

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PAT WASHINGTON,
Appeal

District Court of

No. 4 Civil D046471

Plaintiff and Petitioner,

vs.

San Diego Superior
Court No. GIC 818233

TRUSTEES OF THE CALIFORNIA

STATE UNIVERSITY AND
COLLEGES,

Defendant and Respondent.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

COMES NOW PETITIONER PAT WASHINGTON and, pursuant to Rule 28, California Rules of Court, requests this Honorable Court to grant review of the decision of the Court of Appeal for the Fourth Appellate District filed in this matter on April 14, 2006. Review by this Court is necessary to secure uniformity of decision by the trial and appellate courts.

ISSUES PRESENTED

1. Must a court evaluating a retaliation claim under the California

Fair Employment and Housing Act (FEHA) consider the evidence

“collectively” as mandated by this court in Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1056, 32 C.R.3d 436?

2. Must a court ruling on a summary judgment motion construe all of the evidence and all of the inferences reasonably drawn from the evidence in the light most favorable to the party opposing the motion pursuant to this court’s decision in Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843, 107 C.R.2d 841?

WHY REVIEW SHOULD BE GRANTED

This court has provided strong direction requiring the lower courts to evaluate the evidence in support of a FEHA retaliation claim “collectively” and, on summary judgment, “in the light most favorable to the party opposing the motion.” Nonetheless, some lower courts faced with complex summary judgment motions continue to parse and weigh the evidence, making decisions reserved by our legal system to trial by jury.

A recent commentary analyses this phenomenon. “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.” 1[1]

As California and the United States strive to realize the ideal of a truly color blind society, it may be tempting to view our progress as greater than what reality dictates. An overly optimistic assessment may make it difficult to ascribe a discriminatory motivation to acts that appear neutral or plausible on their face, particularly when evaluating the decisions of a respected institution such as a public university. Such confidence may be misplaced.

As the United States Supreme Court stated in University of Pennsylvania v. EEOC (1990) 493 U.S. 182, 189-190:

When Title VII was enacted originally in 1964, it exempted an “educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.” § 702, 78 Stat. 255. Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (*i.e.*, tenured) academic positions. See H.R. Rep. No. 92-238, pp. 19-20 (1971), U.S.Code Cong. & Admin.News 1972, pp. 2137, 2154-2155.

1[1] 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, 855.

The courts have also addressed the difficulty in establishing claims of discrimination against colleges and universities. “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 . . . 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.

In the present case, the Court of Appeal ruled that summary judgment was proper on Pat Washington’s claims of racial discrimination and retaliation for complaining about racial discrimination in her suit challenging her denial of tenure at San Diego State University (SDSU). In reaching its decision the court recognized and considered direct evidence of the hostility directed at plaintiff when she complained of racial bias but credited the university’s contention that its decision was based solely on deficiencies in her scholarly production. The court also considered and rejected both expert testimony that supported the plaintiff’s position and the decision of the United States Equal Employment Opportunity Commission (EEOC) in her favor. It gave no weight to the EEOC’s decision and completely rejected the expert’s testimony without regard to the weight to which it is entitled. The court addressed each item of evidence submitted in opposition to the motion

in isolation from the other evidence, improperly weighed the evidence, and consistently drew from the evidence inferences adverse to the plaintiff.

This court should grant review to insure that its decisions regarding the evaluation of evidence on summary judgment motions generally and in cases alleging retaliation under FEHA specifically are uniformly applied.

BACKGROUND

Dr. Pat Washington filed her action against the Trustees of the California State University and Colleges (Trustees or CSU) on July 11, 2003. She asserted claims for employment discrimination and retaliation forbidden by FEHA, based upon the denial of tenure in the Department of Women's Studies (WSD) at SDSU. The Trustees filed their answer to her complaint on February 13, 2004.

On January 14, 2005, the Trustees filed their motion for summary judgment or in the alternative summary adjudication. App.2[2] 1. The parties submitted hundreds of pages of evidence in support of their respective positions³[3].

2[2] Appellant's Appendix in Lieu of Clerk's Transcript on Appeal (California Rules of Court, Rule 5.1).

3[3] The declarations submitted by the Trustees are at App. 19-346 and 458-463. Dr. Washington's declarations are at App. 379-416.

Following oral argument on March 30, 2005 (App. 470), the Superior Court granted summary judgment on all claims. App. 470-477. The court entered judgment against Dr. Washington on April 19, 2005. App. 478.

