PSS 7; App. 348-349, 380. By 1999 Washington and her colleagues in the WSD were involved in a series of disputes

² Plaintiff's Separate Statement of Disputed and Undisputed Facts in Opposition to Motion for Summary Judgment, or in the Alternative, Summary Adjudication of Issues.

³ Appellant's Appendix in Lieu of Clerk's Transcript on Appeal (California Rules of Court, Rule 5.1).

over racial issues, and these disputes continued through her tenure denial. PSS 8, App. 349, 380.

(3) Dr. Washington criticized the Department's failure to hire an Asian graduate student as a teaching assistant on racial grounds. The chair of the WSD, Susan Cayleff, reacted strongly to Dr. Washington's criticism. PSS 8, App. 349, 381; PSS 9-10, App. 349, 381.

(4) Ongoing disputes between Dr. Washington and faculty members in the WSD over racial issues created a high level of animosity towards her. PSS 8, App. 349, 380; PSS 9-12, App. 349, 381; PSS 13, App. 349-350, 381; PSS 14-15, App. 350, 381; PSS 16, App. 350, 381-382; PSS 21, App. 351, 87-90; PSS 22, App. 351, 91-95; PSS 26, App. 352-353, 179-181, 184, 186, 188-189, 207; PSS 28, App. 353, 383; PSS 36, App. 354, 106-109.

(5) During and after a mediated meeting called to address racial issues within WSD, Chair Cayleff and Professors Zimmerman, Huckle, Jones, Watson, and Espin, who together comprise two-thirds of the nine-member WSD, demonstrated their hostility towards Dr. Washington. PSS 4, App. 348, 380; PSS 7, App. 348-349, 380; PSS 9-12, App. 349, 381; PSS 13, App. 349-350, 381; PSS 14-15, App. 350, 381; PSS 16, App. 350, 381-382; PSS 21, App. 351, 87-90; PSS 22,

App. 351, 91-95; PSS 26, App. 352-353, 179-181, 184, 186, 188-189, 207; PSS 28, App. 353, 383; PSS 36, App. 354, 106-109; PSS 42, App. 355, 384, 406.

(6) WSD faculty falsely denigrated Dr. Washington's teaching effectiveness, a charge that was not withdrawn until CSU's final decision on her tenure application. PSS 21, App. 351, 87-90; PSS 22, App. 351, 91-95; PSS 23, App. 352, 382; PSS 26, App. 352-353, 179-181, 184, 186, 188-189, 207; PSS 36, App. 354, 106-109; PSS 37, App. 354-355, 112-113; PSS 38, App. 355, 115.

(7) WSD faculty members accused Dr. Washington of lacking "collegiality" only after she criticized them for refusing to appoint an Asian woman as a teaching assistant. PSS 8, App. 349, 380; PSS 9, App. 349, 381; PSS 21, App. 351, 87-90; PSS 22, App. 351, 91-95; PSS 36, App. 354, 106-109.

(8) The WSD failed to fairly assess Dr. Washington's publications in comparison to those of Doreen Mattingly. PSS 49; App. 356, 385, 411-412, 413-416. Dr. Washington's expert, Helen Bannan, testified that Dr. Washington and Dr. Mattingly were similarly qualified for tenure, in terms of their accomplishments in scholarly research relevant to Women's studies. Both Dr. Washington and Dr.

Mattingly were hired in the same year, 1996, and were evaluated for tenure by the Department within successive years, 2000 and 2001. PSS 1, 35, 36, 48; App. 348, 414.

(9) The EEOC issued a “reasonable cause” finding on Dr. Washington’s retaliation claim. PSS 47; App. 356, 384-385, 408-410.

II. THE COURT DID NOT VIEW THE EVIDENCE AND THE INFERENCES TO BE DRAWN FROM THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO DR. WASHINGTON.

