

No. 02-3376

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. KARIN PAGEL MEINERS, PH.D.

Plaintiff-Appellant,

vs.

UNIVERSITY OF KANSAS,
CHANCELLOR ROBERT HEMENWAY,
in his official capacity, and
PROVOST DAVID SHULENBURGER,
in his official capacity,

Defendants-Appellees

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

The Honorable Kathryn H. Vratil
District Court No. 01-2354-KHV

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT
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PRIOR APPEALS

There are no prior appeals to this action.

STATEMENT OF JURISDICTION

This is an employment case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and under 42 U.S.C. §1983. The plaintiff, Dr. Karin Pagel Meiners, Ph.D., was employed as a tenure-track assistant professor by the defendant, the University of Kansas, from August of 1992 through May of 2001. The plaintiff contends that the University violated Title VII by taking adverse employment actions against her in retaliation for her participation in protected activities. The plaintiff further contends that University officials violated §1983 by depriving the plaintiff of her property interest in her continued employment without procedural due process.

On September 16, 2002, the district court filed a memorandum and order, granting summary judgment in favor of the defendants on both of the plaintiff's theories of recovery. (Aplt. App. at 121-161) On the same day, judgment was formally entered in favor of the defendants. (Aplt. App. at 162) On October 11, 2002, the plaintiff filed a timely notice of appeal pursuant to Fed.R.App.Pro. 4(a)(1). (Aplt. App. at 163) The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Does a genuine issue of material fact exist as to the plaintiff's retaliation claim under Title VII?
2. Does a genuine issue of material fact exist as to the plaintiff's due process claim under §1983?

STATEMENT OF THE CASE

The following facts are stated in the light most favorable to the plaintiff, who is the party opposing the entry of summary judgment. For the sake of convenience, those facts which are truly undisputed are taken from the district court's memorandum opinion. (Aplt. App. at 122-135)

I. Plaintiff's Employment Agreement

In August of 1992, the plaintiff signed a written notice of appointment, and began working for the University of Kansas as a probationary tenure-track assistant professor for the academic year which ran from August of 1992 to May of 1993. (Aplt. App. at 48, 122) The plaintiff's employment contract appointed her as Assistant Professor of Germanic Languages and Literature, and specifically stated that her appointment was "subject to all provisions...of the regulations, policies, minutes and resolutions of the Board of Regents and the University of Kansas." (Aplt. App. at 48. Emphasis added.) In regard to tenure, the plaintiff's employment contract further stated:

It is hereby stipulated that final tenure review and decision will occur no later than the 6th year of full-time teaching (or library service) at the University of Kansas. Tenure will accrue after 7 years of full-time teaching (or library service) unless notice to the contrary is provided in accordance with University and Board of Regents regulations on advance notice of non-reappointment.

(Aplt. App. at 48. Emphasis added.)

Robert Hemenway, Chancellor of the University, has the final decision whether to grant promotion and tenure. David Shulenburger, University Provost,

oversees all matters relating to academic affairs. He is responsible for granting leave to tenure-track faculty members, and he also independently recommends to the Chancellor whether promotion and tenure should be granted. Since 1993, the Chancellor has always followed the Provost's recommendations on those issues. (Aplt. App. at 122-123)

II. Regulations And Policies Governing Tenure

The Kansas Board of Regents is the governing body of the University, and the University derives most of its authority from the Board of Regents. The University is subject to the Board of Regents' rules, regulations, and policies. Since 1947, the Board of Regents has adopted written rules, regulations, and policies governing tenure. (Aplt. App. at 123) These tenure regulations are based on the 1940 Statement of the American Association of University Professors ("AAUP"), and amended in 1980, 1981, and 1982. (Aplt. App. at 50-52, 123) In 1992, when the plaintiff received her initial appointment, the Board of Regents' tenure regulations stated in relevant part:

After the expiration of a probationary period, teachers...should have permanent or continuous tenure, and their services should be terminated only for adequate cause....

Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education.... Notice should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period.

(Aplt. App. at 50-51. Emphasis added.)

The Board of Regents' rules, regulations, and policies also governed notice for the non-reappointment of faculty members. In relevant part, those policies in 1992 provided that "[p]rior to the time that a faculty member attains continuous tenure, termination may be effected by administrative action, provided timely notice is given." (Aplt. App. at 53, 124) In the plaintiff's case, the University was required to send notice of non-reappointment at least twelve months before the expiration of her probationary period. (Aplt. App. at 124) According to the AAUP's 1970 Interpretative Comments, the effect of the notice provision is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is unfavorable, the appointment for the following year becomes a terminal one. (Aplt. App. at 104, 124)

The Provost testified that consistent with AAUP guidelines, the University must decide at the end of a faculty member's sixth year of full-time service whether to terminate the employment relationship or grant tenure. He explained that the "six-year period of time gives you the opportunity to look at performance and make judgments about the future so that you don't make a wrong decision when you move someone into a permanent faculty position." (Aplt. App. at 124-125)

When a faculty member is granted tenure, it is tantamount to a lifetime commitment of employment. (Aplt. App. at 53) A tenured faculty member may only be terminated after a hearing. (Aplt. App. at 125)

III. Plaintiff's FMLA Leave In The Fall of 1994

In August of 1993, the State of Kansas promulgated a policy for implementing the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2615, for all state employees. (Aplt. App. at 126) In September of 1993, the University issued a memorandum to faculty summarizing the application of the State's policy. The memorandum stated that if FMLA leave was approved, employees were entitled to 12 workweeks of leave during a 12-month period, and that leave could also be granted on an irregular or reduced work schedule basis. (Aplt. App. at 84, 126) The memorandum further provided: "Upon return from family and medical leave, an employee is guaranteed that he/she will be returned to the same or equivalent position." (Aplt. App. at 85)

