

No. 02-3376

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. CYNTHIA A. ANNETT, PH.D.

Plaintiff-Appellant,

vs.

UNIVERSITY OF KANSAS

Defendant-Appellee

Appeal from the United States District Court
for the District of Kansas

The Honorable Julie A. Robinson
District Court No. 01-2367-JAR

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT
REQUESTED

TABLE OF CONTENTS

STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUE.....	2
STATEMENT OF THE CASE	2
I. The Plaintiff's Filing And Pursuit Of Her Sex Discrimination Lawsuit.....	2
II. Denial Of Principal Or Co-Principal Investigator Status To The Plaintiff	3
III. Appointment Of The Plaintiff As An Adjunct Lecturer	11
IV. Failure To Hire The Plaintiff As The Assistant Director of Equal Opportunity	14
V. Proceedings In The District Court.....	22
ARGUMENTS AND AUTHORITIES.....	23
<u>Garrett v. Hewlett-Packard Company</u> , 305 F.3d 1210, 1216 (10th Cir. 2002).....	23, 24
<u>Gullickson v. Southwest Airlines Pilots' Ass'n</u> , 87 F.3d 1176, 1183 (10th Cir. 1996).....	23
<u>Reeves v. Sanderson Plumbing Prod., Inc.</u> , 530 U.S. 133, 150 (2000)	24
I. Genuine Issues of Material Fact Exist As To The Plaintiff's Retaliation Claim Under Title VII.....	24
<u>Peterson v. Utah Dept. of Corrections</u> , 301 F.3d 1182, 1189 (10th Cir. 2002).....	24
<u>McDonnell Douglas Corp. v. Green</u> , 411 U.S. 792 (1973).....	24
<u>Wells v. Colorado Department of Transportation</u> , 325 F.3d 205, 1212 (10th Cir. 2003).....	24, 41, 42, 44
A. The Plaintiff's Prima Facie Case	25
<u>Pastran v. K-Mart Corp.</u> , 210 F.3d 1201, 1205 (10th Cir. 2000)	25, 41

<u>Jeffries v. State of Kan.</u> , 147 F.3d 1220, 1231 (10th Cir. 1998)	25, 33, 36
(1) Protected Activities	25
<u>Medlock v. Ortho Biotech, Inc.</u> , 164 F.3d 545, 500 (10th Cir. 1999)	25
<u>Marx v. Schnuck Markets, Inc.</u> , 76 F.3d 324, 326-27 (10th Cir. 1996).....	25
<u>Robbins v. Jefferson County Sch. Dist. R-1</u> , 186 F.3d 1253, 1258 (10th Cir. 1999).....	26, 28
<u>Rollins v. State of Florida Dep't of Law Enforcement</u> , 868 F.2d 397, 400 (11th Cir. 1989).....	26
<u>Love v. Re/Max of America, Inc.</u> , 738 F.3d 383, 385 (10th Cir. 1984)	26
<u>Zinn v. McKune</u> , 143 F.3d 1353, 1362 (10th Cir. 1998)	26
<u>Holden v. Owens-Illinois</u> , 793 F.2d 745 (6th Cir. 1986)	29, 30
<u>Johnson v. University of Cincinnati</u> , 215 F.3d 561 (6th Cir. 2000)	29, 30, 31, 32
<u>Booker v. Brown & Williamson Tobacco Co., Inc.</u> , 879 F.2d 1304 (6th Cir. 1989).....	31
(2) Adverse Employment Actions	32
<u>Garcia v. Pueblo Country Club</u> , 299 F.3d 1233, 1241 (10th Cir. 2002).....	33
<u>Heno v. Sprint/United Management Co.</u> , 208 F.3d 847, 857 (10th Cir. 2000).....	33
<u>Sanchez v. Denver Public Schools</u> , 164 F.3d 527, 532 (10th Cir. 1998).....	33, 35, 38
<u>Aquilino v. University of Kansas</u> , 268 F.3d 930, 934 (10th Cir. 2001)	33
(3) Causal Connections	38
<u>Bullington v. United Air Lines, Inc.</u> , 186 F.3d 1301, 1320 (10th Cir. 1999)	39
<u>Anderson v. Coors Brewing Co.</u> , 181 F.3d 1171, 1179 (10th Cir. 1999).....	39, 40,42
B. The Defendant's Proffered Nondiscriminatory Explanation	40

C. Issues of Pretext	41
<u>Randle v. City of Aurora</u> , 69 F.3d 441, 451 (10th Cir. 1995)	41
<u>Ramirez v. Oklahoma Dept. of Mental Health</u> , 41 F.3d 584 (10th Cir. 1994)	42
<u>Miller v. Fairchild Industries, Inc.</u> , 797 F.2d 727, 731-32 (9th Cir. 1986)	42
<u>Schwartzman v. Valenzuela</u> , 846 F.2d 1209, 1210 (9th Cir. 1988)	42
<u>Smith v. Diffie Ford-Lincoln-Mercury, Inc.</u> , 298 F.3d 955, 961 (10th Cir. 2002).....	42
<u>Danville v. Regional Lab Corp.</u> , 292 F.3d 1246 (10th Cir. 2002).....	43
<u>Morgan v. Hilti, Inc.</u> , 108 F.3d 1319, 1223 (10th Cir. 1997).....	44
<u>Reeves v. Sanderson Plumbing Products, Inc.</u> , 530 U.S. 133 (2000).....	44, 45
CONCLUSION.....	45
CERTIFICATE OF COMPLIANCE WITH RULE 32	46
ORAL ARGUMENT	46
CERTIFICATE OF SERVICE	47
ADDENDUM: Memorandum and Order Filed on September 4, 2002.	

PRIOR APPEALS

There are no prior appeals to this action.

STATEMENT OF JURISDICTION

This is an employment case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. The plaintiff, Dr. Cynthia A. Annett, Ph.D., was employed as a tenure-track Assistant Professor by the defendant, the University of Kansas, from August of 1992 through May of 1999. The plaintiff contends that the University violated Title VII by taking adverse employment actions against her in retaliation for her participation in protected activities. Those protected activities included filing and pursuing a sex discrimination lawsuit against the University from February of 1999 to June of 2000. The plaintiff contends that the University retaliated against her by: (1) denying her Principal Investigator or Co-Principal Investigator status; (2) appointing her to a position as an Adjunct Lecturer, rather than as an Adjunct Assistant Professor; and (3) failing to hire her to the position of Assistant Director of Equal Opportunity.

On September 4, 2002, the district court filed a memorandum and order, granting summary judgment in favor of the University. (Aplt. App. at 179-205) On the same day, judgment was formally entered in favor of the University. (Aplt. App. at 206) On September 13, 2002, the plaintiff filed a motion to alter or amend the judgment, pursuant to Fed.R.Civ.Pro. 59(e). (Aplt. App. at 207) On January 17, 2003, the district court denied the plaintiff's motion to alter or amend the judgment. (Aplt. App. at 216-220) On February 14, 2003, the plaintiff filed a timely notice of appeal pursuant to Fed.R.App.Pro. 4(a)(1). (Aplt. App. at 221) The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUE

1. Do genuine issues of material fact exist as to the plaintiff's retaliation claim under Title VII?

STATEMENT OF THE CASE

The following facts are stated in the light most favorable to the plaintiff, who is the party opposing the entry of summary judgment. The facts include information contained in the plaintiff's declaration, since that information is "based on personal knowledge and sets forth facts that would be admissible in evidence." Garrett v. Hewlett-Packard Company, 305 F.3d 1210, 1213 (10th Cir. 2002); Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995). For the sake of convenience, the facts which are truly undisputed are taken from the district court's memorandum opinion. (Aplt. App. at 180-183)

In August of 1992, the plaintiff, Dr. Cynthia A. Annett, Ph.D., began employment as a tenure-track Assistant Professor at the University of Kansas. In March of 1998, the plaintiff was denied promotion and tenure, and she was advised that her employment with the University would be terminated. At that time, the plaintiff was issued a terminal contract, indicating that her employment would terminate at the end of the 1998/1999 school year. (Aplt. App. at 17-18, 180)

I. The Plaintiff's Filing And Pursuit Of Her Sex Discrimination Lawsuit

On February 19, 1999, the plaintiff filed a lawsuit against the University, docketed as Case No. 99-2070, which claimed that her denial of tenure and her subsequent

termination were motivated by discriminatory and retaliatory motives. (Aplt. App. at 18, 180) For purposes of discovery in Case No. 99-2070, the plaintiff deposed Dr. Robert Hemenway, Chancellor of the University; Dr. David Shulenburg, Provost of the University; Dr. Maria Carlson, Director of the University's Center for Russian and East European Studies; and Maurice Bryan, Director of the University's Equal Opportunity Office. (Aplt. App. at 19, 180)

