

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Michael R. Cuenca

Plaintiff/Petitioner - Appellant,

v.

University of Kansas, Myron A. Kautsch,
James K. Gentry

Defendants/Respondents -

Appellees.

Case No. 03-3145

Appellant/Petitioner's Opening
Brief

NOTICE AND INSTRUCTIONS

If you proceed on appeal pro se, the court will accept a properly completed Form A-12 in lieu of a formal brief. This form is intended to guide you in presenting your appellate issues and arguments to the court. If you need more space, additional pages may be attached. A short statement of each issue presented for review should precede your argument. Citations to legal authority may also be included. This brief should fully set forth all of the arguments that you wish the court to consider in connection with this case.

New issues raised for the first time on appeal generally will not be considered. An appeal is not a retrial but rather a review of the proceedings in the district court. A copy of the completed form must be served on all opposing counsel and on all unrepresented parties and a proper certificate of service furnished to this court. A form certificate is attached.

APPELLANT/PETITIONER'S OPENING BRIEF

1. Statement of the Case. (This should be a brief summary of the proceedings in the district court.)

Plaintiff filed Title VII, 28 USC § 1981 and 1983, discrimination charges against defendants/respondents/appellees. The District Court dismissed all plaintiff's charges.

2. Statement of Facts Relevant to the Issues Presented for Review.

- a. Plaintiff/Appellant asserts the facts stipulated in the parties' Final Pre-Trial Order (DOA 182) and the facts set forth below.
- b. When plaintiff applied for and was found qualified for the position of Assistant Professor of Visual Communications, defendant University's School of Journalism sought administrative approval to offer the position to two candidates. The approved salary offer for the two candidates was identical. (DOA 185, paragraphs 25-27.)
- c. After the white male candidate declined the offer of employment, Defendant Kautsch lowered the amount of salary offered to the plaintiff. (Id.)
- d. Eleven days after his third request for relief from a discriminatory teaching overload, which he had copied to defendant Kautsch, plaintiff received notice from Kautsch that he was removing the plaintiff from the School's technology committee. (DOA 185, paragraph 45.)
- e. After Plaintiff and defendant Kautsch met in Kautsch's office on Monday, December 11, 1995 to discuss plaintiff's written complaint of disparate treatment, Kautsch instituted immediate and extraordinary actions to terminate the plaintiff. Defendant Kautsch wrote to his own supervisor that the reason the plaintiff would be terminated "would be that the faculty member is making demands and stating expectations . . ." (DOA 185, paragraph 59.)
- f. Defendant University's Provost (then called Vice Chancellor of Academic Affairs) was informed of Defendant Kautsch's

extraordinary actions against the plaintiff as they were progressing in December, 1995, through letters written by both defendant Kautsch and the plaintiff. (DOA 185, paragraphs 54-59.)

- g. Defendant University initiated neither disciplinary action against defendant Kautsch nor remedial action to restore the plaintiff.
- h. In January 1996, defendant Kautsch placed the plaintiff under a “special review,” the conditions of which violated plaintiff’s rights under the First Amendment, Title VII, and defendant University’s own policies and procedures. (DOA 185, paragraph 67.)
- i. In March of 1996, defendant Kautsch unilaterally promoted an employee of defendant’s School of Journalism to a brand new position, that he called the Integrated Media Lab general manager. The responsibilities of this position were similar to plaintiff’s job description and were within the plaintiff’s qualifications. Defendant Kautsch rewarded the promoted employee with a 22% raise. (DOA 185, paragraphs 77.)
- j. Kautsch violated University employment search policies by not advertising the position and not allowing plaintiff the opportunity to apply for the position. (DOA 185, paragraph 78.)
- k. On May 6, 1996, plaintiff met with defendant University’s Office of Equal Opportunity director, Maurice L. Bryan, to register a complaint of racial discrimination. (DOA 185, paragraphs 79.)
- l. Ten days later, the plaintiff received an undeserved negative annual performance evaluation and it included an annual salary increase of \$180, which the letter also said was the lowest raise of any faculty member in the School of Journalism. (DOA 185, paragraph 80.)
- m. Defendant University’s Professor Theodore P. Frederickson investigated the circumstances and connected the adverse employment action to the plaintiff’s protected activity. (DOA 185, paragraphs 81-82.)

- n. In May of 1996, defendant University of Kansas discriminated against the plaintiff by awarding him a salary increase that was the lowest of any tenure-track faculty member in defendant University's School of Journalism. (DOA 185, paragraph 80.)
- o. The plaintiff's salary increase was more than 5 standard deviations below the mean of the others of defendant University's School of Journalism's tenure-track faculty. (DOA 185, paragraph 94.)
- p. On June 3, 1996, plaintiff wrote Provost David E. Shulenburger a plea for help (DOA 185, paragraph 88.)
- q. Provost Shulenburger took no action to restore the plaintiff, even though once again he had been asked directly by defendant Kautsch to approve a questionable plan obviously designed to terminate the plaintiff (DOA 185, paragraphs 83-87).
- r. In the fall of 1996, plaintiff again sought help directly from Provost Shulenburger. (DOA 185, paragraph 106.)
- s. After plaintiff's fall 1996 request to the Provost for remedial action, defendant University took no action to restore the plaintiff or protect his rights.
- t. Plaintiff filed a formal complaint with the KHRC/EEOC in February 1997. Concurrently, defendant's Office of Equal Opportunity initiated an investigation into the plaintiff's complaint of discrimination and retaliation. (DOA 185, paragraph 107.)
- u. In June of 1997, the director of defendant University's Office of Equal Opportunity, Maurice L. Bryan, Jr., abruptly closed his office's internal investigation of the Plaintiff's complaint of illegal discrimination and retaliation. (DOA 185, paragraphs 111-112.)
- v. Bryan testified that it is not the formal policy of his office to automatically suspend an investigation into an employee's allegations of discrimination. (DOA 185, paragraphs 114.)