In March of 1994, the plaintiff requested and received part-time FMLA leave to care for her three-month-old child. The plaintiff's leave consisted of a 40% reduced work schedule from August 22 to December 8, 1994, which the plaintiff covered by using 173.5 hours of paid sick leave and 62.9 hours of unpaid leave, for a total of 5.97 work weeks. (Aplt. App. at 126-127)

The plaintiff's FMLA leave was approved by her department chair, Dr. William Keel. (Aplt. App. at 101) Dr. Keel did not seek prior approval from the Provost before granting the plaintiff's request for FMLA leave. (Aplt. App. at 70,

73) According to Dr. Keel, the plaintiff's FMLA leave was structured so that the plaintiff did not go below 100% FTE (full-time employment). (Aplt. App. at 71) The plaintiff specifically told Dr. Keel that she did not want to go below 100% FTE. (Aplt. App. at 70, 72) Provost Shulenburger testified that a faculty member on paid sick leave continues to be on full-time service, saying:

They're simply on sick leave during that period, being paid for sick leave. I think they would continue to be on the payroll and continue to be full-time while they were being paid for their sick leave.

(Aplt. App. at 78, 127. Emphasis added.)

In July of 1994, after the University had approved the plaintiff's request for FMLA leave but before the leave commenced, the plaintiff received an annual notice of continuing appointment for the 1994-95 academic year. (Aplt. App. at 127) This notice of continuing appointment was signed by then-Chancellor Gene Budig, and it stated that the plaintiff's appointment was "1.00 FTE." (Aplt. App. at 88) Chancellor Hemenway testified that an annual notice stating that the appointment was "1.00 FTE" indicates full-time employment, unless there were other notes on the notice that would indicate otherwise. (Aplt. App. at 69A, 69C) The Chancellor further testified it is the University's custom and practice that, if a faculty member is not on a full-time appointment for a semester or for a year, that fact will be noted on the annual notice of appointment. (Aplt. App. at 69C)

On February 10, 1995, Dr. Keel wrote a letter to Dr. Shulenburger, who was then Vice Chancellor of Academic Affairs, stating that the plaintiff had been

permitted to reduce her appointment by 60% in the fall semester of 1994 for FMLA leave, but that she had resumed full-time duties. The letter did not request an extension of the date for the plaintiff's mandatory tenure review. (Aplt. App. at 128) On March 15, 1995, however, Dr. Shulenburg wrote a letter to the plaintiff, indicating that the date for her mandatory tenure review would be extended. (Aplt. App. at 128) This letter stated:

I understand that your appointment during this period was reduced to 60 percent with your return to full-time status beginning spring 1995 semester.

Under our tenure regulations, part-time service does not count toward the probationary period. Therefore, the date of your mandatory review for tenure has been adjusted to reflect this change in status. The review must occur no later than 1998-99 academic year.

(Aplt. App. at 54. Emphasis added.) The plaintiff did not know whether the statements made by the Provost in his letter of March 15 regarding tenure were true, or whether the Provost had the authority to make those statements. (Aplt. App. at 113-114)

The Provost's letter of March 15 was contrary to the Board of Regents' regulations governing tenure. In 1995, the Board of Regents' regulations did not permit the extension of the date for a faculty member's mandatory tenure review. (Aplt. App. at 50-51) The Provost conceded in his deposition that prior to September of 1997, the universities governed by the Board of Regents could not extend the probationary period for a tenure-track faculty member beyond seven years of full-time service. (Aplt. App. at 76, 77)

The Provost's letter of March 15 was also contrary to the practices of the University and the understanding of the parties, since the plaintiff's appointment during the fall semester of 1994 was not "reduced to 60 percent" and thus was not "part-time service". Dr. Keel testified that the plaintiff's FMLA leave was structured so that the plaintiff would not go below 100% full-time employment. (Aplt. App. at 71, 72) Furthermore, the plaintiff's annual notice of appointment for the 1994-1995 academic year stated that her appointment was "1.00 FTE". (Aplt. App. at 88) In addition, all but 62.9 hours of the plaintiff's FMLA leave was paid sick leave. (Aplt. App. at 127) The Provost testified that when a faculty member takes paid sick leave, the faculty member continues to be on full-time service. (Aplt. App. at 78, 127) For these reasons, the plaintiff's appointment during the fall semester of 1994 constituted full-time service, not part-time service.

Even assuming that the plaintiff's appointment during the fall semester of 1994 only constituted part-time service, the Provost's letter of March 15 was still contrary to the University's FMLA policy. The memorandum issued by the University in September of 1994 specifically stated that upon return from FMLA leave, "an employee is guaranteed that he/she will be returned to the same or equivalent position." (Aplt. App. at 85) Since the plaintiff was in a tenure-earning position prior to the fall semester of 1994, she automatically returned to her tenure-earning position at the beginning of the spring semester of 1995. Consequently, the extension of the plaintiff's probationary period for one full

academic year, instead of for one semester, was contrary to the University's FMLA policy.

IV. Plaintiff's Reduced Appointment In the Fall of 1997

Over two years after the plaintiff had completed her FMLA leave in the fall of 1994, the University adopted a written policy regarding interruption of the probationary period for tenure-track faculty members. (Aplt. App. at 94-97) The purpose of this policy, which was adopted on January 23, 1997, was "to provide the faculty member a period of time that is not included in the probationary period" to address specific personal circumstances. (Aplt. App. at 95) The policy adopted by the University on January 23, 1997, included a section governing leave under the FMLA. That section stated in relevant part:

Faculty members granted full-time family medical leave for three consecutive months who are untenured, and not on a terminal appointment, will be granted an extension of the tenure clock for one year. However, the approval of a request for Family Medical Leave by the Department of Human Resources will not automatically extend the tenure clock. A separate request must be submitted to the Office of the Provost.