The Court’s decision dismisses Dr. Washington’s claims because it determines, in effect, that the evidence she has presented is ambiguous as to the motivation of the members of the Department who were hostile towards her. See, for example, the Decision at page 21 (“However, there was no evidence that any of the professors’ animosity for Dr. Washington was based on race.”). The Court has placed an almost impossible burden on Dr. Washington. It is well recognized that “[P]roving intentional discrimination can be difficult because ‘[t]here will seldom be “eyewitness” testimony as to the employer’s mental processes.’ (citations omitted) It is rare for a plaintiff to be able to produce direct evidence or ‘smoking gun’ evidence of discrimination.” Heard v. Lockheed Missiles and Space Co. (App. 6 Dist. 1996) 44 Cal.App.4th 1735, 1748, 52 C.R.2d 620.

The California Supreme Court has emphasized that “[I]n ruling on the [summary judgment] motion, the court must ‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom ([Code of Civil Procedure] § 437c, subd. (c)), and must view such evidence (citations omitted) and such inferences (citations omitted) in the light most favorable to the opposing party.” Aguilar, supra, 25 Cal.4th at p. 843. Further, a court may not grant summary judgment “‘based on inferences . . . , if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.’ (Code Civ. Proc., § 437c, subd. (c).)” Id. at p. 856.

In Colarossi v. Coty U.S. Inc. (App. 4 Dist. 2002) 97 Cal.App.4th 1142, 1149, 119 C.R.2d 131, this Court relied on Aguilar, supra, at p. 856, stating that on summary judgment a court may not weigh the plaintiff’s evidence or inferences against those presented by the defendants “as though it were sitting as the trier of fact, [but] it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact.*”

Under California law “An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.” Evidence Code §

600, subd. (b). Inferences are critical in discrimination cases, especially in cases that arise in an academic setting. “Particularly in a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available.” Sweeney v. Board of Trustees (1st. Cir. 1978) 569 F.2d 169, 175, vacated on other grounds, 439 U.S. 24.

This Court must “liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.” Yanowitz, supra, 36 Cal.4th at p. 1037, citing Wiener v. Southcoast Childcare Centers, Inc. (2004) 32 Cal.4th 1138, 1142, 12 C.R.3d 615. This rule applies with particular force in discrimination cases, because “[T]he FEHA advances the fundamental public policy of eliminating discrimination in the workplace, and the provisions of the act are to be construed broadly and liberally in order to accomplish its purposes.” Government Code § 12933, subd. (a); Yanowitz, supra, 36 Cal.4th at p. 1054, n. 14, citing Commodore Home Systems, Inc. v. Superior Court of San Bernadino County (1982) 32 Cal.3d 211, 220, 185 C.R. 170.

Under California law, in a retaliation case very little evidence of pretext need be produced beyond that necessary to establish a *prima facie* case in order to preclude summary judgment, and the same evidence may be used to establish a *prima facie* case and to show pretext. Strother, supra, 79 F.3d at p. 870. To move past summary judgment in a retaliation case, an employee is required to produce very little direct evidence of the employer's intent. Morgan v. The Regents of the University of California (App. 1 Dist. 2000) 88 Cal.App.4th 52, 69, 105 C.R.2d 652.

A. Inferences reasonably drawn from the evidence support Dr. Washington's claim for retaliation.

Dr. Washington submits that the following evidence and the inferences to be drawn from it support her claim that retaliation played a role in the denial of her promotion to tenure:

(1) Disputes within the National Women's Studies Association (NWSA). The Court's decision (pp. 2-3) recognizes that Dr. Washington engaged in "several heated disputes with Dr. Bonnie Zimmerman," the past president of NWSA and a professor in the small Department. However, the Court's decision fails to acknowledge that these "disputes" involved discussions of racism, Dr. Zimmerman's efforts to dissolve the NWSA Women of Color Caucus, of which Dr.

Washington was co-chair, and the Caucus' success in passing resolutions concerning racism in the NWSA and in women's studies. PSS 7; App. 348-349, 380.

Here, it is reasonable to infer that because no-one likes to be accused of racism or to have the organization one leads so accused, Dr. Zimmerman harbored some hostility towards Dr. Washington as a result of their disputes over racial issues in the NWSA and that this hostility impacted her decision-making on Dr. Washington's tenure application.