- w. Bryan testified that he undertook no investigation into the plaintiff's complaint, either prior to or after he suspended the investigation in June of 1997. (DOA 185, paragraphs 115.)
- x. Bryan also testified that according to defendant University's formal policies, when allegations of discrimination come to the attention of the administration it is the responsibility of the administration, "[t]o investigate the allegations and to take, and to take appropriate action as a result of that investigation." (DOA 185, paragraph 116.)
- y. Bryan stated that he suspended the plaintiff's internal complaint specifically because he said the plaintiff ended the mediation of the external complaint. (DOA 185, paragraph 113.)
- z. Plaintiff applied for the position of New Media Leader in October of 1997. Defendants determined the plaintiff to be qualified. The plaintiff was found to be one of only four qualified applicants, but was denied an interview. The remaining three candidates were interviewed and all were white males. Plaintiff was rejected for the position (DOA 185, paragraphs 126-135).
 - aa. None of the candidates were offered the position, the position remained open and defendant Gentry sought additional applicants from "persons of complainant's qualifications" (DOA 185, paragraphs 136-138).
 - bb. Defendant Gentry took adverse employment action against the plaintiff by excluding the plaintiff from meetings of import to the plaintiff's fields of teaching, research and service either by not informing him of such meetings or by scheduling the meetings for times when the plaintiff could not attend because he was in class. (DOA 185, paragraphs 178-185.)
 - cc. During the plaintiff's application for permanent tenure, defendant Gentry produced a fraudulent, false evaluation by hiding significant materials from decision makers and by misrepresenting the significance of the plaintiff's work. (DOA 185, paragraphs 141-189.)

- dd. During the period that the plaintiff's tenure dossier was being reviewed by the ultimate decision makers, the plaintiff's immediate supervisor, Theodore P. Frederickson, published an editorial on the front page of the University Daily Kansan, the student newspaper, attacking the plaintiff for his protected activities and for this lawsuit (DOA 185, paragraphs 200-205).
- ee. Statements in Frederickson's published editorial directly established that Frederickson was attacking the plaintiff for his protected activity (DOA 185, paragraphs 204-205), proving that this adverse employment action was motivated at least in part by an illegal motive.

During the plaintiff's application for permanent tenure, one decision maker directly expressed illegal discrimination against the plaintiff and said that the plaintiff's opposition to discrimination in the workplace was a valid reason for denying the plaintiff's tenure. (DOA 185, paragraphs 212-219, referring to DOA 186, exhibit 128.)

- ff. During the plaintiff's application for permanent tenure, one decision maker publicly and directly expressed that the plaintiff's opposition to discrimination in the workplace would have an "adverse impact" on the School of Journalism. (DOA 185, paragraphs 204-205.)
- gg. Neither the decision-making committees nor defendant University's Provost or Chancellor disclaimed or disavowed the statements of illegal discriminatory animus contained in the plaintiff's tenure dossier and published in defendants' daily student newspaper. (DOA 185, paragraphs 218-220.)
- hh. Plaintiff informed all of the decision makers of the evidence of the corruption of his tenure dossier and of the likelihood that the tenure review had been motivated by an illegitimate motive. (DOA 185, paragraphs 195-197.)
- ii. A trial on the merits in the case of *Aquilino v. University of Kansas*, No. 00-3150 (10th Cir.) and No. 99-CV-2231-KHV (D. Kan.), resulted in a jury verdict of liability for illegal Title VII retaliation against defendant University of Kansas. Even though the verdict was vacated on technical grounds, the vacating decision stated:

At trial, KU stipulated that Dr. Aquilino engaged in protected activity, and on appeal it does not challenge the evidence showing the causal connection between Dr. Aquilino's protected activity and the allegedly adverse actions the university took against her.

Aquilino v. University of Kansas, 268 F.3d 930 (10th Cir. 2001).

- jj. In another case of a former faculty member who alleged due process violations and other violations of his civil rights against defendant University of Kansas, the Tenth Circuit, ruling in the case of *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504 (10th Cir. 1998), expressed concern about the conduct of defendant University's administration, stating:

At the same time, we are certainly less than sanguine about some of the alleged actions taken by various University officials. In addition, the allegations of various violations of University policy cause us some discomfort.

- kk. The report of the Kansas Conference of the American Association of University Professors (AAUP), prepared after March, 2000, interviews with faculty employed by defendant University of Kansas, detailed these conditions on the Lawrence campus that are contrary to AAUP's standards:

Violation of Academic Due Process procedures

Denial of access to personnel files

Undue influence by Administrators

Retaliatory Acts

Violations of Rules and Regulations/Handbook

Failure to follow procedures in a consistent manner

Apparent discrepancies between the procedures followed and the description outlined in the Faculty Handbook

Misuse of Student evaluation forms

Lack of Academic Community

An Apparent failure to follow up on complaints of unfair treatment

No meaningful response to complaints

Fear, intimidation and retaliation seems all to pervasive on this campus

- ll. Defendant University of Kansas declares in its faculty handbook that it complies with AAUP standards. (DOA 185, paragraphs 222-223.)
- mm. Defendant University of Kansas was found out-of-compliance with Executive Order 11246 by the U.S. Office of Federal Compliance Programs (OFCCP) in 1982. Defendant University of Kansas entered into a conciliation agreement with the OFCCP, in which they promised to remedy their lack of compliance. In a letter to the Vice Chancellor, University Directors, Deans, Directors and Chairpersons, then-Chancellor Gene Budig explained:

The OFCCP concluded that the University had not emphasized sufficiently the responsibilities that all administrators and supervisors have for the implementation of affirmative action and equal opportunity (see attachment.)

And:

We are instituting, consequently, a policy whereby the annual performance evaluation of each person with managerial and supervisory responsibility will include review of equal employment opportunity efforts and results.

(DOA 185, paragraph 236) Defendant University did not comply with this promise and had no such policy in effect during the employment of the plaintiff.

- nn. In 1995, the OFCCP once again found defendant University of Kansas out of compliance with Executive Order 11246. Defendant University was found to have “failed to address the underutilization of minorities and females, and the corrective action it will take to correct the underutilization, by job groups.” (DOA 185, paragraphs 232-234.)
- oo. Prior to their on-site review of defendant University, the OFCCP informed defendant University that among other data, they would require records of:

c. Terminations. The regulations at 41 CFR 60-2.13(d) and (g) require an evaluation of the degree to which non-discrimination policy is carried out with respect to employee terminations. Also ee 60-2.25.