(Aplt. App. at 95, 125-126. Emphasis added.)

The policy adopted by the University on January 23, 1997, also included a section governing part-time appointments. That section stated in relevant part:

Part-time service to the University in teaching, research, and administration does not count toward tenure. Reductions in appointments require prior approval by the Provost. Such reductions may be granted when it is in the best interest of the University. Appointment reductions remove the faculty member

from the tenure-earning position. A faculty member previously in a tenure-earning position who enters into a reduced appointment may automatically reenter the tenure-earning position if he or she returns to full-time status within one academic or calendar year of the beginning of the reduced appointment. A faculty member who does not return to full-time status within one year will be issued a term appointment....

Time accrued toward the probationary period before the reduction in appointment will be counted toward the probationary period when the individual reenters a tenure-track position. The resulting total probationary period will not exceed seven years.

(Aplt. App. at 96, 126. Emphasis added.)

On March 3, 1997, the plaintiff sent a letter to Dr. Keel, requesting a reduction of 40% in her appointment for the fall semester of 1997, due to the death of her husband. In her letter, the plaintiff stated: "It is...my understanding that taking this reduction will automatically postpone the mandatory tenure review by one year." (Aplt. App. at 55) Dr. Keel suggested to the plaintiff that she include this sentence in her letter. (Aplt. App. at 114)

On March 28, 1997, Provost Shulenburger sent a letter to the plaintiff, approving her request for a reduction in her appointment for the fall semester of 1997. The Provost's letter stated in part:

W]e[have adjusted the date of your mandatory review for tenure to reflect this change in status. The review must occur no later than the 1999-2000 academic year.

(Aplt. App. at 56. Emphasis added.) The plaintiff did not know whether the statements made by the Provost in his letter of March 28 regarding tenure were

true, or whether the Provost had the authority to make those statements. (Aplt. App. at 113-114)

The Provost's March 28, 1997, extension of the plaintiff's probationary period for one full academic year, instead of for one semester, was contrary to the University's policy of January 23, 1997, regarding reductions in appointments. The University's policy specifically states that a faculty member who enters into a reduced appointment "may automatically reenter the tenure-earning position if he or she returns to full-time status within one academic or calendar year of the beginning of the reduced appointment." (Aplt. App. at 96. Emphasis added.) The University's policy further states that the "resulting total probationary period will not exceed seven years." (Aplt. App. at 96. Emphasis added.) Therefore, under the University's policy, the plaintiff automatically reentered her tenure-earning position at the beginning of the spring semester of 1998, and the spring semester of 1998 counted towards the plaintiff's total probationary period of seven years.

The Provost's March 28, 1997, extension of the plaintiff's probationary period for one full academic year was also contrary to the Board of Regents' regulations governing tenure. In March of 1997, the Board of Regents' regulations did not authorize any extension of a faculty member's probationary period. (Aplt. App. at 50-51) On September 18, 1997, however, the Board of Regents amended its regulations governing tenure by adding the following sentence at the end of the regulations:

Under unexpected special and extenuating circumstances, prior to the sixth year of service, and at the request of the faculty member and the appropriate dean, the Chief Academic Officer of the university may grant an extension of the tenure clock for a maximum of one year.

(Aplt. App. at 98-99) Provost Shulenburg conceded in his deposition that prior to September of 1997, the universities governed by the Board of Regents could not extend the probationary period for a tenure-track faculty member beyond seven years of full-time service. (Aplt. App. at 77)

V. Plaintiff's Requests For Graduate Faculty Status And For Tenure By Default

During the 1999-2000 academic year, the University considered the plaintiff for merit-based tenure and promotion to associate professor. (Aplt. App. at 129) The University decided to deny tenure and promotion, however, and in March of 2000 the plaintiff received a notice of non-reappointment and a terminal contract for the 2000-2001 academic year. (Aplt. App. at 57, 129) In September of 2000, the plaintiff made a self-nomination of promotion and tenure, asking the University to rescind its notice of non-reappointment. (Aplt. App. at 129)

As a result of her terminal contract, the plaintiff was no longer eligible for regular membership on the graduate faculty. The plaintiff had one graduate student who was enrolled for the fall semester of 2000, however, and Dr. Keel requested that the plaintiff's graduate faculty status be extended through that semester. On October 26, 2000, the University approved this request. (Aplt. App. at 129)

On September 26, 2000, the plaintiff filed an administrative complaint with the Kansas Human Rights Commission ("KHRC"). The plaintiff's charge generally complained of her feeling that since her employment in May of 1992, she had been subjected to continuous discrimination. Dr. Keel learned of the plaintiff's charge sometime in October of 2000. (Aplt. App. at 129-130)

On December 1, 2000, the Provost informed the plaintiff that any further request to extend her graduate faculty status must originate with her department, and receive the endorsement of the Dean of the College of Liberal Arts and Sciences. (Aplt. App. at 82, 130) On January 2, 2001, the plaintiff asked Dr. Keel to extend her graduate faculty status through the spring semester of 2001, so that she could continue to work with her graduate student, who intended to enroll in six thesis hours in the spring semester. (Aplt. App. at 82, 130) Dr. Keel agreed to present the plaintiff's request to the department's Promotion and Tenure Committee, which consisted of himself and Professors Leonie Marx, Frank Baron and Ernst Dick. (Aplt. App. at 130)