These same four individuals also testified at the trial in Case No. 99-2070. The trial began on February 14, 2000, and culminated with a verdict unfavorable to the plaintiff on March 3, 2000. Post-trial motions continued into June of 2000. (Aplt. App. at 19, 112, 180)

On April 21, 1999, while the plaintiff's lawsuit was pending, Dr. Carlson submitted a grant application to USAID, a federal agency. This grant application listed Dr. Carlson as the Principal Investigator for the grant, and it also listed the plaintiff as the Co-Principal Investigator and as the Project Coordinator on the grant. (Aplt. App. at 18, 87, 180) The grant application to USAID involved working with indigenous populations in the Altai Republic of Siberia. The grant application to USAID did not include any salary for the plaintiff as Co-Principal Investigator or as Project Coordinator. (Aplt. App. at 87-88)

II. Denial Of Principal Or Co-Principal Investigator Status To The Plaintiff

The University of Kansas is awarded approximately \$85,000,000.00 in grants per year. (Aplt. App. at 101) Almost all grants awarded to the University are administered by

the University of Kansas Center for Research, Inc., now known as KUCR, formerly known as CRINC. (Aplt. App. at 65)

Grants begin as proposals that are prepared and submitted to a sponsoring entity for funding. KUCR's Proposal Services Office advises and assists the Principal Investigator ("PI") and others listed in the project in putting together the proposal, including the budget, and then submitting the proposal to the funding entity. If the sponsoring entity awards the grant, then it is routed through KUCR. KUCR controls the accounting, approval of purchases, approval of appointments and other related activity on the grant or project. Then the award is made available to the PI, who is the responsible party for administering the grant or project on behalf of KU and KUCR. (Aplt. App. at 65-66)

Some grants, particularly in the sciences and related fields, have the capability of including salary to pay for services performed by individuals who work to support the grant. (Aplt. App. at 66) A PI or Co-Principal Investigator ("Co-PI") on a grant can be paid through the grant. (Aplt. App. at 106) According to Dr. Robert Hemenway, Chancellor of the University, there are some individuals at the University who receive their salary out of grant funds, which is sometimes referred to as "soft money." (Aplt. App. at 94-96)

In addition to the capability of receiving a salary through a grant, there are other tangible benefits to being a PI or a Co-PI on a grant. According to Dr. James Roberts, Associate Vice Chancellor for Research and Public Services of the University, these benefits include reimbursement for expenses, and the availability of health insurance

through the University. (Aplt. App. at 100, 107) Dr. Roberts further testified that another benefit of being a PI or a Co-PI on a grant is that such a status is a measure of success in the academic world. (Aplt. App. at 107) Dr. Roberts explained:

Research is part of the evaluation process for faculty members and one of the, one of the measures of success is participation in grants and that's determined by being a PI or a Co-PI...on a grant.

(Aplt. App. at 107) Dr. Roberts further testified that if a person is PI or Co-PI on one grant, it is more likely that the person will have success in getting other grants. (Aplt. App. at 107)

The University has a written policy restricting the designation of PI or Co-PI status to certain categories of individuals. The University's written policy states in relevant part:

There are three different categories of Principal Investigator status at the University of Kansas. PI status conveys to an individual the privilege of acting as director or co-director (PI or Co-PI) on a sponsored project application. The University restricts the designation of PI status to certain categories of individuals under the following procedures:

1. **Regular PI Status** is granted automatically to Regular Faculty and Academic Staff and also to Research Associates identified in the Budget of the University in recognition of their affiliation with the University.
2. **Special PI Status** may be granted to individuals who possess credentials similar to those persons described in Category 1 above but who do not currently hold a Category 1 affiliation with the University. For example, persons holding courtesy and adjunct appointments may request special PI status. Special PI status usually requires a terminal degree in the discipline.

The procedure to obtain special PI status is for the sponsoring unit, e.g., department, unit, or school, to make a written request to the Vice Chancellor for Research and Graduate Studies. The request should include a copy of the individual's vita. It should also indicate that the individual possesses the expertise to hold special PI status and that the department agrees to support and house any project awarded under the PI's direction.

3. **Project PI Status** may be granted to any unclassified or classified employee of the University not covered in Category 1, e.g. professional staff. This status is granted to an individual only on a project-by-project basis and must be requested for each new project.

The procedure requires a letter of request from the individual's supervisor, co-signed by the unit head. The request should be addressed to the Vice Chancellor for Research and Graduate Studies and should contain a copy of the nominee's vita. The letter makes a recommendation for the person based on his or her expertise, indicates departmental agreement to house any resulting project, and addresses the relevance of the project to the nominee's regular employment responsibilities.

(Aplt. App. at 56)

As a tenure-track Assistant Professor, the plaintiff had regular PI status at the University from August of 1992 through May of 1999. (Aplt. App. at 102, 106) During this time period, the plaintiff was PI or Co-PI on seven separate funded grants, which together totaled about \$131,865.00. (Aplt. App. at 112)

In the spring of 1999, prior to her termination as a tenure-track Assistant Professor, the plaintiff applied for PI status at the University through Dr. Carlson. (Aplt. App. at 75-76) The plaintiff intended to develop grants, and to "use my experience and

talents to generate a soft money position for myself." (Aplt. App. at 76) In her deposition, the plaintiff described her application for PI status through Dr. Carlson as follows:

A. ...I had applied through her for Principal Investigator status -- I'm trying to remember when, whether or not it was before the trial, but I believe I requested it before my termination and there was a long process involved in granting it, so in our conversation she led me to believe that after review by the Provost this was going to be the best situation I was going to be able to obtain.

Q. And what situation was that?

A. That was, I believe I'm formally an Adjunct Lecturer without Principal Investigator status.

Q. Other than applying for PI -- did you apply by a letter, did you send a letter to Maria saying 'I want PI status'?

A. I don't remember what materials she asked me for. I know that typically it requires a review of a CV so I don't know if I was required to write a letter or if it was something by cover letter from her, because we had discussed it in conversation.

(Aplt. App. at 75-76. Emphasis added.)

Dr. Carlson admitted that at least the plaintiff inquired about PI status through her. In her affidavit, Dr. Carlson testified: "Plaintiff informally requested that I inquire as to her eligibility for PI status (not eligible according to KUCR guidelines)." (Aplt. App. at 63)

Dr. Carlson's representations to the plaintiff about her application for PI status were false or misleading. Dr. Roberts testified in his deposition that adjunct faculty

members of the University are eligible for special PI status and project PI status. (Aplt. App. at 56, 102) Dr. Roberts further testified that he is the person who approves requests for special or project PI status, and that it is not unusual for him to get requests for approval of special or project PI status for adjunct faculty members. (Aplt. App. at 103-104) Dr. Roberts also testified that more often than not he approves requests for special PI status for adjunct faculty members, although he usually switches it to project PI status; in fact, he cannot recall ever turning down a properly documented request for special PI status. (Aplt. App. at 104-105) Finally, Dr. Roberts testified that if Dr. Carlson had come to him in 1999 and told him that the plaintiff had been denied promotion and tenure, he would have told Dr. Carlson that the plaintiff was no longer eligible for automatic PI status, but she was eligible for special or project PI status. (Aplt. App. at 108)

In reliance on Dr. Carlson's misleading representations about the plaintiff's eligibility for PI status, the plaintiff did not submit any grants through the University of Kansas naming herself as PI or Co-PI. The plaintiff testified:

I was not allowed to submit any grants through KU because I did not have Principal Investigator status or Co-Principal Investigator status and so the grants that I developed could not be submitted in my name.

(Aplt. App. at 74)

If the plaintiff had been correctly advised about her eligibility for PI status, she would have submitted several grant applications through the University of Kansas, naming herself as PI or Co-PI. One of those grant applications would have been an

application to the State Department College and University Partnership Program. In January of 2000, the plaintiff was developing this grant application in collaboration with another faculty member at the University of Kansas, Dr. Ann Calhoon. The purpose of this grant application was to further develop the projects with indigenous populations in the Altai Republic of Siberia. Specifically, this grant application was to further develop the affiliation between the Gorno-Altai State University in Siberia and three universities in Kansas -- the University of Kansas, Kansas State University, and Haskell Indian Nations University. Although the plaintiff had participated in the development of this grant, she did not include herself as Co-PI in the grant application, since she had been led to believe by Dr. Carlson that she was not eligible for any kind of PI or Co-PI status at the University of Kansas. (Aplt. App. at 112-113, 138)

Another grant application which the plaintiff would have submitted through the University of Kansas, naming herself as PI or Co-PI, was an application to the MacArthur Foundation for a grant in the amount of \$100,000.00. (Aplt. App. at 113) On February 3, 2000, Dr. Carlson sent an e-mail to Provost Shulenburg discussing this grant application, saying in part:

1. As I understand the proposal, the PI would be Cynthia, in her capacity as adjunct of CREES. The Haskell affiliation gives her additional credibility, given the nature of the project. She would need to receive 'Project PI Status' from Jim Roberts in order to do this (technically she has the qualifications: affiliation with CREES, terminal degree in field, relevant project). I have not requested Project PI status and would not do so without agreement all around.