This analysis shall consist of, for each group or job title, the total number of employee terminations, as well as the number of minority group and the number of female terminations.

Please note that if you present terminations by job title, include the department and job group from which the person(s) terminated.

(DOA 185, exhibit 132, at fifth page, paragraph c.) The tenure process is an employment action that can and does result in termination, but the University does not track this employment action with regard to affected class.

- pp. Defendant University remains out of compliance with the tenets of Executive Order 11246 or their conciliation agreement with the OFCCP, because they deliberately do not produce records of their promotion and hiring employment actions per 41 C.F.R. 60-2.13(d) and (g), as directed by the OFCCP. (DOA 185, paragraph 243.)
- qq. Defendant has not complied with their OFCCP agreement to annually report on their previous year's Affirmative Action Plan. (DOA 185, paragraph 242.)
- rr. In 1997, through a series of focus groups that involved a third of their minority faculty defendant University gathered anecdotal evidence that confirmed their minority faculty's concerns with their chances for retention. The transcripts of these sessions, a summary of the sessions and the final report on the sessions showed that among the minority faculty there was widespread dissatisfaction with the conditions of employment at the University. Defendant University's administration commissioned the focus groups and the resulting report, then attached a roster of participants and the complete transcript to the report so that they could avoid being compelled to release the report under the Kansas Open Records Act. (DOA 185, paragraph 97.)

- ss. At the University of Kansas, as of the fall semester of 2000, white males of all ranks made up 62.99% of the total faculty in the ranks of Assistant Professor to Full Professor. The percentage of all males other than white is only 9.31% of the Assistant to Full Professor ranks. (DOA 185, paragraph 228.)
- tt. Although Hispanics make up 7% of the population in Kansas, at KU Hispanics make up only 2.23% of the faculty (DOA 185, paragraph 231.)
- uu. Between the years 1981 and 2001, the retention rate of minority males was so low that there was actually a loss (-3.71%) from the rank of Assistant Professor to Associate Professor. During the same time period, the gain of white males was +12.93%. This proves that there is a wide disparity (16.64%) between the retention of minority males (-3.71%) and white males (+12.93%). (DOA 185, paragraph 229.)
- vv. Plaintiff would have been only the third minority faculty member ever tenured by defendant University's School of Journalism.
- ww. Plaintiff was the first faculty member ever turned down for tenure in defendant University's School of Journalism.
- xx. Defendant Gentry has a verifiable record of past and ongoing discrimination against minority employees under his supervision, particularly Asian American and Hispanic males. (DOA 185, paragraphs 117-125.)

3. Statement of Issues.

a. **First Issue:** The District Court erred in granting Defendants' motion to substitute a completely new motion for summary dismissal and erred by granting that substituted motion without allowing plaintiff the opportunity to respond to defendants' substituted motion for dismissal.

Argument and Authorities:

1. In the memorandum and order of May 9, 2003 (DOA 214), the District Court granted defendants' motion to substitute their motion for summary judgment. Plaintiff had opposed the motion on the grounds that defendants' original motion had been improperly filed in violation of the District Court's rules and should have been disregarded. Plaintiff argued that because the deadline for filing dispositive motions had since passed, the motion to substitute should have been disallowed because defendants should have filed a motion to file outside of time, made outside of time. However, in the May 9, 2003 memorandum and order (DOA 214), the District Court not only granted defendants' motion to substitute a completely new motion for summary judgment, but also granted that new motion, without allowing plaintiff an opportunity to respond to that new motion, even though both parties had requested the opportunity for plaintiff to respond (DOA 197, 204).
2. This, of course, creates a technical conundrum. Because the Court granted the motion to substitute, which in effect struck that original motion from the record, how then, could there be a ruling on that motion? Conversely, if the District Court was granting the new motion that had been substituted, the Court did so without allowing plaintiff the opportunity to respond to that new, substituted motion.
3. Any argument that the two motions were the same in substance is rendered moot by the granting of the motion to substitute, because, if the two motions were the same in substance, why was substitution necessary at all?

b. Second Issue: The District Court erred in striking portions of the plaintiff's affidavit and not specifying which portions he struck and not allowing plaintiff an opportunity to correct any error in the pleadings.

Argument and Authorities:

4. In Plaintiff's opposition to defendants' motion to strike the plaintiff's affidavit, plaintiff cited Judge Crow's previous ruling, "that in assessing a conflict under these circumstances, the court should disregard a contrary affidavit only if it constitutes an attempt to create a sham fact issue." (*Land v. Midwest Office Technology, Inc.*, 114 F. Supp. 2d 1121 (D. Kan. 2000), cited by plaintiff in docket 203.) However, in the pendant case, Judge Crow then held that "Plaintiff's assertion is incorrect, as motions to strike are both proper and frequently made on other grounds." (Docket 214, at 3.)
5. Plaintiff complied with Rule 56(e) by providing an affidavit that was "made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Notwithstanding the District Court's complaint that plaintiff's affidavit was "voluminous", plaintiff's affidavit was required by and authorized by Rule 56.
6. The District Court erred in partially granting defendants' motion to strike without specifying which portions he intended to disregard. This leaves plaintiff with no opportunity to challenge specific material and proper portions, which may have been improperly disregarded.
7. Indeed, according to the law of the land, as cited by this District Court, plaintiff should have been allowed an opportunity to correct any shortcomings in his pleadings that might have caused the Court to disregard material evidence. In *Van Deelen v. City of Eudora*, 1996 U.S. Dist. LEXIS 18075, Judge Crow opined:

No less than the Supreme Court has said that a pro se plaintiff's complaint must be construed liberally and judged against a less stringent standard than that used for pleadings

drafted by counsel. *Haines v. Kerner*, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972). The Tenth Circuit has explained this rule, as follows:

We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

Hall v. Belmon, 935 F.2d at 1110 (footnote omitted). In addition, courts must afford pro se litigants a "reasonable opportunity to remedy the defects in their pleadings." *Hall v. Bellmon*, 935 F.2d at 1110 n.3.

c. Third Issue: The District Court erred by disregarding plaintiff's evidence of discriminatory intent and its application per Section 107, and the direct evidence of mendacity, which is sufficient to prove illegal intent.