(2) The dispute over appointing an Asian woman as a teaching assistant. The Court's decision (p. 3) acknowledges the dispute between Dr. Washington and her colleagues over the hiring of a minority woman as a graduate student and the conduct of the Department's chair, Dr. Susan Cayleff, in this dispute. PSS 8; App. 349, 380. Dr. Cayleff criticized Dr. Washington for being "uncollegial" and "too fixated on rules" for demanding that the same criteria be applied to all applicants. PSS 9; App. 349, 381. Professor Cayleff ordered Dr. Washington to undergo psychological counseling, but changed her command to a "suggestion" after Dr. Washington asked her to put it in writing. PSS 10; App. 349, 381.

The inferences that must be drawn from this episode are: (1) The chair of the department reacted angrily, unprofessionally, and punitively towards Dr. Washington for demanding equal treatment of a minority applicant for a position; and (2) Because of Dr. Washington's protected advocacy of equal treatment for a minority woman, Dr. Cayleff became her protagonist as events developed in the Department. The latter conclusion is demonstrated by Dr. Cayleff's treatment of Dr. Washington's innocuous request for support for her trip to Belarus, her seemingly irrational accusations that Dr. Washington had attempted to sabotage a conference, and her actions regarding Dr. Washington's teaching schedule and room assignments. (Decision at pp. 3-4.) Dr. Cayleff's hostility towards Dr. Washington began with this incident and continued through the tenure denial. Remarks by decision makers displaying a retaliatory motive constitute direct evidence of retaliation. Iwekaogwu, supra, 75 Cal.App.4th at p. 816.

(3) The Department's response to Dr. Washington's efforts to mediate concerns about racial discrimination. The Court acknowledges (pp. 4-5) the anger generated by Dr. Washington's expression of concerns about racial discrimination in the Department. At the mediation on May 15, 2000, Professors Cayleff, Kathleen Jones, and

Olivia Espin responded to Dr. Washington's concerns about racial discrimination by shouting at her. The three of them and Professor Barbara Watson stated that they would no longer serve on Washington's RTP (retention, tenure, promotion) Committee. Professor Espin⁴ threatened to retire if she were told to sit on the RTP committee. Professor Jones demanded that Dean Strand "do something" about Washington because she was not "going to put up with this shit," and Professor Cayleff stated that it was Washington's choice if she wished to stay in a department where no-one spoke to her. PSS 16; App. 350, 381-382.

The inferences to be drawn from this event are: (1) members of the Department became enraged, abusive, and threatening when confronted with allegations of racism; and (2) as of May 2000, a majority of the nine faculty members in the Department (Professors Zimmerman, Cayleff, Jones, Espin, and Watson) were angry at Dr. Washington because of her complaints about racism; and (3) four of the faculty members were making explicit threats concerning Dr. Washington. Even worse, Paul Strand, Dean of the College of Arts and

⁴ Professor Espin also admitted that she routinely refused to sit on a graduate student's thesis committee if Dr. Washington was a member. Defendant's Exhibit 40, p. 37; App. 251.

Letters at SDSU, openly sided with the Department members in their attacks on Dr. Washington. (Decision at pp. 4-5.)

In Colarossi, supra, 97 Cal.App.4th at p. 1153, this Court stated that both direct and circumstantial evidence may be used to demonstrate an employer's intent to retaliate. Direct evidence consists of remarks by decision makers demonstrating a retaliatory motive. Circumstantial evidence includes the timing of events and how the employee was treated in comparison to others. Here the statements and threats made by Dr. Washington's colleagues constitute direct evidence demonstrating a retaliatory motive. Their timing in response to Dr. Washington's complaints exclude the possibility of another motive.

