

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Michael R. Cuenca,
Plaintiff

vs.

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

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CASE NO. 03-3145

PLAINTIFF/APPELLANT’S PETITION FOR REHEARING EN BANC

1. Plaintiff/Appellant Michael R. Cuenca, *pro se*, petitions the court for a REHEARING EN BANC of the court’s ORDER AND JUDGMENT of June 15, 2004.
2. As set forth herein and throughout all of plaintiff/appellant’s briefs in this court and in the district court, said Order and Judgment conflicts with U.S. Supreme Court decisions regarding the dismissal of employment discrimination cases at summary judgment, including *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), *Teamsters v. United States*, 431 U.S. 324 (1977), and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).
3. As set forth herein and throughout all of the plaintiff/appellant’s briefs, said Order and Judgment conflicts with numerous 10th Circuit decisions regarding summary dismissal, including *Bullington v. United Air Lines, Inc.* 186 F.3d 1301, 1321 (10th Cir.

1999), (plaintiff raises a genuine issue of material fact when decisionmakers have made statements revealing retaliatory motives), *Corneveaux v CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996), (“a causal connection is established where the plaintiff presents evidence to raise the inference that her protected activity was the likely reason for the adverse action”), *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2001), (summary dismissal is precluded when plaintiff presents evidence—even circumstantial evidence—of a discriminatory motive), *McAlester v. United Air Lines*, 851 F.2d 1249 (10th Cir. 1988), (statistical evidence is probative of illegal intent), and *Kenworth v. Conoco, Inc.*, 979 F.2d 1462 (10th Cir. 1992), (a plaintiff is entitled to burden shifting upon “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”).

4. In his own motion for summary judgment and as a response to defendants’ motion for summary dismissal, appellant proffered five direct statements of illegal intent (summarized at Plaintiff/Appellant’s Opening Brief, page 16) and explained that the statements clearly conform to the statutory language of Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), which:

provides that an unlawful employment practice is established whenever race, color, religion, sex, or national origin was a motivating factor, even though other factors also motivated the practice. *Memo in Support of Plaintiff’s Motion for Summary Judgment, DOA 184, paragraph 60.*

5. At page 1 of his reply to defendants’ response to his motion for summary judgment (DOA 210), plaintiff explained the application of § 107 and its impact:

Section 107 is a *statute* that expressly specifies a condition of liability. It is not a legal precedent or landmark ruling, subject to re-interpretation or disregard. Plaintiff proved Section 107's condition of liability by proffering direct evidence that illegal reasons motivated defendants' actions at least in part.

6. Even so, the district court completely disregarded plaintiff's § 107 evidence and arguments. Addressing the district court's failure to even mention § 107, the panel wrote: "The district court did not directly address this argument. It may have rejected Cuenca's mixed motive analysis, however, based on its conclusion that he had presented no direct evidence of discrimination and retaliation." (Order and Judgment, page 8.) Is it routine practice for the 10th Circuit to make up reasons, *sua sponte*, for the district courts on appeal? Can an appeals court review a district court's finding that the district court did not make in the first place? The appeals court has no jurisdiction over a decision that was not made and should at the very least remand for a decision. (See *Tonnas v. Stonebridge* 78 Fed. Appx. 966, 968 (5th Cir. 2003) ("the courts' reasoning normally should appear, in some form, in the judicial record"), *Cavegn v. Twin City Pipe*, 223 F.3d 827, 831 (8th Cir. 2000) (case remanded for district court's ruling).)

7. At page 8, the appeals panel discredited appellant's citation of *Desert Palace* by saying that it wasn't the law at the time of the district court's decision. However, appellant did not rely on *Desert Palace*, but on Section 107, which has been the law since 1991. The Supreme Court's subsequent *Desert Palace* ruling merely clarified the simple, strict construction and application of its language to be followed by the lower courts, affirming the appellant's application of Section 107 in the instant case. Complying with Section 107, this appellant presented evidence of illegal motivating

factors and is entitled at the very least to a trial on the merits, if not summary judgment.