Argument and Authorities:

8. The District Court disregarded Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The U.S. Supreme Court has unanimously affirmed the authority of that section within the past few weeks, in *Desert Palace, Inc. v. Costa*, No. 02-679, 299 F.3d 838, 539 U.S. ___ (2003), ruling that:

an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Id., at 3. And:

Section 2000e-2(m) unambiguously states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration with respect to "any employment practice." On

its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.

Id., at 8.

9. The Supreme Court has made it as clear as can be by emphasizing the phrase “any employment practice” and the word “demonstrated” that if “any employment practice” is “demonstrated” to have been motivated by an illegal reason, liability is established. The clarification that this applies to “any employment practice” abrogates the District Court’s ruling that plaintiff’s claims did not involve “adverse employment actions” that were adverse enough to be actionable. And this *Desert Palace* decision makes it clear that direct evidence is not necessary for the plaintiff’s “demonstration”:

Moreover, Congress explicitly defined the term “demonstrates” in the 1991 Act, leaving little doubt that no special evidentiary showing is required. Title VII defines the term “demonstrates” as to “mee[t] the burdens of production and persuasion.” §2000e(m). If Congress intended the term “demonstrates” to require that the “burdens of production and persuasion” be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in §2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42.

Id., at 8.

10. In the instant case, plaintiff has presented documentary, uncontrovertable evidence of no fewer than six direct statements by defendants that clearly, and without necessity of inference, establish that illegal retaliation motivated defendants’ and defendants’ managers, at least in part, even though other, perhaps even legitimate, factors may have motivated their actions. Liability is established via Section 107 and this proof of illegitimate motive, as plaintiff argued clearly and specifically in all of the dispositive motion pleadings. These written and verbal statements referred specifically to the

plaintiff, referred specifically to adverse actions taken against him, were made in the context of adverse employment actions against plaintiff, and leave no necessity of inference that defendants had been for many years angry with and resentful of plaintiff for speaking his mind, filing an internal discrimination grievance, and for becoming the leader of a workplace civil rights coalition.

11. As an example, Hoy's statement is in a letter of review written specifically for plaintiff's up-or-out tenure review. Hoy's recommendation:

Considering the information below, I reluctantly conclude that I would not recommend to retain Michael Cuenca as an Associate Professor with tenure.

DOA 185, paragraphs 212-219, referring to DOA 186, exhibit 128, at page 30743, under "Recommendation". Then:

This is a good, straight forward statement and reads well until the long last paragraph. At that point, Cuenca brings up a minority issue that, I believe, has no place in such a statement. Until this point I had no knowledge he was a minority.

Id., at page 30745, under "Record and evaluation of teaching". At the end, he adds to his recommendation:

However, the information contained in Cuenca's own voluntary statements can be taken as a forewarning of future attitude, perhaps even problems, when he is an Associate Professor with tenure. This may compromise the career goals of both Cuenca and the School.

Id., at page 30746, second paragraph from the bottom.

12. This is the very kind of statement referred to by the District Court in its discounting of this evidence, as showing "on its face that the employment decision was reached for discriminatory reasons." Memorandum and Order, DOA 214, page 17, citing *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1249 (10th Cir. 2002). The

“discriminatory reason” need only be one of many other reasons, to establish liability under Section 107/Price Waterhouse. (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).)

13. In fact, in the decision published as *Beams v. Norton*, 2003 U.S. Dist. LEXIS 6472 (D.Kan. 2003) Judge Crow again cited *Danville*, quoting another passage which clearly states that:

a plaintiff can avoid summary judgment "either by presenting evidence that the employer's reason is pretextual, i.e., unworthy of belief or by otherwise introducing evidence of a discriminatory motive. *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2001) (citation omitted).
[Emphasis added.]

As demonstrated above, plaintiff did, indeed, “introduc[e] evidence of a discriminatory motive.” In the instant case, the statements of intent were not at all the type of ambiguous stereotyping or general displeasure which has long been accepted as direct evidence of illegal intent by the U.S. Supreme Court, in *Price Waterhouse* and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); in the instant case they were statements made during the context of employment decisions, focused on the plaintiff and the plaintiff’s protected activities. As plaintiff detailed in his Reply to Defendants’ Response to Plaintiff’s Motion for Summary Judgment, (Dk. 210):

In 1995, defendant Kautsch stated in a letter to his superiors that he was attempting to terminate plaintiff because plaintiff was “making demands and stating expectations” (PMSJ, App. B, exhibit 159). In 1995, plaintiff’s supervisor threatened plaintiff with retaliation if he filed a race-based complaint (PMSJ, App. B, exhibits 22 and 112). In 1997, defendant University suspended plaintiff’s internal complaint and their Director of Equal Opportunity stated under oath that he did so because defendants’ counsel blamed plaintiff for failed mediation (PMSJ, App. B, exhibits 65 and 66). In 1999, Professor Hoy stated in plaintiff’s tenure dossier that plaintiff should not be granted tenure because of plaintiff’s opposition to discrimination (PMSJ, App. B, exhibit 128). In 2000,

plaintiff's supervisor published an editorial, claiming to speak for "many of us on the faculty" and stating that plaintiff's civil rights activism and his lawsuit would have an "adverse impact" on the School of Journalism (PMSJ, App. B, exhibit 122). In 2003, defendants' counsel filed a brief in this case wherein they cited plaintiff's published statements of opposition to discrimination in their workplace as justification for plaintiff's colleagues' animus (Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment (Dk. 205), (hereinafter DRSJ), page 16). Six statements, made over seven years by four individuals and by defendants' counsel, clearly establish that defendants harbored illegal animus against plaintiff for his individual grievances and for his public support for the rights of others. The statements establish not only illegal animus, but also that defendants actually believed their illegal animus was justified. Consequently, no inference is necessary to divine that illegitimate reasons motivated defendants, because in those statements they clearly and expressly connected their actions with plaintiff's protected speech, his race-based discrimination complaint, and his civil rights activism. These statements are *material* for purposes of proving intent under Section 107. All other facts and defenses of defendants are now rendered immaterial, per *Hinsdale*, cited above, and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), cited in the conclusion.