In its decision filed April 14, 2006, the Court of Appeal affirmed the judgment of the Superior Court in all respects. The court stated that it had viewed the evidence in the light most favorable to Dr. Washington, citing 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.

The court stated 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, citing Yanowitz, supra, 36 Cal.4th at p. 1042; and Fisher v. San Pedro Peninsula Hospital (App.2 Dist. 1989) 214 Cal.App.3d 590, 614, 262 C.R. 842.) 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.

In ruling that Dr. Washington failed to establish a causal link between her protected activity and the tenure denial, 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, supra, 25 Cal.4th at p. 843. Dr. Washington presented undisputed evidence that (1) members of the WSD reacted with anger, hostility, and threats to her complaints of racial bias; and (2) she was denied tenure while SDSU granted tenure to a White, WSD faculty member with similar qualifications. At the summary judgment stage this evidence is sufficient to allow the conclusions that the department's hostility towards Dr. Washington for complaining about racial bias was a reason for its decision to deny her tenure and that its purported concern about her research productivity was a pretext for unlawful discrimination.

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, 1774[4]. 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.

LEGAL DISCUSSION

I. DR. WASHINGTON 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:

4[4] 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.

(1) There were no Black tenure track faculty members in the Department of Women's Studies during its over 30 year history prior to the hiring of Dr. Washington. PSS5[5] 1, 3; App. 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 over racial issues, and these disputes continued through her employment up to the tenure denial. PSS 8; App. 349, 380.

(3) Dr. Washington criticized the WSD's failure to hire an Asian graduate student as a teaching assistant on racial grounds. The chair of the WSD, Susan Cayleff, reacted very negatively 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,

5[5] Plaintiff's Separate Statement of Disputed and Undisputed Facts in Opposition to Motion for Summary Judgment, or in the Alternative, Summary Adjudication of Issues.

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 comprised two-thirds of the faculty 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 dismissed Dr. Washington's claims because it determined, in effect, that the evidence she presented was ambiguous as to the motivation of the members of the WSD 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 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.

This 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. As stated in Yanowitz, supra, “[W]e liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.” 36 Cal.4th at p. 1037.

In Colarossi v. Coty U.S. Inc. (App. 4 Dist. 2002) 97 Cal.App.4th 1142, 1149, 119 C.R.2d 131, the Court of Appeal 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.*"

"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." California Evidence Code § 600, subd. (b). Inferences are critical in discrimination cases, especially in cases that arise in an academic setting, where the level of sophistication renders the discovery of direct evidence of discrimination unlikely. Sweeney, supra, 569 F.2d at p. 175.

The courts 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 Bernardino County (1982) 32 Cal.3d 211, 220, 185 C.R. 170.

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. 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.

The Court of Appeal evaluated the evidence presented by Dr. Washington and failed to view it in the light most favorable to her, contrary to the requirements of Aguilar, supra. Additionally, it evaluated each item of

evidence in isolation, rather than viewing it collectively, as required by Yanowitz.

When viewed as required under the correct legal standards, the following evidence and the inferences to be drawn from it support plaintiff's 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 of Appeal'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 WSD. 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 a co-chair, and the Caucus' success in passing resolutions concerning racism in the NWSA and in the field of women's studies. PSS 7; App. 348-349, 380.

Here, it is reasonable to infer that 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 teaching assistant 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 WSD. The latter conclusion is demonstrated by Dr. Cayleff's negative treatment of Dr. Washington's innocuous request for support for a 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. Such remarks by decision makers displaying a retaliatory motive constitute direct evidence of retaliation. Iwekaogwu v. City of Los Angeles (App. 2 Dist 1999) 75 Cal.App.4th 803, 816, 89 C.R.2d 505.

(3) The Department's response to Dr. Washington's efforts to mediate concerns about racial discrimination. The court acknowledged (pp. 4-5) the anger generated by Dr. Washington's expression of concerns about racial discrimination in the WSD. 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 Espin⁶[6] 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.

⁶[6] 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.

The inferences to be drawn from this event are: (1) members of the WSD became angry, 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 Letters at SDSU, openly sided with the department members in their attacks on Dr. Washington. (Decision at pp. 4-5.)