(Aplt. App. at 136. Emphasis added.)

After sending this e-mail, Dr. Carlson did not request approval from Dr. Roberts for Project PI status for the plaintiff. (Aplt. App. at 90-91) Instead, Dr. Carlson advised the plaintiff to submit the grant application as an independent scholar, rather than through the University of Kansas. Relying upon Dr. Carlson's advice, the plaintiff submitted the grant application as an independent scholar, rather than through the University. The MacArthur Foundation did not approve the grant application submitted by the plaintiff as an independent scholar. In the plaintiff's opinion, based on her grant-writing experience, it is reasonably likely that the MacArthur Foundation would have approved the plaintiff's grant application if she had submitted it through the University of Kansas. (Aplt. App. at 113)

A third grant application which the plaintiff would have submitted through the University of Kansas, naming herself as PI or Co-PI, was an application to the Environmental Protection Agency ("EPA"). In the spring of 2000, the plaintiff developed this grant in collaboration with Dr. Larry Erickson, a faculty member at Kansas State University. The purpose of this grant application was to develop a program for monitoring the water quality in the Altai Republic of Siberia. The grant application was submitted with Dr. Erickson as the PI, and it was approved by the EPA. (Aplt. App. at 71, 113)

Although the plaintiff had participated in the development of the grant application to the EPA, she did not include herself as PI or Co-PI in the grant application, since she had been led to believe by Dr. Carlson that she was not eligible for any kind of PI or Co-PI status at the University of Kansas. If the plaintiff had been correctly advised about her

eligibility for Project PI status at the University of Kansas, the grant application to the EPA would have been submitted through the University of Kansas, naming the plaintiff as PI and Dr. Erickson as Co-PI. In addition, the grant application also would have included some salary for the plaintiff as PI. (Aplt. App. at 113-114)

A fourth grant application which the plaintiff would have submitted through the University of Kansas, naming herself as Co-PI, was an application to the National Science Foundation ("NSF"). In the fall of 2001, the plaintiff developed this grant in collaboration with her husband, Dr. Ray Pierotti, a faculty member at the University of Kansas. The purpose of this grant application was to recruit native Americans into the environmental sciences. The grant application was submitted with Dr. Pierotti as the PI, and it was approved by the NSF in the amount of \$375,155.00. Although the plaintiff had participated in the development of the grant application to the NSF, she was not included as Co-PI in the grant application, since she had been led to believe by Dr. Carlson that she was not eligible for any kind of PI or Co-PI status at the University of Kansas. If the plaintiff had been correctly advised about her eligibility for Project PI status at the University of Kansas, the grant application to the NSF would have been submitted with the plaintiff as Co-PI. In addition, the grant application also would have included some salary for the plaintiff as Co-PI. (Aplt. App. at 114)

III. Appointment Of The Plaintiff As An Adjunct Lecturer

In July of 1999, the plaintiff was pursuing discovery to support her claims of sex discrimination against the University in Case No. 99-2070. (Aplt. App. at 42) On July 16, 1999, Dr. Carlson signed a Faculty and Staff Recruitment Record ("FSSR"),

requesting the appointment of the plaintiff to the position of Adjunct Assistant Professor in the Center for Russian and East European Studies. (Aplt. App. at 57, 89) On July 20, 1999, Dean Sally Frost Mason signed the FSSR, thus approving the request for appointment of the plaintiff to the position of Adjunct Assistant Professor. On July 28, 1999, however, Provost Shulenburger signed the FSSR, but marked out "Assistant Professor" and added "Lecturer," thus only approving the appointment of the plaintiff to the position of Adjunct Lecturer. (Aplt. App. at 57)

About one year later, on July 20, 2000, Dr. Carlson signed another FSSR, again requesting the appointment of the plaintiff to the position of Adjunct Assistant Professor. However, Provost Shulenburger again changed the FSSR, and only approved the appointment of the plaintiff to the position of Adjunct Lecturer. (Aplt. App. at 139)

The University recognizes a distinction between the position of Adjunct Assistant Professor and the position of Adjunct Lecturer. The University's Faculty Handbook states in relevant part:

The principal titles granted by the University to academic faculty are those normally bestowed by institutions of higher education: professor, associate professor, assistant professor, and instructor. The title lecturer is sometimes given to those performing usual classroom duties but who are employed at a less-than-full-time rate or for a short term by the University....

Two other prefixes may be employed in conjunction with the basic academic titles. These titles are 'adjunct' for those contributing to the University's instructional efforts without remuneration from the University and 'courtesy' for those who serve the particular academic unit without remuneration but who are otherwise employed by the University. These titles are approved for no more than one academic year at a time.

(Aplt. App. at 45)

The University has a custom and practice of appointing faculty members to the position of Adjunct Assistant Professor. Since 1996, Provost Shulenburg has appointed at least 100 faculty members to the position of Adjunct Assistant Professor. (Aplt. App. at 142-144)

Provost Shulenburg's appointment of the plaintiff to the position of Adjunct Lecturer, rather than to the position of Adjunct Assistant Professor, adversely affected the plaintiff's ability to obtain compensation from grants. Some grants have the capability of including salary to pay for services performed by individuals who work to support the grant. The amount of salary paid from a grant is based upon the salary of a comparable position at the supporting educational institution. As an Adjunct Lecturer at the University of Kansas, the plaintiff was only eligible to obtain a salary from grants comparable to the salary of a Lecturer in her field at the University of Kansas, not the salary of an Assistant Professor. In the plaintiff's field, the salary of a Lecturer at the University of Kansas is substantially less than the salary of an Assistant Professor. (Aplt. App. at 114-115)

In May of 2000, about two months before Provost Shulenburg refused to appoint the plaintiff to the position of Adjunct Assistant Professor in July of 2000, the Provost gave an interview to a newspaper reporter from the Lawrence Journal-World. During the interview, the Provost described the lawsuit filed by the plaintiff and her husband as the greatest threat to the University during the 1999-2000 academic year. (Aplt. App. at 110-11, 120-121) The newspaper article stated in relevant part:

The other challenge Shulenburger faced was a lawsuit by a pair of faculty members alleging bias by the University in granting tenure and retaliation for their speaking out in favor of the rights of minority and female faculty.

Shulenburger was required to sit in a federal courtroom for nearly three weeks during testimony and jury deliberations.

KU won the lawsuit, but the Provost sees the challenge to the faculty committee system for granting tenure as the greatest threat the University faced in the 1999-2000 academic year.

'They attacked the collegial decision-making of the University,' he said. 'They attacked, to me, the essence of the University. How do we make decisions? We get educated people together to make decisions.'

(Aplt. App. at 121. Emphasis added.)

IV. Failure To Hire The Plaintiff As The Assistant Director of Equal Opportunity

On March 3, 2000, the jury returned its verdict against the plaintiff on her claims of sex discrimination in Case No. 99-2070. (Aplt. App. at 19) In April of 2000, the plaintiff and Mike Cuenca, another faculty member at the University of Kansas, were preparing a report on the status of women and minorities at the University. In obtaining information for their report, the plaintiff and Mr. Cuenca visited the University's Equal Opportunity Office ("EOO") a number of times, and reviewed documents maintained by the EOO. (Aplt. App. at 71, 79-80, 115)

In reviewing documents maintained by the EOO, the plaintiff and Mr. Cuenca discovered that the University had been audited by the Office of Federal Contract Compliance Program ("OFCCP") in 1995. The plaintiff and Mr. Cuenca then requested

from the EOO, and obtained, a copy of the conciliation agreement between the University and the OFCCP concerning the audit. (Aplt. App. at 73)

The OFCCP administers and enforces several federal equal opportunity laws, including Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973. Complaints filed with the OFCCP are also covered by the dual jurisdiction of the Equal Employment Opportunity Commission, under the authority of Title VII of the Civil Rights Act of 1964. (Aplt. App. at 118)

The University's conciliation agreement with the OFCCP was signed by Chancellor Hemenway on June 9, 1995. In the conciliation agreement, the University acknowledged three violations of Executive Order 11246, and agreed to remedy those violations by taking certain corrective actions involving the University's Affirmative Action Plan ("AAP"). The conciliation agreement stated in relevant part:

1. VIOLATION: KU has violated the terms of the EEO/affirmative action clause at 41 CFR 60-1.40(c) by failing to submit a summary of the results of its prior year AAP.