14. These statements and the "voluminous" record of disciplinary actions, poor performance reviews, lower salary increases, exclusion, hyperscrutiny, misrepresentation of facts, violations of procedures and denials of due process, leave no necessity of inference that defendants were motivated by an illegal retaliatory motive. No matter how many other motives they may have had for their many improprieties, in the consideration of this case it matters only that they also had that illegal retaliatory motive.
15. In any event, the Supreme Court has now made it clear in *Desert Palace* that the adduction of direct evidence is not necessary to "demonstrate" that an employer used a forbidden consideration in "any

employment practice”. The Supreme Court’s new *Desert Palace* decision abrogates any decision that required a plaintiff to adduce direct evidence to shift the burden, establish liability, and earn a trial with a mixed-motive jury instruction.

16. And even before *Desert Palace*, the Tenth Circuit had ordered that if a Court rules that such statements do not constitute direct evidence and are merely circumstantial evidence, even then they are sufficient to preclude summary judgment because they raise a genuine controversy over intent. According to the *Danville* case, cited by the District Court in its discounting of the direct evidence, any inference regarding a controversy over credibility or intent must be made in plaintiff’s favor:

We have already discussed, in the context of direct evidence, the comment Dr. Garner overheard during the selection committee meeting that plaintiff "might not be around very long." Although the comment does not constitute direct evidence of age discrimination sufficient to take the case to a jury, it is circumstantial evidence from which an inference of discriminatory intent might be drawn.

[Defendant] characterizes this comment as an isolated, stray, ambiguous remark that is insufficient to show pretext. 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. [Citations omitted.]

Danville, 292 F.3d, at 1251.

17. In addition, defendants throughout the record have proffered myriad, changing reasons, reasons unworthy of belief, deliberate misconduct,

and several instances of lying under oath or in written documents, which provide ample, sufficient evidence of pretext and mendacity. For example, although the District Court explained away Defendant Gentry's withholding of materials from the external reviewers by casting it as harmless error (which is an assessment of intent, reserved for the fact-finder), Gentry also lied under oath when asked if he had sent all the materials and lied to the University by stating that plaintiff had no refereed or juried work. According to the U.S. Supreme Court, this evidence of falsity and mendacity is sufficient to actually *prove* intentional discrimination:

“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. . . .”

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000), at 2108. And:

As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*. But the inference remains—unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above.

Reeves, 120 S. Ct. at 2112. (Citations omitted.) As detailed in plaintiff’s briefings, Gentry’s mendacity was matched by Frederickson, Musser, Marino, and others of defendants’ employees.

18. The District Court also discounted the impact of Hoy’s letter on the adoptive admission allegation, ruling that the failure to disavow Hoy’s statement proved nothing. But the Supreme Court specifically decided otherwise under the same committee-based decisionmaking circumstances in *Price Waterhouse*:

Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that *the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible - and, one might say, inevitable - conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.*

Price Waterhouse, 490 U.S., at 256. (Emphasis added.)

19. So, according to the controlling law of the land, whether one decides to call these statements “direct evidence” or not, the statements in the instant case made by defendants and their managers—even if those statements are rejected as direct evidence—and the direct evidence of their mendacity “demonstrate” that defendants were motivated by a “forbidden consideration with respect to ‘any employment practice’” and liability is established. At the very least, plaintiff has adduced the existence of an issue of material fact and adduced enough evidence of pretext to survive summary dismissal and earn a jury trial with a mixed motive instruction.

d. Fourth Issue: The District Court erred by failing to draw all necessary inferences in the light most favorable to plaintiff, while considering summary dismissal.

Argument and Authorities:

20. The U.S. Supreme Court has ordered that in considering summary dismissal, “the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves*, 120 S. Ct., at 2110. In *Reeves*, the Supreme Court also cited *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, at 255, ordering that “credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.”
21. In the instant case, the District Court confirmed plaintiff’s factual allegations and then drew no reasonable inferences in favor of plaintiff. In doing so, the District Court disregarded the mountain of circumstantial evidence capped by no fewer than six documented statements of illegal motivation. In the course of briefing the dispositive motions, defendants produced no evidence that controverted plaintiff’s facts, nor did they supply any truthful, acceptable, reasonable business decisions for their actions. They merely colored the evidence and the District Court did the same, in all respects either ignoring the inferences that should have been drawn for the plaintiff or drawing all inferences in defendants’ favor.
22. In *Reeves*, the Supreme Court could have been describing the instant case, in which the District Court rationalized or ignored every piece of evidence probative of the plaintiff’s case:

Again, the court disregarded critical evidence favorable to the petitioner—namely, the evidence supporting petitioner’s prima facie case and undermining respondent’s nondiscriminatory explanation. See 197 F.3d at 693-694. The court also failed to draw all reasonable inferences in favor of petitioner.

Reeves, 120 S. Ct., at 2111.

23. From the time plaintiff first spoke up about his grievances, defendants have worked steadfastly to demonize and vilify him. The vilification of an employee who files a discrimination complaint comes from page one of the retaliator's playbook. A judge with decades of experience trying civil rights cases would obviously know that. But the big-picture inference that this District Court judge made in his decision was that all of these verified and proven incidents and actions were either benign or the fault of the plaintiff. Rather than acknowledge defendants' actions and attitudes toward the plaintiff as proof of their retaliatory motives—or even drawing the proper inference that those actions might actually be illegal—this District Court accepted the inference defendants wanted and cast the plaintiff in as negative a light as possible, concentrating on and accepting defendants' retaliatory aspersions against plaintiff, essentially taking part in the retaliation. Conversely, the District Court rationalized or ignored the actual, verified misconduct of the defendants. For example, when Judge Crow dismissed defendant Gentry's withholding of materials from external reviewers as some sort of harmless error, ignoring Gentry's subsequent lies, his perjury, and his deliberate, willful misconduct, Crow drew an inference of intent and that inference was drawn in the light most favorable to defendants—which he is supposedly not allowed to do in the context of summary judgment.