(4) The investigation of Dr. Washington's complaint. The investigator hired by SDSU to investigate Dr. Washington's March 2001 complaint confirmed that Department members were angry about being accused of racial discrimination. (Decision at p. 6.) Her other findings were consistent with the conclusion that members of the Department treated Dr. Washington in a retaliatory manner. Her report (Defense Exhibit 36; App. 166) includes findings that Professor Cayleff had been inconsistent when accusing Dr. Washington of grade inflation (p. 14; App. 179); that Cayleff's relationship with Dr. Washington had

“deteriorated” (pp. 14-15; App. 179-180); that Professor Cayleff’s assessment of the same article written by Dr. Washington had declined markedly in successive evaluations (p. 16; App. 181); that members of the RTP Committee contradicted each other when asked whether they had discussed the May 2000 “mediation” (pp. 19 [Jones], 21 [Kohen], 23 [Watson] ; App. 184, 186, 188); that the RTP Committee’s comments about Dr. Washington’s teaching seemed contradictory (p. 24; App. 189); and that Professor Cayleff’s actions in subtly encouraging a student to pursue a complaint against Dr. Washington were “problematic” (p. 42; App. 207). PSS 26; App. 352-353, 179-181, 184, 186, 188-189, 207.

The inference to be drawn from the investigation is that by mid-2001, just a few months before the tenure denial, a campaign of retaliation against Dr. Washington was in full swing. Another retaliatory act occurred at the spring 2001 graduation ceremony, when Professor Cayleff neglected to present the Faculty Mentoring Award to Dr. Washington, who had been selected to receive it. (Decision at p. 6.)

(5) The absence of African American women from the Department. Dr. Washington was the first African American woman

hired for a tenure track position in the 30-year history of the Department. (Decision at page 2.) PSS 1; App. 348, 380.

The inferences to be drawn from this fact are: (1) members of the Department were unaccustomed to working with African American women and to responding to their concerns about racial issues; and (2) members of the Department did not want to have African American women as colleagues. While the Court has concluded that the lack of African American women in the Department does not constitute “substantial evidence” or “probative” evidence of discrimination (Decision at p. 19), that is not the same thing as stating that it does not support any relevant inference in this case when considered, as it must, in conjunction with all of the other evidence. See, Laborde v. The Regents of the University of California (C.D. Cal. 1980) 495 F.Supp. 1067, 1071, affd. (9th. Cir. 1982) 686 F.2d 715, where similar statistical evidence was considered in conjunction with the case as a whole as evidence of discrimination without regard to whether it was statistically significant.

(6) The EEOC’s reasonable cause determination. The EEOC determined that there was “reasonable cause” to believe that San Diego State University discriminated and retaliated against Dr. Washington in

the denial of tenure. (Decision at pp. 24-25) PSS 47; App. 356, 384-385, 408-410.

The inference to be drawn from the EEOC's finding is that SDSU retaliated against Dr. Washington. The Court concluded that the EEOC's finding "does not create a triable issue of fact," citing Coleman v. Quaker Oats Co. (9th Cir. 2000) 232 F.3d 1271, 1283-1284, for the proposition that "a conclusory EEOC reasonable cause letter, at least by itself, does not create an issue of material fact." (emphasis added) Dr. Washington does not challenge this statement of the law and agrees that the EEOC finding, at least by itself, is not sufficient to carry her burden. However, the EEOC's finding should be considered in conjunction with the rest of the evidence as supporting an inference of retaliation.

In Plummer v. Western International Hotels, Inc. (9th Cir. 1981) 656 F.2d 502, 505, the court pointed out that "a civil rights plaintiff has a difficult burden of proof," and found reversible error in the failure to admit the EEOC's probable cause finding. Cf. Heyne v. Caruso (9th Cir. 1995) 69 F.3d 1475, 1483. Here, the finding is in evidence and should be considered of some weight in establishing Dr. Washington's claim.

B. The Court's decision declines to draw inferences favorable to Dr. Washington.

(1) The Court declined to draw any inference from Dr.

Washington's disputes with Dr. Zimmerman in the NWSA. (Decision at p. 20.) Dr. Zimmerman is an important person on the SDSU campus, having served as the chair of the Department in 1995-1997 and 1998 (App. 346) and as an associate vice president of faculty affairs since May 2003. App. 341. She participated in all of SDSU's decisions concerning Pat Washington. App. 346. It strains credulity to conclude – as a matter of law - that it would be improper to infer that a person who is embroiled in disputes over racial issues (App. 380) and believes that she has been falsely accused of racism will not react to that criticism at all.

(2) The Court declined to draw any inference from Dr.

Washington's disputes over the hiring of an Asian graduate student.