REMEDY: On April 25, 1995, KU agreed to compile a report of the results of its affirmative action program annually. This will be included in future AAP's.

2. VIOLATION: KU's record keeping is inadequate because the gender of minorities were not identified, for affirmative action purposes, in the applicant flow, hiring and promotion personnel activity data for the faculty, non-faculty (unclassified) and classified job groups. 41 CFR 60-2.12(m) and 41 CFR 60-3.4A and B.

REMEDY: On April 25, 1995, KU agreed to revise our procedures to include the gender of minorities in its future applicant flow, hiring and promotion data for the faculty, non-faculty (unclassified) and classified job groups.

3. VIOLATION: KU's identification of problem areas section of its AAP is inadequate because it failed to address the underutilization of minorities and females, and the corrective action it will take to correct the underutilization, by job group. 41 CFR 60-2.13(d).

REMEDY: On April 25, 1995, KU agreed to address the underutilization of minorities and females, and the corrective action it will take to correct the underutilization, by job groups in its future AAP's.

(Aplt. App. at 140-141)

The EOO was charged with the responsibility of complying with the conciliation agreement between the University and the OFCCP. (Aplt. App. at 84-85) On or about April 24, 2000, the plaintiff and Mr. Cuenca went to the EOO to request, and to review, certain documents relating to the conciliation agreement between the University and the OFCCP. Those documents included the University's annual AAPs since 1996, as well as computer printouts of the University's applicant flow data. Danielle Dempsey-Swopes, then the Associate Director of the EOO, provided some of those documents to the plaintiff and Mr. Cuenca. Ms. Dempsey-Swopes also told the plaintiff and Mr. Cuenca that the AAP for 1996 was not available, and that much of the applicant flow data was either unavailable or incorrect due to problems with the computer programs. (Aplt. App. at 77-78, 122, 115)

The plaintiff and Mr. Cuenca, in turn, told Ms. Dempsey-Swopes that, based on their review of the documents and data, they believed that the University was in violation of the conciliation agreement with the OFCCP as well as Executive Order 11246. Specifically, the plaintiff and Mr. Cuenca told Ms. Dempsey-Swopes they believed that the University had failed to: (a) compile annual reports of the results of its affirmative action program; (b) maintain adequate records concerning gender and minority status in the applicant flow data; and (c) take action to correct the underutilization of minorities and females in certain job groups. The plaintiff and Mr. Cuenca also expressed some of these same concerns to Maurice Bryan. (Aplt. App. at 77-78, 115-116)

In one of the plaintiff's earlier visits to the EOO in April of 2000, Ms. Dempsey-Swopes told the plaintiff about the job opening for the position of Assistant Director. Several years earlier, Ms. Dempsey-Swopes had appointed the plaintiff to serve with her on a panel investigating a complaint of sexual harassment. During their service on the investigation panel, the plaintiff had told Ms. Dempsey-Swopes about the plaintiff's prior administrative experience with affirmative action and equal opportunity issues while working for the federal government. (Aplt. App. at 71, 116)

The announcement for the Assistant Director position described the general duties and requirements of the position as follows:

The Assistant Director will facilitate, coordinate and monitor the recruitment and hiring process for faculty and unclassified staff. This position reports to the Director of the Equal Opportunity Office. This position requires an individual with strong leadership skills and a strong commitment in theory and practice to the ideals of affirmative action, equal opportunity and nondiscrimination.

(Aplt. App. at 47. Emphasis added.)

On April 14, 2000, the plaintiff applied for the Assistant Director position by sending a letter and her resume to the EOO. (Aplt. App. at 49-53) The plaintiff's letter summarized her experience and qualifications for the position, and included the following information:

I have familiarity with EO/AA laws and regulations through my prior employment with the federal government, where I engaged in a number of activities to implement programs with Historically Black Colleges, investigate allegations of sexual harassment and discrimination, and design programs to recruit and retain minorities and women in the federal government. While on the faculty at KU, I evaluated the report to the Chancellor on the status of women in a presentation at the Hall Center for the Humanities. In addition, I have recently served as a founding member of the Kansas University Sexism and Racism Victims Coalition. In my capacity as spokesperson for KUSRVC, I have conducted telephone conferences with the OCR of the Department of Education, the Office of Federal Contracts Compliance Programs, and the regional office of the EEOC. I recently made a presentation to a panel of state and national representatives of the AAUP on the status of women and minorities at KU, including a statistical analysis of the 20-year trend in faculty hires and tenure, as well as an analysis of compliance to EO/AA laws. In addition, I have worked with a number of faculty on campus to help them navigate through the KHRC and EEOC complaint process. Finally, I have experience with EO/AA laws in federal court trials.

(Aplt. App. at 49-50. Emphasis added.)

The plaintiff's resume likewise summarized her work experience, and included the following information under the heading "Professional Experience":

1989-1992 Assistant Unit Leader-Fisheries, Cooperative
Fish and Wildlife Research Unit, U.S. Fish and

Wildlife Service. Assistant Research Professor,
Biological Sciences, University of Arkansas,
Fayetteville.

(Aplt. App. at 51)

In her deposition, the plaintiff explained that her employment with the federal government -- as an Assistant Unit Leader in the U. S. Fish and Wildlife Service -- had involved training in, and administration of, equal opportunity and affirmative action laws and regulations. The plaintiff testified:

We actually had to undergo training. We also had written into our performance standards that we would participate in EO and Affirmative Action activities. I was sent on duty assignments to help deal with cases having to do with sexual harassment in the Fish and Wildlife Service, and we oversaw training for graduate students in the program in Equal Opportunity-Affirmative Action.

(Aplt. App. at 72)

The plaintiff further explained in her deposition that her employment with the federal government had involved administrative responsibility for coordinating and monitoring the unclassified recruitment process. (Aplt. App. at 81-82) The plaintiff testified:

Q. Had you ever held a position where you were, as part of your job duties, were responsible for coordinating and monitoring the unclassified recruitment process?

A. When I was at the University of Arkansas our unit had its own staff and I helped with the job descriptions and the hiring procedures and things of that sort for the staff and that was at the University of Arkansas and that was a federal state co-op.

Q. And that was part of your job description, was to coordinate and monitor unclassified staff recruitment?

A. We, the three unit leaders supervised all the staff.

(Aplt. App. at 81)

The plaintiff further testified that she had been involved in a number of searches for faculty members at the University of Kansas, and that she had served on several search committees for faculty members. (Aplt. App. at 82) The plaintiff also mentioned this experience in her application letter for the Assistant Director position. (Aplt. App. at 49)

According to the Recruitment Plan dated March 15, 2000, the official search committee for the Assistant Director position consisted of four people: Danielle Dempsey-Swopes (chair), Becky Eason, Sandy Gilliland, and Steve Ramirez. (Aplt. App. at 46) The search committee initially screened the credentials of all of the applicants, and then discussed the applicants who met the minimum and preferred qualifications. (Aplt. App. at 59) The search committee determined that the plaintiff met the minimum and preferred qualifications for the position. (Aplt. App. at 54)

Three of the four members of the official search committee initially rated the plaintiff equal to, or higher than, Gwen Jansen who ultimately was selected for the Assistant Director position. Ms. Dempsey-Swopes gave the plaintiff an initial rating of 110, and Ms. Jansen an initial rating of 90. Ms. Eason gave the plaintiff an initial rating of 201, and Ms. Jansen an initial rating of "not acceptable." Ms. Gilliland gave the

plaintiff an initial rating of 20 (which was subsequently reduced to 18), and Ms. Jansen an initial rating of 20. (Aplt. App. at 123-133, 145)

During the search committee's discussion of the qualified applicants, the plaintiff's prior lawsuit against the University was mentioned. (Aplt. App. at 93) In addition, notes from the search committee's discussion indicate that someone commented the plaintiff "may be strong but would she be for KU." (Aplt. App. at 134)

At some point prior to May 8, 2000, the decision was made to interview four of the applicants for the Assistant Director position. The plaintiff was not one of the applicants selected for an interview. (Aplt. App. at 54-55, 60)

On June 12, 2000, Mr. Bryan sent a letter to the plaintiff, responding to her inquiry about the hiring process for the Assistant Director position. Mr. Bryan stated in part:

Each of the interviewees had direct experience facilitating unclassified searches within the University or at a State of Kansas agency, and worked previously in a position where it was his or her primary responsibility to coordinate recruitment or to serve as the lead administrator for the recruitment process.

(Aplt. App. at 117. Emphasis added.)