24. The Tenth Circuit follows the doctrine that the District Court must favor the nonmovant in determining summary dismissal:

In reviewing such dispositions, this court repeatedly has emphasized that we must draw all inferences in favor of the party opposing summary judgment. See, e.g., *Trujillo v. University of Colo. Health Sciences Ctr.*, 157 F.3d 1211, 1213 (10th Cir. 1998) (stating that in reviewing summary judgment disposition, court draws all reasonable inferences in favor of nonmoving party); *Curtis v. Oklahoma City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200, 1214 (10th Cir. 1998) ("In determining whether a genuine issue of material fact exists, the court must draw all reasonable inferences in favor of the nonmoving party."). In this respect, we must view the evidence in context, not simply in its segmented parts. Recently we described the inquiry governing the evaluation

of hostile work environment claims as follows: "The existence of sexual harassment must be determined 'in light of the record as a whole,' and the trier of fact must examine the totality of the circumstances, including 'the context in which the alleged incidents occurred.'" *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1262 (10th Cir. 1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)), cert. denied, 526 U.S. 1039, 119 S. Ct. 1334 (1999). Such a thorough examination of the record is required because "the very term 'environment' indicates that allegedly discriminatory incidents should not be examined in isolation." *Id.* Under this interpretation, because conduct which is not gender-based may form a part of the context or environment in which the discriminatory conduct is alleged to have occurred, such conduct may be relevant to, and should be considered in, evaluating a hostile work environment claim. In *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987), for example, we held that "evidence of a general work atmosphere . . . --as well as evidence of specific hostility directed toward the plaintiff--is an important factor in evaluating the claim." Thus, even if some of the alleged conduct was not "explicitly sexual in nature," *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1265 (1997) (citation omitted), if it reasonably could be inferred that the conduct was related to gender or arose out of a context in which admittedly sex- and gender-related conduct occurred, then it is for the fact finder to decide whether such an inference should be drawn. See *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (explaining that "because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant").

Even according to this District Court judge:

Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*,

467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). "The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993).

A court judges the sufficiency of the complaint accepting as true the well-pleaded factual allegations and drawing all reasonable inferences in favor of the plaintiff. *Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir. 1987). n1 The court construes the allegations ¶8]□n the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991).

Van Deelen v. City of Eudora, 1996 U.S. Dist. LEXIS 18075.

25. There is no way the District Court should have dismissed plaintiff's case. Plaintiff considers this denial of a trial by jury a potential violation of his Seventh Amendment Constitutional rights. Plaintiff has a right to take these allegations and the probative evidence to the fact-finder. The District Court is not to substitute its will for a jury's, nor even weigh the evidence.

e. Fifth Issue: The District Court erred in not considering all of the direct evidence of discrimination, retaliation, and pattern and practice.

Argument and Authorities:

26. Plaintiff proffered extensive direct evidence of previous illegal acts, statistical direct evidence of pattern and practice discrimination, and direct evidence of past violations of federal civil rights law. The District Court erred in disregarding this evidence, especially in light of the sources of the evidence.
27. The District Court summarily rejected all of plaintiff's statistical evidence by faulting him for not using applicant flow data. However,

defendants refused to produce accurate and complete applicant flow data and the District Court affirmed its magistrate judge's determination that defendants would not be compelled to produce it. (See DOA 111 and 120.) And defendants' assistant provost stated in writing that such data pertaining to promotions was not kept. (DOA 184, para. 43.) In fact, defendants' failure to keep and maintain adequate statistical records is what they were cited for by the OFCCP. (See DOA 184, paras. 40-45.) For the District Court to allow them to succeed in suppressing this evidence by actually using their failure against the plaintiff is absurd, particularly in light of the U.S. Supreme Court's approach to statistical evidence of discrimination:

Although some courts have rejected statistical evidence if it was flawed in any way, the Supreme Court in *Bazemore v. Friday*, signaled clearly that mathematical perfection is not required: "A plaintiff in a Title VII suit need not prove discrimination with scientific certainty: rather, his or her burden is to prove discrimination by a preponderance of the evidence." In *Bazemore*, the Court supported a trend of opinion that methodological defects in otherwise relevant data detract from the value of such evidence, but "ordinarily [do] not obliterate its evidentiary value."

David Baldus & James Cole, *Statistical Proof of Discrimination* at vii (1987 Cumulative Supp. (footnotes omitted)).

28. The Tenth Circuit follows the U.S. Supreme Court direction that statistical evidence is probative of illegal discriminatory intent and has explained this approach:

statistics alone may be used to establish a prima facie case of racial discrimination in a disparate treatment case. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977); *Weahkee v. Norton*, 621 F.2d 1080, 1083 (10th Cir. 1980). The Supreme Court has also held that statistics may be used to prove that the employer's racially neutral reason for termination is purely pretext.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Anderson v. City of Albuquerque*, 690 F.2d 796, 802 (10th Cir. 1982). Even if United's contentions were true, McAlester's case does not rest solely on statistics but also rests upon individual instances of discriminatory treatment.

McAlester v. United Air Lines, 851 F.2d 1249, 1260 (10th Cir. 1988).

29. Additionally, plaintiff's statistics are from the University's own data and they are the same data used by the OFCCP in their finding that the University was guilty of "underutilizing" minorities and women. (See DOA 184, paras 40-45.) "Underutilizing" is merely the OFCCP's euphemism for discrimination.
30. Defendants have faced retaliation claims in federal court before, and have been found liable by a jury. Defendants have been investigated by the American Association of University Professors, a disinterested party, and have been found to violate faculty rights and to retaliate. All of that is probative evidence of their past conduct and all of it must be weighed by the fact-finder, not dissimilated by the District Court.
31. The statistical evidence against individual defendant Gentry is probative of his state of mind, his pattern of practice, and his intent.
32. The District Court dissected plaintiff's case as if each allegation, statement and incident occurred in a vacuum, separate and distinct from the rest of the record, as if no two events were related, as if no two people influenced each other or acted in concert, as if all of defendants' assertions were truthful. However, the Court is required by the Supreme Court's law of the land to consider all evidence in the context of the complete case, not piecemeal, and is required to draw all necessary inferences in the light most favorable to the plaintiff. The Supreme Court has made it clear that "in the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." *Reeves*, 120 S. Ct., at 2110.

f. Sixth Issue: The District Court erred by not applying Section 107/*Price Waterhouse* and shifting the burden to defendants.