Here, the Court attaches absolutely no significance to a dispute in which the Department declined to hire a “highly qualified Asian graduate student,” Dr. Washington objected, and her colleagues in the Department criticized for being “uncollegial” and “too fixated on rules.” (Decision at p. 20.) App. 380-381. One might draw the inference that the dispute had nothing to do with the race of the

graduate student, but such a conclusion would reflect CSU's argument rather than a necessary inference from the facts. At the summary judgment stage the required inferences are that the hostile responses to Dr. Washington's concerns reflect anger at being criticized for racial bias.

(3) The Court declined to draw any inference from the criticisms of Dr. Washington as "uncollegial." The Court concluded that there is "no evidence" that the criticisms of Dr. Washington as lacking in collegiality in 2001 and 2002 had anything to do with her protest over the failure to hire the Asian graduate student in 1999. (Decision at p. 20.) Of course it is true that no-one told Dr. Washington that she was considered to lack collegiality because she protested discrimination. However, it is established that the first criticism of Dr. Washington as lacking collegiality occurred during the argument about the Asian graduate student. App. 381. Further, the use of an amorphous term such as "lack of collegiality" is an easy way to dismiss the views of someone whose views and opinions are not appreciated. Here, the reasonable inference to be drawn is that Pat Washington developed a "lack of collegiality" when she began complaining of racism in the Department.

In this regard it is relevant to cite one commentator's recent discussion of how "collegiality" is misused by employers and sanctioned by courts as a purported non-discriminatory basis for an adverse employment action. "Unfortunately, courts overwhelmingly defer to the employers' stated rationale of 'collegiality' as a legitimate, non-discriminatory reason for an adverse employment action. Moreover, courts consistently fail to inquire into how linked or derivative the underlying act of discrimination grieved by the employee is to the perception of incivility by the employer."⁵

(4) The Court refused to draw any inference from the anger and threats demonstrated by Department members when Dr. Washington complained to them about racial discrimination. The evidence that Dr. Washington complained about race and was met with a barrage of threats and vulgarity is credited by the Court. (Decision at p. 4.) Yet the Court later dismisses this incident as not evidence of racial bias, instead concluding that the individuals accused of racism may have "harbored feelings of personal animosity" towards Dr. Washington. (Decision at p. 21.) While it may be true that the members of the Department who

⁵ Cho, "Unwise," "Untimely," and "Extreme": Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change, (2006) 39 UC Davis Law Review 805, 809.

yelled at and threatened Dr. Washington after she complained during the May 15, 2000, mediation were motivated by something other than her accusations, such a conclusion is contrary to the law of summary judgment.⁶ In the context of this case, the comments of Dr.

Washington's colleagues on May 15, 2000, represent the beginning of the end of her career at SDSU. The same faculty members who on May 15, 2000, stated that they would no longer sit on Dr. Washington's retention, tenure, and promotion (RTP) committees (Professors Cayleff, Jones, Espin, and Watson) sat on her RTP committee just a few months later and unsurprisingly gave her a very poor review, culminating in Professor Cayleff's recommendation "with grave reservations" that Dr. Washington be appointed for a sixth year. (Decision at pp. 4-5.) The obvious inference to be drawn here is that rather than boycotting Dr. Washington's RTP Committee, her angry colleagues decided to take advantage of the opportunity to set the stage for the denial of tenure a year later by giving Dr. Washington a poor review. An improper, retaliatory motive may be inferred from the circumstances of the employee's treatment. Flait, supra, 3 Cal.App.4th at p.

⁶ Further, even CSU's investigator concluded that Dr. Washington's colleagues were "angry" about being accused of racial discrimination. (Decision at p. 6.)

A little more than a year later, in fall 2002, Dr. Washington was evaluated for tenure. The four member RTP committee included Professors Jones and Watson. PSS 35; App. 354, 384. Each had stated during the May 15, 2000, mediation that she would refuse to sit on Dr. Washington's future RTP committees (Decision at p. 4.); and each had nonetheless participated in her 2000 annual review committee. (Decision at page 5.) Professor Jones had responded to Dr. Washington's complaints of racial discrimination by demanding that the Dean "do something" about Dr. Washington because she was not "going to put up with this shit." (Decision at page 3.) Despite this strong evidence of hostility towards Dr. Washington following her complaints of racial discrimination, the Court declined to conclude her evaluations were tainted by her complaints of discrimination. (Decision at p. 29) Instead, the Court accepted CSU's claim that its decision was based upon deficiencies in Dr. Washington's research record. Id.