Mr. Bryan's statement in his letter that "[e]ach of the interviewees had direct experience facilitating unclassified searches" is false. Ms. Jansen, who was hired as the Assistant Director, testified in her deposition that her previous employment at the University did not involve facilitating searches for any unclassified positions. (Aplt. App. at 98)

V. Proceedings In The District Court

The district court granted summary judgment in favor of the University as to all aspects of the plaintiff's retaliation claim. The district court first held that the plaintiff's filing and pursuit of her sex discrimination lawsuit against the University constituted protected activity under Title VII, but that the plaintiff's complaints to Mr. Bryan and Ms. Dempsey-Swopes did not constitute protected activity. (Aplt. App. at 186-188) The district court next concluded that the University's failure to hire the plaintiff as the Assistant Director of Equal Opportunity constituted an adverse employment action under Title VII, but that the failure to grant the plaintiff PI or Co-PI status as well as the failure to appoint the plaintiff as an Adjunct Assistant Professor did not constitute adverse employment actions. (Aplt. App. at 188-193) Lastly, the district court concluded that the plaintiff failed to raise a genuine issue of material fact as to whether the University's explanation for failing to hire the plaintiff as the Assistant Director of Equal Opportunity was pretextual. (Aplt. App. at 196-203)

Following the district court's entry of summary judgment, the plaintiff filed a motion pursuant to Fed.R.Civ.Pro 59(e), requesting that the district court reconsider and alter its judgment for two reasons. (Aplt. App. at 207) The first reason was that the district court had misapprehended the nature of the plaintiff's complaints to Mr. Bryan and Ms. Dempsey-Swopes. The plaintiff contended that she not only complained to Mr. Bryan and Ms. Dempsey-Swopes that the University had failed to comply with its conciliation agreement with the OFCCP, but also that the University had failed to take action to correct the underutilization of minorities and females in certain job groups.

(Aplt. App. at 209-212) The second reason was that the district court had misapprehended Tenth Circuit law regarding close temporal proximity between protected activity and adverse employment action as sufficient evidence of pretext. (Aplt. App. at 212-215)

The district court denied the plaintiff's Rule 59(e) motion. In regard to the nature of the plaintiff's complaints to Mr. Bryan and Ms. Dempsey-Swopes, the district court held that those complaints were too broad, and that they did not identify any specific discriminatory hiring practice by the University. (Aplt. App. at 218-219) In regard to the sufficiency of close temporal proximity between protected activity and adverse employment action as evidence of pretext, the district court concluded that "the great weight of recent Tenth Circuit law supports the proposition that close proximity alone will not support an inference of pretext." (Aplt. App. at 219)

ARGUMENTS AND AUTHORITIES

This court reviews a district court's grant of summary judgment de novo to determine whether there is a genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Garrett v. Hewlett-Packard Company, 305 F.3d 1210, 1216 (10th Cir. 2002). In considering whether there are any genuine issues of material fact, "the court does not weigh the evidence but instead inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." Gullickson v. Southwest Airlines Pilots' Ass'n, 87 F.3d 1176, 1183 (10th Cir. 1996). In analyzing a summary judgment motion, the court "may not make credibility determinations or weigh the evidence", and "must disregard all

evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 150 (2000).

In the instant case, the district court erroneously weighed the evidence, and failed to view the record in the light most favorable to the plaintiff. As discussed in detail below, a reasonable jury, when faced with the evidence presented here, could return a verdict for the plaintiff on her retaliation claim under Title VII. Accordingly, the district court erred in granting summary judgment in favor of the University.

I. Genuine Issues of Material Fact Exist As To The Plaintiff's Retaliation Claim Under Title VII

The plaintiff's retaliation claim is based on 42 U.S.C. §2000e-3(a), which states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because [the employee] has opposed any practice made on unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The purpose of this statute is "to let employees feel free to express condemnation of discrimination that violates Title VII." Peterson v. Utah Dept. of Corrections, 301 F.3d 1182, 1189 (10th Cir. 2002).

The plaintiff's retaliation claim is not based on any direct evidence of a retaliatory motive. Accordingly, the retaliation claim must be analyzed under the three-stage, burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g., Wells v. Colorado Department of Transportation, 325 F.3d 1205, 1212 (10th Cir. 2003); Garrett v. Hewlett-Packard Company, 305 F.3d at 1216.

A. The Plaintiff's Prima Facie Case

At the first stage of the burden-shifting analysis, the plaintiff must establish a prima facie case of retaliation, consisting of the following elements: (1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's adverse action. Pastran v. K-Mart Corp., 210 F.3d 1201, 1205 (10th Cir. 2000); Jeffries v. State of Kan., 147 F.3d 1220, 1231 (10th Cir. 1998).

(1) Protected Activities

As to the first element of her prima facie case, the plaintiff contends that she has established both "participation" in a Title VII proceeding as well as "opposition" to Title VII discrimination. (Aplt. App. at 168-169) The plaintiff "participated" in a Title VII proceeding by filing and pursuing her sex discrimination lawsuit against the University, Case No. 99-2070. The plaintiff filed Case No. 99-2070 on February 19, 1999, and she continuously pursued the lawsuit until March 3, 2000, when the jury returned its verdict. (Aplt. App. at 19) It is undisputed that filing and pursuing a lawsuit constitutes protected activity under Title VII. See, e.g., Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 500 (10th Cir. 1999); Marx v. Schnuck Markets, Inc., 76 F.3d 324, 326-27 (10th Cir. 1996).

The plaintiff further contends that she also "opposed" Title VII discrimination through her statements to Mr. Bryan and Ms. Dempsey-Swopes on or about April 24, 2002. In her memorandum in opposition to the motion for summary judgment, the plaintiff articulated her contention as follows:

The plaintiff's 'opposition' to Title VII discrimination consisted of her statements to Mr. Bryan and Ms. Dempsey-Swopes on or about April 24, 2000, expressing the plaintiff's belief that the University was in violation of Title VII. Specifically, the plaintiff expressed her belief that the University had failed to comply with Executive Order 11246 (which is enforced by the EEOC), and had failed to take action to correct the underutilization of minorities and females in certain job groups. (See about Statement of Facts at nos. 42-46.) [Aplt. App. at 160-162] Such informal complaints to management-level employees constitute protected activity under Title VII. [Citations omitted.]

(Aplt. App. at 168-169)

In one of the cases cited by the plaintiff in her memorandum in opposition to summary judgment, Robbins v. Jefferson County Sch. Dist. R-1, 186 F.3d 1253, 1258 (10th Cir. 1999), this court stated:

Title VII extends protection to 'those...who informally voice complaints to their superiors or who use their employers' internal grievance procedures.' Rollins v. State of Florida Dep't of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989). Furthermore, a plaintiff does not have to prove the validity of the grievance she was allegedly punished for lodging; 'opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated.' Love v. Re/Max of America, Inc., 738 F.3d 383, 385 (10th Cir. 1984); see Zinn v. McKune, 143 F.3d 1353, 1362 (10th Cir. 1998).

In her declaration submitted in opposition to summary judgment, the plaintiff testified that on or about April 24, 2000, she went with Mr. Cuenca to the EEO to request, and to review, certain documents relating to the conciliation agreement between the University and the OFCCP. Ms. Dempsey-Swopes provided some of those documents to Mr. Cuenca and the plaintiff. Ms. Dempsey-Swopes also told them that the

AAP for 1996 was not available, and that much of the applicant flow data was either not available or incorrect. (Aplt. App. at 115) According to the plaintiff, she and Mr. Cuenca responded as follows:

Mr. Cuenca and I, in turn, told Ms. Dempsey-Swopes that, based on our review of the documents and data, we believed that the University was in violation of the conciliation agreement with the OFCCP as well as Executive Order 11246. Specifically, we told Ms. Dempsey-Swopes we believed that the University had failed to: (a) compile annual reports of its affirmative action program; (b) maintain adequate records concerning gender and minority status in the applicant flow data; and (c) take action to correct the underutilization of minorities and females in certain job categories. We also expressed some of these same concerns to Maurice Bryan.

(Aplt. App. at 115-116)

When the plaintiff's testimony is viewed in the light most favorable to her, a reasonable jury could find that the plaintiff opposed Title VII discrimination by expressing her good faith belief that the University had violated Title VII in two distinct ways. First, the plaintiff expressed her belief that the University had violated Title VII by failing to comply with the conciliation agreement with the OFCCP, i.e. failing to compile annual reports of the University's affirmative action program, and failing to maintain adequate records concerning gender and minority status in the applicant flow data. Second, the plaintiff expressed her belief that the University had violated Title VII by failing to take action to correct the underutilization of minorities and females in certain job categories.