8. Additionally, the panel relied upon *Shorter v. ICG Holdings, Inc.* 188 F.3d 1204 (10th Cir. 1999) to justify disregarding appellant's evidence of illegal motivation, ruling that *Shorter* required that appellant needed direct evidence of discrimination in the 10th Circuit prior to *Desert Palace* and that plaintiff's evidence of illegal motivation is not direct evidence. Appellant pointed out in his Opening Brief (pg. 18), that under *Danville*, statements of illegal intent, even if only considered circumstantial evidence, are sufficient to preclude summary judgment (292 F.3d, at 1251).

9. On top of his Section 107 evidence, appellant proffered statistical evidence of a pattern and practice of discrimination and retaliation by defendants (detailed on pages 24-26 of his Opening Brief and on pages 14-16 of his Reply Brief), which this court and the Supreme Court have ruled is sufficient to preclude summary dismissal (*Hazelwood, Teamsters, McAlester*, and *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980).)

10. The panel disregarded the fundamental instruction that when considering motions for summary dismissal, the courts "must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence", per *Reeves, Anderson and Trujillo v. University of Colo. Health Sciences Ctr.*, 157 F.3d 1211 (10th Cir. 1998), *Curtis v. Oklahoma City Pub. Sch. Bd. Of Educ.*, 147 F.3d 1200 (10th Cir. 1998), *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257 (10th Cir. 1998), *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), and *Crawford v. Runyon*, 37 F.3d 1338 (8th Cir. 1994), *Shaw v. Valdez*, 819 F.2d 965 (10th Cir. 1987). The requirement that all inferences be drawn in the light most favorable to the party facing

dismissal is obviously one of the most basic tenets of summary judgment law. The 10th Circuit has very clearly ruled that:

It is fundamental that the jury must be permitted to decide from among the different inferences which might be drawn from the evidence.

Tomsic v. State Farm Mut. Auto Ins. Co., 85 F.3d 1472, at 1478 (10th Cir. 1996). In fact, two of the judges from this panel repeated this basic requirement in *Annett v. Univ. of Kansas*, No. 03-3069 (page 2), a decision released the same day as the instant decision. It's incomprehensible, then, that they stated on page 10 of the Order and Judgment in this particular case that, "The inferential burden runs the other way, however."

11. Two statements in particular from the Order and Judgment prove not only that the panel *expressly refused* to draw all necessary inferences for the plaintiff, but that their Order and Judgment contained unfounded criticism of the plaintiff's presentation of his appeal. On page 3, the appeals panel wrote:

[Cuenca] asserts that the district court failed to draw all necessary inferences in the light most favorable to him. He fails, however, to describe what specific inferences, based on specific evidence, that it should have drawn in his favor.

Then, on page 10, they wrote:

Cuenca argues that the University of Kansas' failure to disavow Hoy's statements should result in an inference that its decisionmakers took Hoy's comments into account when making their decision. *The inferential burden runs the other way, however*; Cuenca had the burden to link the outside reviewer's statement to the decision to deny tenure. (Emphasis added.)

This is unimpeachable proof, in the panel's own words, that they refused to conform to established law by drawing the necessary inferences that would protect plaintiff from dismissal. And their own words, on page 10, refute the panel's unfair page 3 accusation

that appellant did not provide specific arguments regarding inferences, referring directly to an instance in which he did. Later, on page 14, they cite another of appellant's arguments for a different specific inference that should have been drawn in his favor.

12. In the instance referred to on page 10, plaintiff had pointed out that evidence accepted by the Court showed that in documents presented in the tenure dossier of appellant, one reviewer—who, in the language of *Kenworth*, was undeniably one of the “persons involved in the decisionmaking process”—made statements of illegal animus. First, again splitting hairs, they ruled that this person who was “involved in the decisionmaking process” was not a decisionmaker. Even if he wasn't, if the Court were to draw an inference from that evidence in the light most favorable to the appellant, that inference would be that the presence of the statements in the dossier and the University's failure to refute it was evidence that the statements were accepted and considered by the decisionmakers (as the Supreme Court did in *Price Waterhouse*.) But the appeals panel inferred instead that the other decisionmakers would have ignored the statements in the dossier. That's an inference for defendants. Then the panel actually ruled that the plaintiff needed to prove something the court is clearly required to infer.