Dr. Keel testified that he did, in fact, present the plaintiff's request for an extension of her graduate faculty status to the Promotion and Tenure Committee, and that the Committee unanimously decided not to endorse the request. (Aplt. App. at 70, 74) However, two members of the Committee -- Professor Baron and Professor Dick -- testified in their depositions that they could not recall any meeting of the Committee in January of 2001 to consider or discuss the plaintiff's request for an extension of her graduate faculty status. (Aplt. App. at 66, 67, 68,

69) Nevertheless, on January 19, 2001, Dr. Keel advised the plaintiff that the Committee had unanimously decided not to endorse her request, and that as far as the department was concerned, the matter was closed. (Aplt. App. at 131)

On January 29, 2001, the plaintiff requested Dr. Keel to endorse her application for a travel grant from the International Travel Research Fund. (Aplt. App. at 117) The next day, Dr. Keel sent a letter to the plaintiff, refusing to endorse her application for the international travel grant. (Aplt. App. at 117) In his deposition, Dr. Keel testified that it was his understanding the plaintiff was not eligible for the travel grant because she did not have graduate faculty status. (Aplt. App. at 70, 75)

On February 6, 2001, the plaintiff filed an administrative charge with the Equal Employment Commission ("EEOC"), alleging discrimination and retaliation by the University. (Aplt. App. at 131) The University was required by the EEOC to file a position statement responding to the plaintiff's charge by March 7, 2001. (Aplt. App. at 105) Provost Shulenburger testified that, based on the University's custom and practice, it is likely that he was consulted about the University's response to the plaintiff's charge. (Aplt. App. at 76, 79, 132) On April 24, 2001, the EEOC issued a "Dismissal and Notice of Rights" letter, which stated that the EEOC had found no violation of any non-discrimination statute, but advised the plaintiff of her right to sue. (Aplt. App. at 132-133)

On May 4, 2001, the plaintiff wrote the Provost, alleging that the extension of her probationary period in 1994 and 1997 involved administrative errors, and

that she was entitled to tenure. (Aplt. App. at 58-59, 133) Specifically, the plaintiff asserted that the University had erroneously extended her probationary period for one year, rather than one semester, on account of each one-semester leave of absence. The plaintiff calculated that with a one-year extension, her probationary period expired in May of 2000. Since she had not received notice of non-reappointment 12 months prior to that date, the plaintiff asserted that she was entitled to tenure by default. (Aplt. App. at 58-59, 133) The plaintiff concluded her letter by saying:

In order to correct the errors in my case and to be in congruence with Regent's Policy and AAUP guidelines, the only honorable thing would be to retroactively grant me tenure as of 1999-2000. I hereby respectfully make this request.

(Aplt. App. at 59, 133)

In support of her position that she was already entitled to the protections of tenure, the plaintiff enclosed two documents along with her May 4 letter to Provost Shulenburger. (Aplt. App. at 59, 133) The first document was a letter from Dr. Martin Snyder, the Associate Secretary of the AAUP. (Aplt. App. at 106-107, 133) In his letter, Dr. Snyder summarized his assessment of the plaintiff's situation as follows:

By Association standards, you are completing the ninth year of full-time service at the University of Kansas, and are, therefore, entitled to all the protections of tenure....If the administration asserts that the tenure clock stops during a leave of absence, it is reasonable to argue that the two semesters should be added together to constitute one year of leave.

(Aplt. App. at 106-107, 133. Emphasis added.)

The other document which the plaintiff enclosed with her May 4 letter to the Provost was a 1973 newspaper article, indicating that eleven faculty members at the University had received tenure in the spring of 1973 as a result of administrative errors. (Aplt. App. at 59, 133) According to the plaintiff's analysis, these administrative errors involved miscalculation of the faculty members' probationary periods. (Aplt. App. at 59, 133)

On May 18, 2001, the Provost sent the plaintiff a letter, rejecting her claim of tenure by default. (Aplt. App. at 60-63, 134) The Provost's letter indicated that for each leave the University had added a year, rather than a semester, because the University had an annual schedule for promotion and tenure review, and "[i]n order for your review to be conducted within the designated cycle, the adjusted date for your mandatory review reflected a full year in response to your initial request [for leave]." (Aplt. App. at 134) Regarding the newspaper article, the Provost enclosed a report about the 1973 incident by his assistant, Jeanette Johnson, and advised that "there is no similarity between your circumstances and those that obtained in 1973." (Aplt. App. at 63, 134)

According to Ms. Johnson's report (Aplt. App. at 108-112), the tenure class of 1973 had been hired under a five-year probationary period, during which period the University adopted a new seven-year probationary period. In addition, several members of the tenure class of 1973 had been hired as "acting" assistant

professors, and it was not clear whether time served in an "acting" capacity counted towards the probationary period. (Aplt. App. at 134) Ms. Johnson summarized the University's response to this situation as follows:

Upon review of the circumstances, the University Counsel determined that persons who had come to the University as acting assistant professors on full-time appointments, had served five years, and had not been given written notice of non-reappointment before the end of the fourth year of service had gained tenure by default. In the spring of 1973, there were about a dozen faculty members who fell into this category, and they were notified that they had gained tenure.

(Aplt. App. at 111. Emphasis added.)