The district court concluded, as a matter of law, that the plaintiff did not oppose practices made unlawful by Title VII, based on the following reasoning:

Plaintiff seems to argue that because complaints filed with the OFCCP and complaints filed pursuant to Title VII are both covered under the jurisdiction of the EEOC, that complaints filed with the OFCCP are complaints opposing a practice made unlawful by Title VII. The Court rejects plaintiff's argument and finds that plaintiff has failed to show that making complaints regarding the University's compliance with the conciliation agreement is a protected activity.

(Aplt. App. at 188) The district court erred in reaching this conclusion. Genuine issues of material fact exist as to whether the plaintiff opposed practices made unlawful by Title VII.

The controlling question is not whether complaints filed with the OFCCP are, in fact, complaints opposing a practice made unlawful by Title VII. Rather, the controlling issue is whether the plaintiff had a "good faith belief" that the University's failure to comply with the conciliation agreement with the OFCCP constituted an unlawful practice under Title VII. Robbins, 186 F. 3d at 1258. Complaints filed with the OFCCP are covered by the dual jurisdiction of the EEOC, under the authority of Title VII. (Aplt. App. at 118) Based on this fact and the plaintiff's declaration, a reasonable jury could find that the plaintiff -- a lay person without a full understanding of the technicalities of Title VII and the OFCCP -- had a good faith belief that the University's failure to comply with the conciliation agreement with the OFCCP constituted a violation of Title VII.

There is a second reason why the district court erred in concluding, as a matter of law, that the plaintiff did not oppose practices made unlawful by Title VII. This second

reason rises from the fact that the plaintiff's contention is not simply that she expressed her belief that the University had violated Title VII by failing to comply with the conciliation agreement with the OFCCP. In addition, as she stated in her declaration, the plaintiff's contention is also that she expressed her belief that the University had violated Title VII by failing "to take action to correct the underutilization of minorities and females in certain job categories." (Aplt. App. at 116) Because the district court misapprehended the two-part aspect of her protected activity, the plaintiff filed a motion to alter or amend the judgment, stating:

Thus, the plaintiff's contention is not simply that she complained that the EOO was out of compliance with the conciliation agreement with the OFCCP, but also that she complained to the EOO that the University had discriminated against minorities and females by failing to hire them in certain job groups. The plaintiff's second complaint -- that the University had discriminated against minorities and females by failing to hire them in certain job groups -- constitutes 'opposing' a practice made unlawful by Title VII within the meaning of 42 U.S.C. §2000e-3(a).

(Aplt. App. at 210)

In support of the above contention, the plaintiff drew the district court's attention to two decisions by the Sixth Circuit: Holden v. Owens-Illinois, 793 F.2d 745 (6th Cir. 1986); and Johnson v. University of Cincinnati, 215 F.3d 561 (6th Cir. 2000). (Aplt. App. at 210-211) In Holden, the Sixth Circuit held that complaints only addressing the implementation of an affirmative action plan in compliance with Executive Order 11246 do not constitute "opposing" a practice made unlawful by Title VII. 793 F.2d at 748-49. In contrast, in Johnson, the Sixth Circuit held that complaints also addressing

discriminatory practices which had occurred in the hiring process -- practices which were contrary to the law as well as the defendant's affirmative action plan -- do constitute "opposing" a practice made unlawful by Title VII. The Sixth Circuit explained this distinction as follows:

We find the district court's application and extension of Holden to the facts of this case contrary to Title VII's intent.

As accurately argued by Plaintiff, the scope of Holden extends only to an employee who protests the implementation of the affirmative action program; because Plaintiff protested discrimination that occurred in the hiring process, which was contrary to law as well as the affirmative action program, his case falls beyond Holden's reach. To hold otherwise would improperly expand the scope of Holden to include not only the employee who protests an employer's failure to implement an affirmative action program under Title VII, but also the employee who opposes discrimination that occurs in the hiring process, the likes of which the affirmative action program was designed to correct and prevent.

215 F.3d at 579. Emphasis in original.

The instant case is more like Johnson than Holden. Here, the plaintiff not only protested the University's failure to implement the conciliation agreement with the OFCCP, she also protested the University's failure to correct the underutilization of minorities and females in certain job groups, i.e. the failure to hire minorities and females in certain job groups. The University's failure to hire minorities and females in certain job groups constitutes discrimination in the hiring process, which is contrary to Title VII as well as the conciliation agreement with the OFCCP. Since the plaintiff protested the University's discriminatory practice in the hiring process, a reasonable jury could find that the plaintiff was opposing a practice made unlawful by Title VII.

The district court attempted to distinguish the instant case from the Sixth Circuit's decision in Johnson on the ground that the "Sixth Circuit was careful to acknowledge that there were specific actions taken by the plaintiff that sufficiently constituted opposition under Title VII." (Aplt. App. at 218) The district court erroneously interpreted the Sixth Circuit's decision in Johnson, because the emphasis in Johnson was not on the plaintiff's opposition to a specific discriminatory hiring practice. The plaintiff in Johnson was the former Vice President of Human Resources of the defendant University of Cincinnati, and his duties included managing the University's affirmative action program. The Sixth Circuit did note that the plaintiff had sent letters to his superiors objecting to the hiring of a specific individual as the Vice-Chairman of the Department of Surgery, and to the decision to waive advertising for that position.

However, the Sixth Circuit emphasized that the plaintiff's primary complaint was directed toward the University's discriminatory hiring practice as a whole. The Sixth Circuit stated:

Plaintiff complained that 'the apparent underutilization of minorities and women at the University Hospital and Medical College demonstrates the lack of commitment or intent to create an equal playing field for qualified candidates, or the development of a mentorship program which would support a safe learning environment for non-whites.' Unlike Booker v. Brown & Williamson Tobacco Co. Inc., [879 F.2d 1304 (6th Cir. 1989)] where the plaintiff was contesting a single decision made by his employer in a letter which he sent to his employer's human resource department, plaintiff in this case was opposing defendant's discriminatory hiring conduct as a whole.

215 F.3d at 580. Emphasis added.

Like the plaintiff in Johnson, the plaintiff here was opposing the University's "discriminatory hiring conduct as a whole," i.e. the University's failure to take action to correct the underutilization of minorities and females in certain job categories. (Aplt. App. at 116) Consequently, a reasonable jury could find that the plaintiff was opposing hiring conduct by the University which she in good faith believed was unlawful under Title VII. This in turn means that the district court erred in granting summary judgment in favor of the University.

(2) Adverse Employment Actions

As to the second element of her prima facie case, the plaintiff contends that the University took three adverse actions against her: (1) denying her PI or Co-PI status; (2) appointing her to a position as an Adjunct Lecturer, rather than as an Adjunct Assistant Professor; and (3) failing to hire her to the position of Assistant Director of Equal Opportunity. (Aplt. App. at 169-172)

The district court held that it is uncontested that the University's failure to hire the plaintiff to the position of Assistant Director constitutes an adverse employment action. (Aplt. App. at 188) However, the district court went on to conclude, as a matter of law, that the other two actions by the University do not rise to the level of "adverse employment actions" within the meaning of Title VII. (Aplt. App. at 189-193) For the reasons discussed below, the district court erred in reaching this conclusion. Genuine issues of material fact exist as to whether the other two actions by the University constitute "adverse" actions.

In Jeffries v. State of Kan., 147 F.3d 1220 (10th Cir. 1998), this court stated that "[i]n recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action." 147 F.3d at 1232. Emphasis added. This court in Jeffries went on to expressly reject the Seventh Circuit holding that an adverse employment action must be "material" in order to be actionable, explaining:

The Tenth Circuit has never recognized such a 'materiality' requirement and we decline to do so here. Rather, this court takes a case-by-case approach to determining whether a given employment action is 'adverse'.

147 F.3d at 1232. See also Garcia v. Pueblo Country Club, 299 F.3d 1233, 1241 (10th Cir. 2002); Heno v. Sprint/United Management Co., 208 F.3d 847, 857 (10th Cir. 2000).

This case-by-case approach to determine whether a given employment action is "adverse" requires "examining the unique factors relevant to the situation at hand." Sanchez v. Denver Public Schools, 164 F.3d 527, 532 (10th Cir. 1998). See also Aquilino v. University of Kansas, 268 F.3d 930, 934 (10th Cir. 2001). When the unique factors relevant to the present case are examined, a reasonable jury could find that the University took "adverse" actions against the plaintiff by denying her PI or Co-PI status, and by appointing her as an Adjunct Lecturer.