13. At page 13, the panel rationalized all of the retaliatory acts against appellant by parroting defendants' argument that appellant deserved their animus. Defendants did not introduce this argument until their summary judgment reply, and the district court allowed plaintiff a Surreply (DOA 214) because of the new issue. In this surreply (DOA 215), appellant pointed out how the 10th Circuit has previously ruled that late introduction of new and subjective reasons for their actions constitutes additional

proof of adverse employment actions and pretext, and that accusations of being a troublemaker constitute adverse employment actions. And most importantly, they directly connected their animus and retaliatory actions to plaintiff's protected opposition, thereby establishing an unlawful employment practice under § 107. Defendants' evidence for this argument is feeble, to say the least. They presented two newspaper columns/letters that were written after the last of the actions in this case and another that's an email written after plaintiff's tenure review, so those could not possibly have motivated or justified defendants' prior actions. The only one they submitted that occurred during the case isn't even a statement by plaintiff, it's Frederickson's own subjective insult in an email. Defendants didn't allege or argue that the examples of plaintiff's opposition were disruptive or extreme, which are requirements of unreasonable opposition under *Robbins* (186 F.3d 1253 (10th Cir. 1999)). Additionally, the denial of protection for unreasonable opposition only applies to specific instances of unreasonable opposition in the cases cited by this court in *Robbins*. Consequently, even if a court found that plaintiff's opposition was unreasonable in the circumstances proffered here by defendants, only those instances would be unprotected; all of this plaintiff's valid internal and external grievances and the filing of this lawsuit are protected activities. Also, contrast the panel's uncritical acceptance of the unsupported, illogical, and self-serving subjective negatives in defendants' arguments here with their page 11 rejection of the legal implications raised by plaintiff's uncontroverted evidence of decisionmaker Frederickson's threat of retaliation and his public condemnation of plaintiff's civil rights activism. Again, they've made credibility

determinations and drawn inferences for the defendants and against the plaintiff.

14. On pages 14-18, the panel constructed a convoluted refutation of the significance of Gentry's actions and on page 17 blatantly misrepresenting Gentry's sworn testimony. To justify their disregard of Gentry's lie to the other decisionmakers that plaintiff didn't have even the one single peer-reviewed work that is the sole research/creative requirement for tenure in the J-School, they wrote:

Contrary to Cuenca's claim in his affidavit, Gentry did not admit at his deposition that the Lowell Thomas Travel Journalism award was a peer-reviewed award; instead, he only said "it could be peer reviewed in a sense." (V R. doc 186, ex. 102, at 4 (depo at 175).)

But that's obviously not a straight answer, so he was asked again (on the same page of the deposition): "was that an award that was reviewed by journalism faculty peers?" And he responded, "Yes." In fact, on page 177 of that deposition he's asked the same question about plaintiff's second national award and he clearly admits that it was peer reviewed, too. Making credibility determinations supposedly forbidden at this stage, ignoring this evidence, the panel also accepted and relied on Gentry's self-serving undervaluing of appellant's national awards and go to great lengths to explain away his actions, making determinations of the import, impact, and his intent, again in violation of their basic instruction not to weigh evidence or make credibility determinations.

15. As for their frequent criticism of appellant's presentation of his case, he filed a motion for summary judgment that conformed to the 40-page limit, accompanied by a carefully organized dossier. The supporting materials were organized in order of their reference in the briefs, accompanied by separate sections each with a table of contents,

with each page numbered consecutively and also by exhibit number and page, for a total of 645 numbered pages (defendants' appeal brief, page 27). He presented a detailed listing of the relevant facts of the case, each supported by a reference to one or more documents in the record, supported by an affidavit detailing the context and his knowledge of the origins of the evidence. He listed the evidence of pattern and practice, the statistical evidence of discrimination and the prior cases against defendants, all referenced to specific documents and/or case numbers. He listed and detailed the 12 causes of action, clearly and specifically citing the statutory basis for each cause of action, referencing specific relevant documents in the record and specific citations of controlling law for each cause of action and argument.

16. In district court, defendants presented 360+ pages of supporting materials. According to the docket, they submitted 815 pages on appeal. In the course of these proceedings, then, defendants have submitted more than 1000 pages of exhibits, while plaintiff has submitted approximately 800. They filed a motion for summary judgment that exceeded the allowed page count (as they acknowledged in their appeal brief, page 28) and an affidavit by defendant Kautsch that contained an obviously false statement; mistakes that required additional briefing and rulings to resolve. They filed an appeal brief the court found deficient and two motions for extension of time, which are supposedly disfavored by this court. Singling out the appellant for reproach (Order and Judgment, page 1), when in fact appellees submitted more pages of documents and failed to follow the courts' rules, further exemplifies the panel's bias for defendants.