The Provost's letter of May 18, 2001, to the plaintiff was contrary to the practices and policies of the University. Chancellor Hemenway testified that the annual notices of appointment, signed by both the Chancellor and a tenure-track faculty member, are directly related to the gaining of tenure. He explained that "when you have had seven annual appointments at full-time status, then you have ended your probationary period." (Aplt. App. at 69A, 69B)

The plaintiff received eight annual notices of appointment, signed by the Chancellor, from July of 1992 through July of 1999. (Aplt. App. at 86-93) Only one of these annual notices of appointment -- the one dated July 1, 1997 -- indicates an appointment for less than "1.00 FTE." (Aplt. App. at 91) Accordingly, at the very latest, the plaintiff completed her seven-year probationary period in May of 2000. This in turn means that the plaintiff gained tenure in May of 2000, since she did not receive her notice of non-reappointment

until March 24, 2000 -- less than one year prior to May of 2000. (Aplt. App. at 57, 129)

The Provost's letter of May 18 to the plaintiff was also contrary to the Board of Regents' regulations governing tenure. The Board of Regents' regulations only authorize the extension of a faculty member's probationary period one time for a maximum of one year. (Aplt. App. at 99) Furthermore, the Board of Regents' tenure regulations state that "the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education...." (Aplt. App. at 50, 99) According to Dr. Elmer Hoyer, the phrase "full-time service," as used in the Board of Regents' regulations, means full-time service calculated on a semester-by-semester basis, rather than on a year-by-year basis. Dr. Hoyer is the former President of the Faculty Senate at Wichita State University, and Past President of the AAUP Kansas Conference. (Aplt. App. at 80-81) Dr. Hoyer's interpretation is similar to the interpretation advanced by Dr. Martin Snyder, the Associate Secretary of the AAUP. (Aplt. App. at 106-107, 133)

VI. Proceedings In The District Court

The University terminated the plaintiff's employment on May 19, 2001, at the end of her terminal contract. (Aplt. App. at 135) The plaintiff filed this lawsuit on July 20, 2001, asserting two basic claims. (Aplt. App. at 135) The first claim is against the University for violation of Title VII, 42 U.S.C. §2000e, et seq. The plaintiff contends that the University took adverse employment actions against

her in retaliation for her participation in proceedings before the KHRC and the EEOC. (Aplt. App. at 30, 33-34)

The second claim is against Chancellor Hemenway and Provost Shulenburger, in their official capacities, for violation of 42 U.S.C. §1983. The plaintiff contends that the Chancellor and the Provost deprived her of her property interest in her continued employment without procedural due process, in violation of the Fourteenth Amendment. The plaintiff seeks only injunctive and declaratory relief under her §1983 claim. The plaintiff seeks an order declaring that the defendants have violated her constitutional right of due process, and enjoining the defendants to restore the plaintiff to her previous position as a tenured faculty member at the University. (Aplt. App. at 18-19, 34-35, 38)

The district court granted summary judgment in favor of the defendants on both of the plaintiff's theories of recovery. In regard to the plaintiff's Title VII claim, the district court concluded that the plaintiff has failed to establish a prima facie case, and further has failed to demonstrate a triable issue as to pretext. (Aplt. App. at 140-153) In regard to the plaintiff's §1983 claim, the district court concluded that the plaintiff has failed to show that she had a legitimate expectation of continued employment as a tenured faculty member, based on an implied-in-fact contract of employment. (Aplt. App. at 155-161)

ARGUMENTS AND AUTHORITIES

This court reviews a district court's grant of summary judgment de novo to determine whether there is a genuine issue as to any material fact, and whether

the moving party is entitled to judgment as a matter of law. Gossett v. Board of Regents For Langston University, 245 F.3d 1172, 1175 (10th Cir. 2001). In considering whether there are any genuine issues of material fact, "the court does not weigh the evidence but instead inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." Gullickson v. Southwest Airlines Pilots' Ass'n., 87 F.3d 1176, 1183 (10th Cir. 1996). In analyzing a summary judgment motion, the court "may not make credibility determinations or weigh the evidence", and "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 150 (2000).

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

I. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO THE PLAINTIFF'S RETALIATION CLAIM UNDER TITLE VII

In support of her first theory of recovery, the plaintiff contends that the University, through its agents, retaliated against her for engaging in protected activities by refusing to extend her graduate faculty status through the spring semester of 2001, and by refusing to grant her tenure by default in May of 2001.

(Aplt. App. at 30, 33-34) The plaintiff's retaliation claim is not based on any direct evidence of a retaliatory motive. Accordingly, the retaliation claim must be analyzed under the three-stage, burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g., Pastran v. K-Mart Corp., 210 F.3d 1201, 1205-6 (10th Cir. 2000); Jones v. Denver Post Corp., 203 F.3d 748, 752 (10th Cir. 2000).

A. The Plaintiff's Prima Facie Case

At the first stage of the burden-shifting analysis, the plaintiff must establish a prima facie case of retaliation, consisting of the following elements: (1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's adverse action. Bullington v. United Airlines, Inc., 186 F.3d 1301, 1320 (10th Cir. 1999); Jeffries v. State of Kan., 147 F.3d 1220, 1231 (10th Cir. 1998).

(1) Protected Activities

As to the first element of the plaintiff's prima facie case, it is undisputed that the plaintiff participated in two Title VII proceedings. The plaintiff filed an administrative charge with the KHRC on September 25, 2000, and pursued the KHRC charge through its dismissal in January of 2001. (Aplt. App. at 129-130) The plaintiff also filed an administrative charge with the EEOC on February 6,

2001, and pursued the EEOC charge through its dismissal on April 24, 2001. (Aplt. App. at 131-133)

(2) Adverse Employment Actions

As to the second element of the plaintiff's prima facie case, "the law in this circuit liberally defines adverse employment action." Jeffries v. State of Kan., 147 F.3d at 1232. Under this liberal definition, a reasonable jury could find that the University took two adverse employment actions against the plaintiff subsequent to her participation in Title VII proceedings.