In regard to the University's denial of PI or Co-PI status to the plaintiff, the plaintiff testified that she applied for such status through Dr. Carlson. (Aplt. App. at 75-76, 190-191) Dr. Carlson conceded that at least the plaintiff "informally requested that I inquire as to her eligibility for PI status." (Aplt. App. at 63) According to the plaintiff,

Dr. Carlson told her that she was not eligible for PI status at the University. (Aplt. App. at 75)

Dr. Carlson's representations to the plaintiff about her eligibility for PI status were false or misleading. As discussed above (pp. 7-8), Dr. Roberts testified that adjunct faculty members of the University are eligible for special PI status and project PI status. (Aplt. App. at 67, 102) Dr. Roberts further testified that if Dr. Carlson had come to him in 1999 and told him that the plaintiff had been denied promotion and tenure, he would have told Dr. Carlson that the plaintiff was no longer eligible for automatic PI status, but she was eligible for special or project PI status. (Aplt. App. at 108)

Indeed, Dr. Carlson knew full well that the plaintiff was eligible for project PI status. On February 3, 2000, Dr. Carlson sent an e-mail to Provost Shulenburger in regard to the plaintiff's application for a grant from the MacArthur Foundation, stating: "I have not requested Project PI status [for the plaintiff] and would not do so without agreement all around." (Aplt. App. at 136) Dr. Carlson sent this e-mail to the Provost only eleven days before the start of the jury trial in the plaintiff's discrimination lawsuit against the University, Case No. 99-2070. (Aplt. App. at 19) After sending this e-mail to the Provost, Dr. Carlson did not request approval from Dr. Roberts for project PI status for the plaintiff. (Aplt. App. at 90-91) Instead, Dr. Carlson advised the plaintiff to submit the grant application to the MacArthur Foundation as an independent scholar, rather than through the University. (Aplt. App. at 113)

In reliance on Dr. Carlson's misrepresentations, the plaintiff did not submit any grant applications through the University naming herself as PI or Co-PI. (Aplt. App. at

74) As discussed above (pp. 9-11), the plaintiff in her declaration identified four specific grant applications which she would have submitted through the University, naming herself as PI or Co-PI, if she had been correctly advised by Dr. Carlson about her eligibility for special or project PI status. (Aplt. App. at 112-114) Dr. Carlson's misrepresentations thus effectively prevented the plaintiff from supporting herself through salary from grants.

The district court concluded, however, as a matter of law, that Dr. Carlson's misrepresentations concerning the plaintiff's eligibility for special or project PI status do not rise to the level of an "adverse" employment action. (Aplt. App. at 189-192) The district court explained:

Even in viewing the evidence in the light most favorable to plaintiff, no reasonable jury could find that Dr. Carlson's omission constitutes adverse employment action against plaintiff. At most, Dr. Carlson's alleged failure to inform plaintiff that she was eligible for project or special PI status can be considered a mere inconvenience to plaintiff because it would have forced plaintiff to investigate the policies regarding PI status to learn that she was, in fact, eligible for special or project PI status. Because mere inconvenience does not constitute adverse employment actions, plaintiff has failed to meet her burden.

(Aplt. App. at 192, citing Sanchez v. Denver Public Schools, 164 F.3d at 532.)

The district court's conclusion is erroneous for at least two reasons. First, Dr. Carlson's conduct amounted to more than causing a "mere inconvenience." In regard to the plaintiff's grant application to the MacArthur Foundation, Dr. Carlson affirmatively declined to request project PI status for the plaintiff, apparently because there was not "agreement all around." (Aplt. App. at 136) Instead, Dr. Carlson advised the plaintiff to

submit the grant application to the MacArthur Foundation as an independent scholar, rather than through the University. (Aplt. App. at 113) The plaintiff testified, based on her grant-writing experience, that it is reasonably likely that the MacArthur Foundation would have approved her grant application if she had submitted it through the University. (Aplt. App. at 113)

Second, a reasonable jury could find that Dr. Carlson's misrepresentations, coupled with her own authority as Director of the Center for Russian and East European Studies ("CREES"), effectively blocked the plaintiff from obtaining special or project PI status on at least two grants. As the Director of CREES, Dr. Carlson had the authority to sponsor grant applications developed by the plaintiff, and to request special or project PI status for the plaintiff. (Aplt. App. at 56, 67, 136) However, Dr. Carlson affirmatively declined to request special or project PI status for the plaintiff in regard to two grant applications which the plaintiff discussed with Dr. Carlson. One grant application was to the State Department College and University Partnership Program, which the plaintiff was developing in January of 2000. (Aplt. App. at 112-113, 138) The other grant application was to the MacArthur Foundation, which the plaintiff was developing in February of 2000. (Aplt. App. at 113, 136)

In this respect, the instant case is analogous to Jeffries v. State of Kan., 147 F.3d 1220, which involved a retaliation claim asserted by a student/employee in a Clinical Pastoral Education ("CPE") Program. The plaintiff contended that the director of the CPE Program, Dr. Ed Outlaw, retaliated against her for filing a complaint of sexual harassment by issuing repeated threats that her contract would not be renewed at the end

of the academic year. 147 F.3d at 1232. The district court granted summary judgment in favor of the defendant, concluding that the plaintiff had failed to establish an adverse employment action, since she had "no evidence that Dr. Outlaw could have blocked her [contract] renewal or that he ever attempted to do so." 147 F.3d at 1232. On appeal, this court reversed the summary judgment in favor of the defendant, explaining:

Dr. Outlaw himself testified he was the person most responsible for making decisions regarding the CPE Program. Dr. Outlaw's power in the hiring and contract renewal process is therefore another disputed question of fact inappropriately decided on a motion for summary judgment.

147 F.3d at 1232. Emphasis added.

Likewise, in the present case, Dr. Carlson's authority in the grant application process to request special or project PI status for the plaintiff raises a disputed question of fact. Accordingly, the district court erred in concluding, as a matter of law, that Dr. Carlson's misrepresentations concerning the plaintiff's eligibility for special or project PI status do not constitute an "adverse" employment action.

The third "adverse" employment action asserted by the plaintiff consists of Provost Schulenburger's appointment of the plaintiff to a position as an Adjunct Lecturer, rather than as an Adjunct Assistant Professor. (Aplt. App. at 57, 139) The plaintiff testified that her appointment as an Adjunct Lecturer adversely affected her ability to obtain compensation from grants. According to the plaintiff, the amount of salary paid from a grant is based upon the salary of a comparable position at the supporting educational institution. In the plaintiff's field, the salary of a Lecturer is substantially less than the salary of an Assistant Professor. (Aplt. App. at 114-115.)

In light of the plaintiff's testimony, which purports to be based on her own personal knowledge, a reasonable jury could find that the Provost's appointment of the plaintiff to a position as an Adjunct Lecturer constitutes an "adverse" employment action. See Sanchez v. Denver Public Schools, 164 F.3d at 532 [stating that an adverse employment action includes "a decision causing a significant change in benefits"].

(3) Causal Connections

As to the third element of her prima facie case, the plaintiff contends that she has come forward with evidence from which a reasonable jury could find a causal connection between her protected activities and all three of the University's adverse actions against her. The district court addressed the causal connection element only as to the University's failure to hire the plaintiff to the position of Assistant Director of Equal Opportunity, since in the district court's view that was the only adverse employment action taken by the University.

In regard to the University's failure to hire the plaintiff to the position of Assistant Director of Equal Opportunity, the district court correctly held that the plaintiff has established a prima facie case of causation, stating:

Plaintiff was denied an interview for the Assistant Director position in May of 2000. Meanwhile, her previous lawsuit culminated with a jury verdict in favor of defendant in March of that same year, with post-trial motions continuing into June of 2000. Protected activity closely followed by adverse action may support an inference of causal connection. The Court finds that the close proximity between trial in plaintiff's first lawsuit against defendant, which constitutes participation in a Title VII proceeding, and the refusal to hire plaintiff as the Assistant Director of the EOO is sufficient to establish a

causal connection for the purpose of plaintiff's prima facie case.

(Aplt. App. at 194, citing Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1320 [10th Cir. 1999]; and Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 [10th Cir. 1999].)

In regard to the University's denial of PI or Co-PI status to the plaintiff, the plaintiff likewise has established close temporal proximity between her protected activity and the University's adverse employment action. Dr. Carlson initially made false or misleading representations to the plaintiff about her eligibility for PI status in the spring of 1999. (Aplt. App. at 75-76) This was shortly after the plaintiff had filed her sex discrimination lawsuit against the University, Case No. 99-2070. (Aplt. App. at 41)

Dr. Carlson again made false or misleading statements to the plaintiff about her eligibility for PI status in February of 2000, in relation to the plaintiff's grant application to the MacArthur Foundation. (Aplt. App. at 113) On or about February 3, 2000, Dr. Carlson affirmatively declined to request project PI status for the plaintiff, apparently because there was not "agreement all around." (Aplt. App. at 136) This was only eleven days before Case No. 99-2070 was scheduled to go to trial. (Aplt. App. at 9) Such close temporal proximity between the plaintiff's protected activity and the University's adverse employment action is sufficient to establish a prima facie case of causation. Anderson v. Coors Brewing Co., 181 F.3d at 1179.