Argument and Authorities:

33. As argued by plaintiff in his Memo in Support of his Motion for Summary Judgment (DOA 184), the introduction of pattern and practice evidence and direct evidence of illegal intent is sufficient to shift the burden to defendants to prove by a preponderance of the evidence that discrimination did not occur. (See DOA 184, para. 76.) According to the Tenth Circuit, as articulated in *Kenworth v. Conoco, Inc.*, 979 F. 2d 1462, at 1471 (10th Cir. 1992):

A plaintiff will be entitled to the burden-shifting analysis set out in *Price Waterhouse* upon presenting "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [discriminatory and/or retaliatory] attitude." *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F. 2d 171, 182 (2d Cir. 1992). *Price Waterhouse* is also applicable on the basis of circumstantial evidence arising from the sequence of events if the evidence is adequate to demonstrate that an improper factor was a substantial motivation in the challenged decision. *Id.* at 183.

34. Plaintiff's Motion for Summary Judgment details 12 separate causes of action, each of which produces a prima facie case of discrimination and/or retaliation. The District Court makes reference to prima facie case only as to plaintiff's comparison of the circumstances of the New Media Leader search with the *McDonnell/Douglas* framework. Even though plaintiff had explained that the case was a Section 107/*Price Waterhouse* case, the District Court discounted the similarities of the two cases to justify dismissing the case by saying there was no prima facie case. But he was ignoring all other circumstances and evidence that create a definite presumption that discrimination and retaliation occurred. In the circumstances of the New Media Leader search, the judge dissembled along with defendants by arguing that the position was actually eliminated, ignoring defendants' acknowledgement that the name of the position and the required qualifications were simply changed and that one of the applicants from the original search was then offered that "new" position—all circumstances that evidence the

falsity of defendants' assertion, creating a controversy over intent that precludes summary dismissal.

35. However, at issue here is not whether the New Media Leader circumstances, standing alone, raise an inference of discrimination and/or retaliation. At issue here are the complete circumstances of this case: an employee who was an outspoken critic of his employer's handling of minority and gender issues and discrimination/retaliation grievances and who had filed his own discrimination and retaliation grievance, experienced one adverse employment action after another, culminating in his termination after a deliberately tainted evaluation. During his employment, plaintiff served in a University-appointed position in which his responsibility was to coordinate the faculty oversight of the climate at the University for its minority and women employees. The employer had been determined by the federal government to be "underutilizing" minorities and women and the employer was laboring under an agreement to remedy their noncompliance with the federal civil rights law that requires specific protections for employees and statistical monitoring of employment decisions. Plaintiff became a leader of the workplace civil rights movement as well as the most media-visible critic of administration policies. During his employment, his supervisors threatened him with isolation if he filed a race-based complaint, attempted to terminate him in proceedings contrary to University policy, refused to investigate his grievance, excluded him from activities and favorable assignments, and misrepresented his employment record. Eventually, his manager would suppress evidence of his record during a up-or-out employment evaluation and lie to the decisionmakers regarding his record. Many of these circumstances, alone, and the totality of these circumstances raise an inference of discrimination and retaliation.
36. The District Court erred in utilizing a strict construction of the language of McDonnell/Douglas to argue the semantics of the framework to justify discounting the circumstances of the New Media Leader search. While ordering that the plaintiff's burden in establishing a prima facie case is not onerous, and that the bar is low for the plaintiff's prima facie case, the Tenth Circuit has used different language:

[a plaintiff] may demonstrate a prima facie case of racial discrimination in a number of ways, including a showing that (1) [he] is a member of a racial minority, (2) [his] job performance was satisfactory, (3) [he] was adversely affected by [his employer's] employment decisions and (4) *similarly situated non-minority employees were treated differently from [him]* (see the discussion in *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 & nn. 6-7 (10th Cir. 2000)). That is not an onerous burden (*Ortiz v. Norton*, 254 F.3d 889, 895 (10th Cir. 2001)). [Emphasis added.]

Goodwin v. GMC, 275 F.3d 1005, 1012 (10th Cir. 2002). And that “at the prima facie stage of the *McDonnell Douglas* analysis, a plaintiff is only required to raise an inference of discrimination, not dispel the non-discriminatory reasons subsequently proffered by the defendant.” (*EEOC v. Horizon/CMS Healthcare Corp.*, at 1193.)

37. When considering retaliation claims, the language is different yet again:

Under [the *McDonnell Douglas*] framework, Plaintiff must first establish a prima facie case by showing "that: (1) [she] engaged in protected opposition to discrimination; (2) [she] suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action." [Citations omitted.]

Wells v. Colorado Dept. of Transportation, 325 F.3d 1205 (10th Cir. 2003).

38. One term remains, however, in any event: “this language is equally fitting to a claim of discriminatory retaliation. Just as a plaintiff's burden to demonstrate a prima facie case is ‘not onerous’ in the context of a claim of disparate treatment, see [Burdine] at 253, it is no more so in the context of a claim of retaliation.” *Marquez v. Baker Process, Inc.*, 42 Fed. Appx. 272 (10th Cir. 2002). And:

As noted, we have stated that it "should now be obvious" that "the burden imposed on a plaintiff at the prima facie stage is

'not onerous.'" *Id.* at 1197 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). In *Horizon* we also noted that "[a] plaintiff alleging discrimination in violation of Title VII can satisfy the fourth element of her prima facie case in a number of ways." 220 F.3d at 1195 n.6.

Ortiz v. Norton, 254 F.3d 889, 895 (10th Cir. 2001).