The first adverse employment action was Dr. Keel's refusal in January of 2001 to endorse the plaintiff's request for an extension of her graduate faculty status through the spring semester of 2001. Dr. Keel had previously endorsed the plaintiff's request for an extension of her graduate faculty status through the fall semester of 2000, so that she could work with a graduate student who had enrolled in the fall semester. (Aplt. App. at 129) On January 2, 2001, the plaintiff requested Dr. Keel to again endorse her request for an extension of her graduate faculty status through the spring semester of 2001, so that she could continue working with her graduate student. (Aplt. App. at 82, 130) However, on January 19, 2001, Dr. Keel refused to endorse the plaintiff's request. (Aplt. App. at 131)

Dr. Keel's refusal to endorse the plaintiff's request for an extension of her graduate faculty status through the spring semester of 2001 constituted an adverse employment action, since it made her ineligible for an international travel grant. The plaintiff requested Dr. Keel to endorse her application for a travel

grant from the International Travel Research Fund on January 29, 2001. (Aplt. App. at 117) The next day, Dr. Keel informed the plaintiff that he could not endorse her application. (Aplt. App. at 117) According to Dr. Keel, the plaintiff was not eligible for an international travel grant because she did not have graduate faculty status. (Aplt. App. at 70, 75)

Grants from the International Travel Research Fund average between \$1,500 and \$2,000. (Aplt. App. at 120) Consequently, the deprivation of eligibility for such a grant falls within this circuit's liberal definition of an adverse employment action. See, e.g., Jeffries v. State of Kan., 147 F.3d at 1232 [refusing to supervise the plaintiff for pastoral education purposes constitutes an adverse employment action]; Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996) [requiring the plaintiff to "go through several hoops" in order to obtain severance benefits constitutes an adverse employment action]; Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) [reassigning the plaintiff to another office constitutes an adverse employment action].

The district court rejected the plaintiff's contention as set forth above, holding as a matter of law that Dr. Keel's refusal in January of 2001 to endorse the plaintiff's request for an extension of her graduate faculty status did not rise to the level of an adverse employment action. (Aplt. App. at 142-143) In reaching this conclusion, the district court relied on this court's opinion in Aquilino v. Univ. of Kan., 268 F.3d 930 (10th Cir. 2001).

Aquilino, like the present case, involved retaliation claims under Title VII against the University of Kansas by a faculty member who had been denied promotion and tenure. The jury returned a verdict in favor of Dr. Aquilino, but this court reversed the judgment on appeal. One of Dr. Aquilino's claims was that during her terminal-year contract, the University had removed her from a graduate student's dissertation committee. 268 F.3d at 933-934. This court first pointed out:

Although this circuit liberally defines 'adverse employment action', it still must be done on a case-by-case basis after 'examining the unique factors relevant to the situation at hand.'

268 F.3d at 934, quoting Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 (10th Cir. 1998). See also Jeffries v. State of Kan., 147 F.3d at 1232.

The Aquilino court went on to conclude that the evidence there was not sufficient to establish an adverse employment action, explaining in part:

Dr. Aquilino's claim is that she suffered an adverse employment action based upon her removal from Ms. Boze's dissertation committee because that action would harm her future employment opportunities. But the 'unique factor' in this case is that Dr. Aquilino had been denied tenure after several years of non-publication and adverse student comments. Because Dr. Aquilino had already been denied tenure, she certainly had no right to be on a dissertation committee. Given Dr. Aquilino's tenure situation, her removal from the committee had, at best, a de minimis effect on her future employment opportunities.

268 F.3d at 934. Emphasis added.

The instant case is distinguishable from Aquilino because of a "unique factor" which is present here, but which was not present in Aquilino. That unique factor is the nature of the harm claimed by the plaintiff. In contrast to Aquilino, the plaintiff here is not claiming harm to her "future employment opportunities". Rather, the plaintiff is claiming harm during her employment in the form of a deprivation of a significant benefit, i.e. eligibility for international travel grants. For the reasons discussed above, a reasonable jury could find that a deprivation of such a benefit falls within this circuit's liberal definition of an adverse employment action.

The second adverse employment action taken by the University against the plaintiff was Provost Shulenburger's refusal to grant the plaintiff tenure by default. In her letter of May 4, 2001, the plaintiff requested the Provost to grant her tenure by default. (Aplt. App. at 59, 133) However, in his response letter of May 18, 2001, the Provost refused this request. (Aplt. App. at 60) As the district court correctly concluded, a reasonable jury could find that "the decision to deny tenure by default was akin to a termination of plaintiff's employment". (Aplt. App. at 145)

(3) Causal Connection

The third element of the plaintiff's prima facie case is a causal connection between her protected activities and the University's adverse employment actions. The plaintiff has come forward with three pieces of circumstantial evidence from which a reasonable jury could find such a causal connection.

The first piece of evidence consists of the close temporal proximity between the plaintiff's protected activities and the University's adverse employment actions. "A retaliatory motive may be inferred when an adverse action closely follows protected activity." Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999). See also Hysten v. Burlington Northern and Santa Fe Ry. Co., 296 F.3d 1177, 1183-1184 (10th Cir. 2002); O'Neal v. Ferguson Const. Co., 237 F.3d 1248, 1253 (10th Cir. 2001).