“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, supra, 75 Cal.App.4th at p. 816. In Colarossi, supra, 97 Cal.App.4th at p. 1153, the Court of Appeal 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 WSD members were angry about being accused of racial discrimination. (Decision at p. 6.) The investigator's 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 I; 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. Viewing this evidence in isolation, the Court of Appeal 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). However, the exclusion of Black women

from the WSD is relevant 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 is the agency charged by Congress with the investigation and resolution of complaints of racial discrimination. 42 U.S.C. § 2000e-5, subd. (b). 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. However, the Court of Appeal 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 in conjunction with the other evidence she submitted 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 a significant, influential person on the SDSU campus, having served as the chair of the WSD 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 Dr. 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 of Appeal declined to draw any inference from Dr. Washington's disputes over the hiring of an Asian graduate student. Here, the court attached absolutely no significance to a dispute in which the WSD 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 of Appeal 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 opinions and status 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.”^{7[7]}

(4) The Court of Appeal refused to draw any inference from the anger and threats demonstrated by WSD members when Dr. Washington complained to them about racial discrimination. The evidence that Dr.

^{7[7]} “Unwise,” “Untimely,” and “Extreme,” supra, 39 UC Davis Law Review at p. 809.

Washington complained about racial matters and was met with a barrage of threats and vulgarity was credited by the court. (Decision at p. 4.) Yet the court later dismissed 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 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.^{8[8]} 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 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

^{8[8]} Further, even CSU’s investigator concluded that Dr. Washington’s colleagues were “angry” about being accused of racial discrimination. (Decision at p. 6.)

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. 478.

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 of Appeal 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.

(5) The Court of Appeal accepted CSU's disputed explanation for the tenure denial. The court's decision reflects its acceptance of CSU's contested assertion 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 emphasized the criticisms of Dr. Washington's scholarly production while minimizing her actual accomplishments.

The court noted 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 RTP 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 concluded 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 had accepted, as it must on summary judgment, the account of her research accomplishments provided by Dr. Washington and Dr. Bannan, then instead of concluding that she had produced only two articles, both of which were based upon her dissertation, it should have concluded that Dr. Washington had produced eight articles, all of them scholarly, and six based upon new areas of research. Based upon these facts the Court of Appeal should have drawn the following inferences: (1) Dr. Washington responded well to the department's concerns about her research productivity; (2) The WSD'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) gave virtually no weight to the opinion of Dr. Bannan because, it stated, 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 records of Dr. Washington and Dr. Mattingly. Because CSU denied tenure to Dr. Washington for alleged deficiencies in her research and publication rate, Dr. Bannan's expert opinion is relevant to the determination of this issue.

Further, it appears that the Court of Appeal assumed the role of trier of fact in weighing and dismissing Dr. Bannan's opinion evidence. On summary judgment, the court was required to 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.

Dr. Bannan's opinion evidence is important because it undermines CSU's assertion that it denied tenure to Dr. Washington for lack of research productivity. If the finder of fact concludes that the publication dossiers of

Dr. Washington and of Dr. Mattingly were both of “high quality” and that Dr. Washington’s dossier was stronger than that of Dr. Mattingly, as Dr. Bannan concluded (App. 416), then CSU’s explanation for the tenure denial is subject to doubt.

“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.

C. The Court of Appeal’s decision does not evaluate the evidence submitted by Dr. Washington “collectively.”

The Court of Appeal 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.

As noted above, in Yanowitz, supra, this 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. The direct evidence of retaliatory animus, considered in conjunction with the disputed evidence regarding Dr. Washington's scholarly productivity, the EEOC's finding, and the expert opinion testimony of Dr. Bannan, is more than adequate to require the denial of summary judgment on Dr. Washington's retaliation claim.

CONCLUSION

The decision of the Court of Appeal demonstrates the need for this court to reaffirm its decisions in Aguilar, supra, and Yanowitz, supra, in order to insure uniformity in the evaluation of claims of retaliation for complaining about discriminatory treatment in employment. For the reasons set forth above, plaintiff Pat Washington requests this court to grant review in this matter and either hear it on its merits or transfer it to the Court of Appeal for further proceedings as this court may direct.

Rule 14(c) Certification

The undersigned hereby certifies that this brief contains 6839 words. This number is based upon the word count of the computer program used to prepare this brief.

Dated: May 23, 2006

Respectfully submitted,
SIEGEL & YEE

By _____

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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 May 24, 2006, I served copies of the following documents:

1. Petition for Review

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:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 24, 2006, at Oakland, California.

Dan Siegel