39. Indeed, the U.S. Supreme Court has clarified that a plaintiff need not adduce or plead some exact set of circumstances to establish a prima facie case:

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constrict the role of the pleadings." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283, n. 11, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) ("When a [redacted] Federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct.

613 (1985) ("The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to ¶*512] survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978); see also *McDonnell Douglas*, *supra*, at 802, n. 13 ("The specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Teamsters v. United States*, 431 U.S. 324, 358, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927 (CA8 1993) ("To measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before ¶**998] discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Swierkiewicz v. Sorema, 534 U.S. 506 (2002), at 511. And:

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of

his national origin in violation of Title VII and on account of his age in violation of the ADEA. App. 28. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. *Id.* at 24-28. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley, supra*, at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Id., at 514.

40. Additionally, the Tenth Circuit has also ruled that a plaintiff may establish a prima facie case solely through statistical evidence, as detailed in PMSJ, Memo in Support, paragraph 47. Plaintiff adduces substantial statistical evidence of a long-standing pattern-and-practice of discrimination and underutilization of minorities, satisfying any prima facie case requirement.
41. In any case, as argued by plaintiff throughout the dispositive pleadings, the introduction of direct evidence of illegal intent establishes the prima facie case and the inference that discrimination occurred, under *Price Waterhouse*. And as of the Supreme Court's new *Desert Palace* decision, that inference is to be made without requiring the production of direct evidence. The District Court erred in dismissing all of plaintiff's claims by saying he had no prima facie case in the New Media Leader search, thereby ignoring the complete, whole case, and the prima facie case established by and through all of the circumstances and in all of the causes of action, along with the direct evidence of past discriminatory and retaliatory conduct and the statistical evidence of an "underutilization" of minorities and women in their workplace.
42. Then the District Court dismissed plaintiff's retaliation claims by citing the Tenth Circuit's *Aquilino* decision (268 F.3d 930 (10th Cir. 2001)) and claiming that none of the alleged adverse employment actions were adverse enough. But plaintiff was *terminated*, which is the ultimate adverse employment action. And in any case, the *Aquilino*

decision and all others that relied on a weighing of the adversity of employment actions have been abrogated by the Supreme Court's unanimous *Desert Palace* ruling that liability is established when an illegal motive affects "any employment action".

g. Seventh Issue: The District Court Judge erred by not recusing himself under 28 USCS 455(a).

Argument and Authorities:

43. Upon the filing of the instant suit, the judge to whom the case was initially assigned recused himself (DOA 3). That judge was a KU graduate and his decision to withdraw was surely weighted by that relationship. But Judge Crow is also a KU grad. Why did one judge pull out and the other not, when both were graduates of defendant institution? 28 USCS 455(a) makes it clear that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under the quite clear and plain wording of this law, it is the judge's responsibility to recuse himself. The parties should not have to request recusal or move for recusal. In the instant case, plaintiff objected to the venue of the District of Kansas specifically because of the domination of the court by KU graduates and to the venue of the Tenth Circuit because of the chief judge's close relationship to defendants (DOA 182). Judges are among the elite of any institution's alumni. They are honored and cited and held up as the successes of an institution's educational efforts. They move within the same social circle as the upper administrators and donors of the University. They have a clear, certain interest in the reputation and public image of the institution. They contribute their own money and help, even by their mere appearance at fund-raising soirees, encourage other alumni to contribute their own money. They are clearly stakeholders in the institution's well-being. If defendants were officers of a corporation and a judge was among its shareholders, would it be seen as acceptable for the judge to preside over the case? It is astounding that so many cases against these defendants have been presided over by graduates of defendants' institution. The law doesn't require that anyone prove a judge may or may not be impartial—it directs the judge to recuse himself even if it merely appears he *might* be impartial.

4. Do you think the district court applied the wrong law? If so, what law do you want applied?

The District Court refused to apply Section 107/*Price Waterhouse, Reeves*, and other District of Kansas, Tenth Circuit, and U.S. Supreme Court law.

5. Did the district court incorrectly decide the facts? If so, what facts?

The District Court accepted the plaintiff's alleged facts, but then drew no inferences that favored the plaintiff when considering summary dismissal.

6. Did the district court fail to consider important grounds for relief? If so, what grounds?

7. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

Plaintiff directs the Court to the arguments above and to his Memorandum in Support of Plaintiff's Motion for Summary Judgment/Partial Summary Judgment (DOA 184) and his Reply to Defendants' Response to Plaintiff's Motion for Summary Judgment/Partial Summary Judgment (DOA 210). In these briefs, plaintiff clearly summarized his case and articulated the legal basis for his case and the governing standards and doctrines to be applied by the Court. Plaintiff carefully dispelled the arguments and coloration of evidence by defendants and exposed the weakness of their defense. This brief addressed the various reasons, excuses, and legal arguments made by defendants and points out the deficiencies in each, many of which were then embraced by the District Court.

8. What action do you want this court to take in your case?

Plaintiff respectfully requests that the Court of Appeals reverse the denial of plaintiff's Motion for Summary Judgment/Partial Summary Judgment and order that liability is established and that a trial on the merits to determine damages should be scheduled; or

Plaintiff respectfully request that the Court of Appeals reverse the granting of defendants' Motion for Summary Judgment and reinstate plaintiff's claims and order that a trial on the merits to determine liability and damages should be scheduled; or

Plaintiff respectfully requests that if this Court does not reverse the District Court's dismissal of plaintiff's claims on other grounds, this Court should reverse the District Court's judgment and order of May 9, 2003, to allow the plaintiff to correct his affidavit and to provide him his due opportunity to respond to defendants' substituted motion for dismissal.

9. Do you think the court should hear oral argument in this case? If so, why?

No.

Date

Signature

CERTIFICATE OF SERVICE

**I hereby certify that on June 27, 2003 I sent a copy of
the Appellant/Petitioner's Opening Brief to**

**Barbara L. McCloud
Office of the General Counsel
245 Strong Hall
University of Kansas
Lawrence, KS 66045,**

the last known address, by United States mail.

Date

Signature