There was a close temporal proximity between the plaintiff's filing of her KHRC charge on September 25, 2000, and Dr. Keel's adverse employment action. Dr. Keel learned of the plaintiff's KHRC charge sometime in October of 2000. (Aplt. App. at 129-130) If Dr. Keel learned of the plaintiff's KHRC charge at the end of October of 2000, then there was less than three months between Dr. Keel's learning of the KHRC charge and his decision on January 19, 2001, not to endorse the plaintiff's request for an extension of her graduate faculty status. (Aplt. App. at 130-131) This close temporal proximity, in turn, gives rise to an inference of a retaliatory motive which is sufficient to establish a prima facie case of retaliation. See, e.g., Anderson v. Coors Brewing Co., 181 F.3d at 1179 [assuming that temporal proximity of two months and one week is sufficient to support a prima facie case of retaliation.]

There was likewise a close temporal proximity between the plaintiff's filing of her EEOC charge on February 6, 2001, and the Provost's adverse employment action. The University was required by the EEOC to file a position

statement responding to the plaintiff's charge by March 7, 2001. (Aplt. App. at 105) The Provost conceded that it is likely that he was consulted about the University's response to the plaintiff's charge. (Aplt. App. at 76, 79, 132) Thus, there was approximately two months and one week between the University's response to the plaintiff's charge and the Provost's letter of May 18, 2001, refusing to grant the plaintiff tenure by default. Again, this close temporal proximity gives rise to an inference of a retaliatory motive which is sufficient to establish a prima facie case of retaliation. Anderson v. Coors Brewing Co., 181 F.3d at 1179.

The second piece of evidence from which a reasonable jury could infer causation consists of a pattern of retaliatory conduct, which began soon after the plaintiff filed her first administrative charge with the KHRC in September of 2000. The leading case in regard to this type of evidence is Marx v. Schnuck Markets, Inc., 76 F.3d 324 (10th Cir. 1996), cert denied, 116 S.Ct. 2552 (1996), which involved retaliation claims under the FLSA. In Marx, this court reversed the entry of summary judgment in favor of the employer, explaining:

We have recognized that protected conduct closely followed by adverse action may justify an inference of retaliatory motive. [Citation omitted.] Although we have rejected attempts to unduly stretch the 'close temporal proximity' required under this standard, [citations omitted], we also believe that the phrase 'closely followed' must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the FLSA complaint and only culminates later in actual discharge.

76 F.3d at 329. Emphasis added.

As in Marx, the plaintiff here has presented evidence of a pattern of retaliatory conduct, which began soon after Dr. Keel learned in October of 2000 that the plaintiff had filed her KHRC charge. This pattern of retaliatory conduct started with Dr. Keel's refusal on January 19, 2001, to endorse the plaintiff's request for an extension of her graduate faculty status through the spring semester of 2001. (Aplt. App. at 129-131). This pattern of retaliatory conduct then culminated in Provost Shulenburger's refusal on May 18, 2001, to grant the plaintiff tenure by default. (Aplt. App. at 134) The Provost's decision was less than three months after the University had been required to file a position statement with the EEOC in response to the plaintiff's charge. See Hysten v. Burlington Northern, 296 F.3d at 1184 [decision-maker must be aware of specific litigation activity].

The third piece of evidence from which a reasonable jury could infer causation consists of "evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision." Kendrick v. Penske Transp. Services, Inc., 220 F.3d 1220, 1230 (10th Cir. 2000). This type of evidence is typically used at the pretext stage of the burden-shifting analysis. However, evidence used at the pretext stage may also be used at the prima facie stage. See Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1397 (10th Cir. 1997). Courts must be sensitive to the "myriad of ways" through which an inference of retaliation or discrimination can be created.

Hysten v. Burlington Northern, 296 F.3d at 1181. The critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of retaliation or discrimination. Kendrick v. Penske Transp. Services, Inc., 220 F.3d at 1227.

Here, it is undisputed that in September of 2000, Dr. Keel endorsed the plaintiff's request for an extension of her graduate faculty status for the fall of 2000, so that she could work with a graduate student. (Aplt. App. at 129) This was before Dr. Keel had learned about the plaintiff's KHRC charge. (Aplt. App. at 129-130) However, after learning about the plaintiff's KHRC charge, Dr. Keel in January of 2001 refused to endorse the plaintiff's request for another extension of her graduate faculty status for the spring of 2001, so that she could continue to work with the same graduate student. (Aplt. App. at 82, 130-131) A reasonable jury could infer that Dr. Keel failed to follow his earlier practice because of a retaliatory motive.

Likewise, a reasonable jury could infer that in May of 2001, the Provost failed to follow the University's unwritten policy or practice because of a retaliatory motive. As indicated by Ms. Johnson's report to the Provost, the University has an unwritten policy or practice of granting tenure by default to faculty members where there has been uncertainty in regard to time counted towards the probationary period, particularly where there has been a change in the University's regulations. (Aplt. App. at 108-112) This unwritten policy or

practice was followed in 1973, when about a dozen faculty members were granted tenure by default.

The plaintiff's situation was similar to the 1973 faculty members in two key respects. First of all, prior to the tenure decision regarding the 1973 faculty members, there was a change in the University's tenure policy, involving an increase in the probationary period from five years to seven years. This change caused uncertainty in regard to time counted towards the probationary period. (Aplt. App. at 110-111) Similarly, prior to the tenure decision concerning the plaintiff, there was also a change in the University's tenure policy, involving certain types of leave which could possibly extend the tenure clock, including leave under the FMLA. (Aplt. App. at 94-87) This change also caused uncertainty as to time counted towards the probationary period. (Aplt. App. at 94) Secondly, some of the 1973 faculty members went through the regular tenure process; were denied tenure; and were given notice of their terminal appointments. (Aplt. App. at 111) Likewise, the plaintiff also went through the regular tenure process; was denied tenure; and was given notice of her terminal appointment. (Aplt. App. at 129)

Despite these similarities, the Provost did not follow the University's unwritten policy or practice in dealing with the plaintiff. The Provost refused to grant the plaintiff tenure by default, despite her specific request for such action. (Aplt. App. at 59, 133) A reasonable jury could find that the Provost refused to

follow the University's unwritten policy or practice because he was motivated by a retaliatory animus.