In regard to Provost Schulenburger's appointment of the plaintiff to a position as an Adjunct Lecturer, rather than as an Adjunct Professor, the plaintiff has also established close temporal proximity between this adverse employment action and her pursuit of

Case No. 99-2070. The Provost initially appointed the plaintiff to an Adjunct Lecturer position in July of 1999. (Aplt. App. at 57) This was only about one month after the plaintiff had served discovery requests to the University in Case No. 99-2070. (Aplt. App. at 42)

The Provost again appointed the plaintiff to an Adjunct Lecturer position in July of 2000. (Aplt. App. at 139) This was only about one month after post-trial motions in Case No. 99-2070 had been resolved. (Aplt. App. at 180) Once again, such close temporal proximity between the plaintiff's protected activity and the University's adverse employment action is sufficient to establish a prima facie case of causation. Anderson v. Coors Brewing Co., 181 F.3d at 1179.

**B. The Defendant's Proffered
Nondiscriminatory Explanation**

At the second stage of the burden-shifting analysis, the defendant must proffer legitimate, nondiscriminatory explanations for its actions. Pastran v. K-Mart Corp., 210 F.3d at 1206; Anderson v. Coors Brewing Co., 181 F.3d at 1178. Here, the district court only addressed the University's explanation for failing to hire the plaintiff as the Assistant Director of Equal Opportunity, since in the district court's view that was the only adverse employment action taken by the University. (Aplt. App. at 194) The University's explanation for failing to hire the plaintiff as the Assistant Director essentially is that the person selected for the position was better qualified. (Aplt. App. at 194-195)

C. Issues of Pretext

At the third stage of the burden-shifting analysis, the plaintiff bears the ultimate burden of demonstrating that the defendant's proffered reasons are pretextual. Wells v. Colorado Department of Transportation, 325 F.3d at 1219; Pastran v. K-Mart Corp., 210 F.3d at 1206. The plaintiff can meet this burden by showing "that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual -- i.e., unworthy of belief." Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995). As this court went on to explain in Randle:

It is not the purpose of a motion for summary judgment to force the judge to conduct a 'mini trial' to determine the defendant's true state of mind. So long as the plaintiff has presented evidence of pretext (by demonstrating that the defendant's proffered nondiscriminatory reason is unworthy of belief) upon which a jury could infer discriminatory motive, the case should go to trial. Judgments about intent are best left for trial and are within the province of the jury.

69 F.3d at 453. Emphasis added.

Here, the plaintiff has presented four pieces of circumstantial evidence which, in their totality, raise a genuine factual issue as to whether the University's proffered reasons for failing to hire her as the Assistant Director are pretextual, i.e. unworthy of belief.

The first piece of evidence showing pretext consists of the close temporal proximity between the plaintiff's protected activity and the failure to hire her. In this context, the plaintiff is relying upon her protected activity consisting of her opposition to Title VII discrimination. As discussed above (pp. 25-31), the plaintiff opposed Title VII discrimination by expressing her good faith belief that the University had violated Title

VII by failing to comply with the conciliation agreement with the OFFCP, and by failing to take action to correct the underutilization of minorities and females in certain job categories. The plaintiff expressed her belief that the University had violated Title VII through her statements to Mr. Bryan and Ms. Dempsey-Swopes on or about April 24, 2002. (Aplt. App. at 115-116)

At some point prior to May 8, 2002, the decision was made not to interview the plaintiff for the Assistant Director position. (Aplt. App. at 54-55, 60) Accordingly, there was only two weeks between the plaintiff's protected activity and the University's adverse employment action. This very close temporal proximity, by itself, is sufficient to show pretext, and to preclude summary judgment. This conclusion follows from the decision in Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584 (10th Cir. 1994), where this court held:

Dr. Ramirez and Ms. Snow alleged that the adverse actions against them, a dismissal and a demotion, were instituted on April 26, 1991 -- just one month and a half after their submission of the grievance for the patient endangered by the HIV-infected employee. Layoffs which occurred less than two months after engaging in protected activity, along with knowledge that the plaintiffs had engaged in that activity, were held sufficiently probative of a retaliatory motive to withstand summary judgment in Miller v. Fairchild Industries, Inc. 797 F.2d 727, 731-32 (9th Cir. 1986). See also Schwartzman v. Valenzuela, 846 F.2d 1209, 121 (9th Cir. 1988).

41 F.3d at 596. Emphasis added. See also Wells v. Colorado Department of Transportation, 325 F.3d at 1217, 1220; Smith v. Diffie Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 961 (10th Cir. 2002); Anderson v. Coors Brewing Co., 181 F.3d at 1179.

The second piece of evidence showing pretext consists of comments made during the search committee's discussion of the qualified applicants for the Assistant Director position. During this discussion, the plaintiff's prior lawsuit against the University was mentioned. (Aplt. App. at 93) In addition, notes from the discussion indicate that someone commented the plaintiff "may be strong but would she be for KU." (Aplt. App. at 134) Such comments constitute circumstantial evidence from which an inference of discriminatory intent might be drawn.

The comments made during the search committee's discussion here are similar to the age-related comments made during a meeting of the selection committee in Danville v. Regional Lab Corp., 292 F.3d 1246 (10th Cir. 2002), involving a failure-to-hire claim under the Age Discrimination in Employment Act. During a meeting of the selection committee in Danville, someone remarked that the plaintiff "might not be around very long." This court held that this remark constituted circumstantial evidence from which an inference of discriminatory intent might be drawn, explaining:

While the remark may be 'ambiguous' in the sense of being susceptible to more than one interpretation, and 'isolated' in the sense that it was only made once, this is not a 'stray' remark in the sense that it lacks a nexus to the employment decision. The remark referred directly to the plaintiff and was made during the committee meeting at which interview candidates were selected. There was evidence from which a jury could conclude that the remark was intended to explain why plaintiff was not being interviewed. Plaintiff has shown an adequate nexus to the employment decision to treat the remark as evidence of pretext.

292 F.3d at 1251. Emphasis added.

The third piece of evidence showing pretext consists of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997). Here, as discussed above (pp. 20-21) such evidence consists of the fact that three of the four members of the official search committee initially rated the plaintiff equal to, or higher than, Ms. Jansen who was ultimately hired as the Assistant Director. (Aplt. App. at 46, 123-133, 145)

The fourth piece of evidence showing pretext consists of the falsity of the University's explanation for not hiring the plaintiff to the Assistant Director position. As the United States Supreme Court explained in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133(2000):

[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

530 U.S. at 147. See also Wells v. Colorado Department of Transportation, 325 F.3d at 1218.

Here, Mr. Bryan sent a letter to the plaintiff on June 12, 2000, responding to her inquiry about the hiring process for the Assistant Director position. Mr. Bryan stated in his letter that "[e]ach of the interviewees had direct experience facilitating unclassified searches." (Aplt. App. at 117) This explanation was false. Ms. Jansen, who was hired as the Assistant Director, testified in her deposition that her previous employment at the University did not involve facilitating searches for any unclassified positions. (Aplt. App. at 98) To paraphrase Reeves, the jury could "infer from the falsity of [Mr. Bryan's] explanation that the employer is dissembling to cover up a [retaliatory] purpose." 530 U.S. at 147.

Based on these four pieces of circumstantial evidence, in combination, a reasonable jury could choose to disbelieve the University's explanation for failing to hire the plaintiff as the Assistant Director of Equal Opportunity. Accordingly, a genuine factual issue exists as to whether the University's explanation is pretextual, and the district court erred in granting summary judgment in favor of the University.

CONCLUSION

For the reasons discussed above, the evidence in this case is not so one-sided that the defendant must prevail as a matter of law as to the plaintiff's claim of retaliation under Title VII. Consequently, the district court's order of summary judgment must be reversed, and the case remanded for trial on this claim.

CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed. R. App. Pro. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 12,544 words. I relied on my word processor to obtain this count, and it is Microsoft Word 2000.

Respectfully submitted,

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ORAL ARGUMENT

Oral argument is requested in this case because it raises at least one issue of first impression in the Tenth Circuit: Is very close temporal proximity between protected activity and adverse employment action, by itself, sufficient to support an inference of pretext?

CERTIFICATE OF SERVICE

I do hereby certify that I have served a true and correct copy of the above and foregoing document on counsel of record by (x) placing the same in the U.S. mail, postage prepaid, () facsimile to the phone number(s) listed below, and that the transmission was reported as complete and without error and that the facsimile machine complied with Supreme Court Rule 119(b)(3), or () hand delivery, on this, the 14th day of August, 2003, to:

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