The Court's decision reflects its acceptance of CSU's position that its decision was made on a non-retaliatory basis, despite Dr. Washington's presentation of evidence that leads to the opposite conclusion. In doing so, the Court exaggerates the criticisms of Dr. Washington's scholarly production while minimizing her actual

accomplishments. The Court notes that in 1997 and 1998, Dr. Washington was advised to accelerate her research efforts. The 1997 evaluation urged her to “focus your attention on developing a research agenda,” and in 1998 the Committee urged her to “develop a coherent research program.” In 1999, the Committee expressed its concern about the “limited number of publications” since her appointment. (Decision at p. 8.)

The Court then appears to conclude that Dr. Washington had failed to respond to these suggestions, stating that “At the time of her tenure review, Dr. Washington had published two research-based, peer-reviewed articles. Both articles drew on research Dr. Washington had conducted while she completed her dissertation in 1993-1994, before her employment at SDSU.” Id. This conclusion, which appears central to the Court’s analysis, is incorrect and in sharp conflict to the evidence presented by Dr. Washington.

In fact, while at SDSU Dr. Washington had eight scholarly, peer-reviewed papers and articles accepted for publication, four by blind peer review. All of the published articles appeared in journals considered scholarly by the NWSA. PSS 39, 40; App. 355, 384. Additionally, the testimony of Helen Bannan indicates that while two

of Dr. Washington's eight articles were based upon her dissertation, the six others were based upon new areas of research. App. 414-415.

There is clearly a factual dispute over Dr. Washington's research productivity, and that dispute is central to the Court's determination that CSU had good grounds to deny her tenure. If the Court were to accept, as it must on summary judgment, the account of her research accomplishments provided by Dr. Washington and Dr. Bannan, then instead of two articles based upon her dissertation, Dr. Washington had produced eight articles, all of them scholarly, and six based upon new areas of research. Based upon these facts the Court should draw the following inferences: (1) Dr. Washington responded very well to the Department's concerns about her research productivity; (2) The Department's reliance on her alleged lack of productivity is subject to challenge and may well be a deliberate misrepresentation; and (3) The Department's alleged basis for denying tenure to Dr. Washington was a pretext for retaliation.

The Court's decision (pp. 23-24) minimizes the opinion of Dr. Bannan because she did not have the opportunity to review the entire tenure files of Dr. Washington and Dr. Doreen Mattingly. However, she did have the opportunity to review and compare the research and

publication outputs of Dr. Washington and Dr. Mattingly. Given that CSU denied tenure to Dr. Washington for alleged deficiencies in research and publication, Dr. Bannan's expert opinion is relevant to the determination of this case.

Further, it appears that the Court has assumed the role of trier of fact in weighing and dismissing Dr. Bannan's opinion evidence. On summary judgment, the Court must view that opinion in the light most favorable to Dr. Washington. At trial, the jury may decide to treat it as insignificant if it determines that Dr. Bannan's opinion was not based upon a sufficient analysis of the relative qualifications of Dr. Washington and Dr. Mattingly.

The Court relied heavily on Slatkin, supra, for its analysis in this case. (Decision at pp. 2, 15, 16, 21) The Slatkin court concluded that the plaintiff had failed to demonstrate that her tenure denial was based upon anti-Semitism, because the evidence there showed that the hostility against her was based upon "academic politics." 88 Cal.App.4th at pp. 1150. The plaintiff in Slatkin presented no admissible evidence of anti-Semitism, and there is not a single word in the entire opinion suggesting that the plaintiff engaged in any dispute regarding her religious affiliation or beliefs or that anyone at the

University of Redlands ever reacted to any such complaint. The decision in Slatkin simply stands for the proposition that personal hostility does not equal unlawful discrimination. Id. at pp. 1157-1158. That decision is inapplicable here, where Dr. Washington has introduced ample evidence that she complained about racial issues and that her complaints were met with immediate and enduring hostility.