17. On appeal, appellant submitted two Form A-12 briefs, of 35 and 17 pages.

Throughout these two appeal briefs, notwithstanding the panel's unfair accusation that they would have to "comb the record" for plaintiff's arguments (Id., page 4), appellant clearly detailed the legal issues and arguments pertaining to each specific argument, piece of evidence, and legal authority. The detailed and specific arguments regarding the application of the direct evidence of illegal motive runs from pages 13-20 of the Opening Brief, followed on page 21 with detailed arguments concerning the inferences and on page 24 with the arguments regarding the additional statistical and documentary evidence of discrimination, retaliation, and pattern and practice. At page 26, appellant addressed the district court's failure to follow *Price Waterhouse*. Specific preclusions of summary dismissal are further detailed in Appellant's Reply Brief, from page 3-13. Starting at page 14, appellant detailed the specific evidence that was disregarded by the district court and the authorities relied upon. That specificity and detail has been disregarded as the district court and the appeals panel both reverted to unfounded and undeserved ad hominem attacks on the appellant and on his presentation of the case.

18. Also pointing to the existence of a protective bias in favor of the University is the appeals panel's disregard of the uncontroverted evidence of and this court's own acknowledgement of multiple similar problems with these defendants (as detailed in plaintiff's memo in support, DOA 184, pages 6-11). How could the court ignore that it had to overturn a jury verdict to protect these defendants in *Aquilino*, a case in which the court acknowledged these defendants' undisputed retaliatory conduct:

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). One of the judges on the panel for this case (Ebel) was also on that *Aquilino* panel. Further, how could the court ignore its own foretelling of the defendants' unethical conduct in *Tonkovich*:

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.

Tonkovich v. Kansas Board of Regents, 159 F.3d 504 (10th Cir. 1998). On the same day the appeals panel's decision in this case was released, the court also released the decision in another civil rights case against these defendants, *Annett v. University of Kansas* (No. 03-3069), which also revealed evidence of retaliatory conduct by these defendants. Two of the judges on the panel for this case (Baldock, Lucero) were also on the *Annett* panel. Judge Lucero wrote the decisions in both cases. One of the judges on the *Annett* panel (Seymour) was also on the panel that recently considered the appeal in *Dr. Karin Pagel Meiners v. University of Kansas*, (No. 02-3376), which also included evidence of retaliatory conduct. But somehow, the court has remained prejudicially blind to the ongoing pattern and practice of discrimination, unlawful employment decisions and retaliation—particularly the retaliation—by the administration of the University of Kansas, proven in the mounting uncontroverted evidence the court has accepted in numerous cases and acknowledged in prior decisions.

19. In light of this obvious deference to defendant University of Kansas and the discernible, unwarranted disparagement of plaintiff/appellant and his case, the influence of Chief Judge Deanell Reece Tacha and the large number of KU graduates in the

district of Kansas over these decisions cannot be discounted. (Plaintiff/Appellant earlier objected to the venues of the district of Kansas and the 10th Circuit for this reason, as explained in his Opening Brief, at page 33.) As a former law professor, associate dean, associate vice chancellor, and vice chancellor at the University of Kansas, a recent officer of their alumni and endowment associations, and a named defendant in one civil rights case against the University of Kansas (*Willner v. Budig*, 848 F.2d 1032), she has too close of a connection to these defendants and too much of a direct interest in the University's well-being for this potential bias to be disregarded. She should not be involved in any way in the disposition of these cases, neither in decisions, assignments of panels, nor even in the voting for this petition. Beyond any direct involvement, her indirect influence over the courts' perceptions and protective bent in favor of the University is immeasurable. This court should be diligent in analyzing all decisions involving the University for warning signs of what may very well be unconscious bias and/or prejudice in favor of their chief judge's former employer. The dismissal of this case has been made and affirmed with subjective determinations and plaintiff-averse inferences, misrepresentations of evidence and in drastic conflict with basic summary judgment law. That should raise red flags of warning for every member of this court that a bias for the University infected the decisions.