“A plaintiff may prevail by establishing a prima facie case combined with sufficient evidence for a reasonable factfinder to reject the employer’s nondiscriminatory explanation for its decision.” Reeves v. Sanderson Plumbing Products (2000) 530 U.S. 133, 140. “That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination ‘by showing that the employer’s proffered explanation is unworthy of credence.’ (citation)... The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.” Id. at pp. 143, 147.

As noted above, in Yanowitz, supra, the California Supreme Court ruled that in considering retaliation claims, courts should consider an employer’s actions “collectively” and that the “continuing

violation” doctrine applies to such claims. The application of the Yanowitz holding to this case requires that the whole pattern of behavior demonstrated by Dr. Washington’s colleagues be considered. Viewed fairly, this evidence demonstrates that whatever the motivations of the members of the WSD were in initially hiring Dr. Washington, their attitude towards her was negatively impacted by her expression of concerns regarding racial issues in the WSD. Following her complaints of racial bias, Dr. Washington’s colleagues commenced a course of action that began with hostile statements, escalated to emotional outbursts, and led to greater and greater expressions of criticism towards every aspect of her performance.

The decision by the WSD and its chair to deny tenure to Dr. Washington cannot be viewed as a single, discrete act, but rather as the culmination of a campaign brought about by her efforts to remedy what she viewed as a climate of racial discrimination in the department.

CONCLUSION

Dr. Washington has demonstrated that the trial court erred when it granted summary judgment on her claims for race discrimination and retaliation. She has also shown that this Court’s decision failed to

construe the evidence in the light most favorable to her, failed to draw and interpret the inferences reasonably and logically drawn from the evidence in her favor, and failed to provide the Fair Employment and Housing Act with the broad and liberal construction required by statute and Supreme Court jurisprudence.

Professor Cho's analysis suggests that the decision here may be a reflection of the modern tendency to discount claims of employment discrimination as though decades of litigation have eliminated the problems addressed by the civil rights laws: "Today, courts are more likely to deny the existence of discrimination in the workplace by imposing higher standards of causation, higher burdens for plaintiffs, and higher hurdles for interpreting 'inferential' modes of discrimination. By heightening the requirements for a successful employment discrimination claim, unsuccessful plaintiffs simply appear as though their cases lack merit."⁷

The evidence of retaliation in this case is almost overwhelming. Even viewing just what occurred on May 15, 2000, when Dr. Washington raised her concerns about racial issues in the Department with her colleagues, their verbal responses – a figurative kick to the

⁷ "Unwise," "Untimely," and "Extreme," supra, 39 UC Davis Law Review at p. 855.

solar plexus – should be enough for the Court to infer their retaliatory motives. For all of the reasons set forth herein and in her opening and reply briefs, Dr. Pat Washington, the first and only African American woman to work in the Department, asks this Court to reverse the trial court’s judgment against her and to return this case to the superior court for trial.

Rule 14(c) Certification

The undersigned hereby certifies that this brief contains 6187 words. This number is based upon the word count of the computer program used to prepare this brief.

Dated: April 28, 2006

SIEGEL & YEE

By _____
Dan Siegel

Attorneys for Appellant
PAT WASHINGTON

PROOF OF SERVICE

I, DAN SIEGEL, declare as follows:

I am an attorney duly licensed to practice law in the State of California. I am not a party to the within action. My business address is 499 14th Street, Suite 220, Oakland, CA 94612.

On April 28, 2006, I served copies of the following documents:

1. Petition for Rehearing

on the parties to this action by placing true copies thereof in sealed envelopes with first class postage thereon fully prepaid and depositing the same in the United States mail at Oakland, California, addressed to:

Richard A. Paul
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Clerk, Superior Court for the County of San Diego
Appeals Division
P.O. Box 122724
San Diego, CA 92112-2724

Clerk, Supreme Court of California (four copies)
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.
Executed on April 28, 2006, at Oakland, California.

Dan Siegel