Conclusion

20. Appellant's appeal was simple and straightforward. He asked the 10th Circuit to uphold its own law, the law of the U.S. Supreme Court, the laws and statutes of the United States, and the plaintiff's Constitutional rights in these specific ways: (1)

requiring the district court to draw all inferences in the light most favorable to the plaintiff when considering summary dismissal; (2) requiring the district court to accord requisite weight to the direct statements of illegal intent/animus; and (3) requiring the district court to accord requisite weight to the statistical and other evidence of discrimination, illegal employment actions and the pattern and practice of retaliation. All of these requests conform to and were supported by properly cited controlling law.

21. Instead, the district court and the appeals panel held this plaintiff/appellant to an unattainable standard for a plaintiff in a civil rights case. The plaintiff in this case proffered written statements and sworn corroboration of illegal motivation that is directly connected to the incidents and actions of the case, as well as statistical and pattern and practice evidence, fulfilling the evidentiary requirements of Section 107, *Price Waterhouse, Hazelwood, Desert Palace, Reeves*, and other controlling law. The district court and the appeals panel dismissed all of this evidence as being of no significance whatsoever. Against that standard, no plaintiff could hope to withstand a motion for summary dismissal. If such evidence is not sufficient to withstand summary judgment, what evidence would be, short of signed affidavits admitting discrimination?

22. Plaintiff/appellant submitted and supported twelve causes of action in this case, any one of which should have been sufficient to preclude summary judgment. The twelve causes of action, detailed from pages 18-40 of Plaintiff's Memo in Support of Summary Judgment (DOA 184) include (1) hostile workplace; (2) the tainting of the tenure review; (3) denial of plaintiff's civil rights in the hiring of a New Media Leader; (4) unauthorized, discriminatory and retaliatory dismissal proceedings against plaintiff

long before tenure review; (5) the deliberate indifference of the University administration; (6) retaliatory suspension of internal complaint process, (7) retaliatory false evaluations of plaintiff; (8) an unauthorized “special review” of plaintiff; (9) the denial of plaintiff’s civil rights in the hiring of a General Manager of the Integrated Media Lab; (10) Frederickson’s retaliatory front page editorial attacking plaintiff’s civil rights activism; (11) discriminatory and retaliatory application of disciplinary proceedings against plaintiff; and (12) a discriminatory and retaliatory low salary increase given plaintiff. Each of those causes of action was detailed and supported by references to specific documentary evidence and relevant controlling law. The statements of illegal intent connected directly to numerous of these actions by defendants established them as unlawful employment practices, per Section 107. Additionally, as plaintiff has asserted from the outset of these proceedings, the evidence of past unlawful conduct, the statistical verification of discrimination in defendants’ workplace, defendants’ OFCCP-verified prior lack of compliance with civil rights employment law and AAUP-verified violations of faculty employment rights all are sufficient supporting evidence of intent and pretext to preclude summary dismissal.

23. Even though the district court and the appeals panel criticized the structure and content of the appellant’s pleadings, both courts fully accepted the relevant facts upon which plaintiff based his case, then disregarded and/or dissembled. The uncontroverted evidence accepted by these two courts establishes that:

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.

Plaintiff/Appellant’s Opening Brief, page 28. Supposedly, this court must accept the evidence in that context and is obliged/required/ordered by Supreme Court law and its own law to draw the necessary inferences that would protect the plaintiff from dismissal:

In this review, we have oft reminded that all inferences arising from the record before us must be drawn and indulged in favor of the party opposing summary judgment. *O’Shea*, 185 F.3d at 1096. “In this respect, we must view the evidence in context, not simply in its segmented parts.” *Id.* That is, given the allegations of the complaint, “we must examine the totality of the circumstances, including ‘the context in which the alleged incidents occurred.’” *Id.* (citation omitted).

McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 921 (10th Cir. 2001).

Additionally, as detailed by plaintiff throughout the case, defendants and others involved in the different “decisionmaking processes” expressed illegal animus toward the plaintiff for his civil rights activism and/or for his civil rights complaints, establishing unlawful employment practices, per Section 107. Summary judgment is precluded.

Appellant’s Seventh Amendment rights are imperiled.

Respectfully submitted,

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