B. The Defendant's Proffered Nonretaliatory Explanations

At the second stage of the burden-shifting analysis, the defendant must proffer legitimate, nonretaliatory explanations for its decisions. Pastran v. K-Mart Corp., 210 F.3d at 1206. Here, the University has met this burden. In regard to the decision not to extend the plaintiff's graduate faculty status through the spring semester of 2001, the University asserts that this decision was made by a neutral body, the department's Promotion and Tenure Committee. (Aplt. App. at 130) In regard to the decision not to grant the plaintiff tenure by default, the University asserts that under its interpretation of its own policies, the plaintiff was not entitled to tenure by default. (Aplt. App. at 148)

C. Issues of Pretext

At the third stage of the burden-shifting analysis, the plaintiff bears the ultimate burden of demonstrating that the defendant's proffered reasons are pretextual. Kendrick v. Penske Transp. Services, Inc., 220 F.3d at 1230. The plaintiff can meet this burden by showing "that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual -- i.e., unworthy of belief." Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995). As this court went on to explain in Randle:

It is not the purpose of a motion for summary judgment to force the judge to conduct a 'mini trial' to determine

the defendant's true state of mind.... Judgments about intent are best left for trial and are within the province of the jury.

69 F.3d at 453. Emphasis added.

Here, the plaintiff has presented four pieces of circumstantial evidence which, in their totality, raise a genuine factual issue as to whether the University's proffered explanations are pretextual, i.e. unworthy of belief. Three of these pieces of evidence were discussed about (pp. 26-30) in the context of the plaintiff's prima facie case: (1) the close temporal proximity between the plaintiff's protected activities and the University's adverse employment actions; (2) a pattern of retaliatory conduct which began soon after the plaintiff had filed her administrative charge with the KHRC; and (3) the University's failure to follow unwritten policies or practices when making the decisions involving the plaintiff. Evidence used at the prima facie stage may also be used at the pretext stage. Conner v. Schnuck Markets, Inc., 121 F.3d at 1397.

The fourth piece of evidence showing pretext consists of "the falsity of the [employer's] explanation." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147-149 (2000). In assessing this piece of evidence, the facts must be viewed as they appear to the persons making the decisions. Kendrick v. Penske Transp. Services, Inc., 220 F.3d at 1231. The relevant inquiry is whether the reasons articulated by the employer were the real reasons for the challenged decisions. Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1261 (10th Cir. 2001).

In regard to the decision not to extend the plaintiff's graduate faculty status through the spring semester of 2001, Dr. Keel testified that he did, in fact, present the plaintiff's request for such an extension to the department's Promotion and Tenure Committee, and that the Committee unanimously decided not to endorse the request. (Aplt. App. at 70, 74) However, two members of the Committee -- Professor Baron and Professor Dick -- testified in their depositions that they could not recall any meeting of the Committee in January of 2001 to consider or discuss the plaintiff's request for an extension of her graduate faculty status. (Aplt. App. at 66, 67, 68, 69) In light of the deposition testimony of Professor Baron and Professor Dick, a reasonable jury could choose to disbelieve Dr. Keel's explanation. In addition, to paraphrase Reeves, a reasonable jury could further "infer from the falsity of [Dr. Keel's] explanation that the employer is dissembling to cover up a [retaliatory] purpose." 530 U.S. at 147.

In regard to the decision not to grant the plaintiff tenure by default, a reasonable jury could likewise choose to disbelieve the University's explanation. The key fact here is that by the University's own admissions, the plaintiff's FMLA leave in the fall of 1994 did not result in her having a part-time appointment. The Provost conceded that when a faculty member takes paid sick leave, the faculty member continues to be on full-time service. (Aplt. App. at 78, 127) According to the Provost, "[f]ull-time service means being on the payroll full-time." (Aplt. App. at 78) Dr. Keel testified that the plaintiff's FMLA leave was structured so

that she would not go below 100% full-time employment, and so that she would "not lose a penny of her salary." (Aplt. App. at 71)

The fact that the plaintiff's FMLA leave in 1994 did not result in her having a part-time appointment is further demonstrated by her annual notice of continuing appointment with the University for the 1994-1995 academic year. This notice of appointment was signed by then-Chancellor Gene Budig, and it stated that the plaintiff's appointment was "1.00 FTE." (Aplt. App. at 88) Chancellor Hemenway testified that an annual notice stating that the appointment was "1.00 FTE" indicates full-time employment, unless there were other notes on the notice which would indicate otherwise. (Aplt. App. at 69A, 69C) The Chancellor further testified that the annual notices of appointment are directly related to the gaining of tenure. He explained that "when you have had seven annual appointments at full-time status, then you have ended your probationary period." (Aplt. App. at 69B)

The plaintiff received eight annual notices of appointment, signed by the Chancellor, from July of 1992 through July of 1999. (Aplt. App. at 86-93) Only one of these annual notices of appointment -- the one dated July 1, 1997 -- indicates an appointment for less than "1.00 FTE." (Aplt. App. at 91) Therefore, based on the Chancellor's own testimony, the plaintiff completed her seven-year probationary period in May of 2000 at the latest. This in turn means that the plaintiff gained tenure in May of 2000, since she did not receive her notice of

non-reappointment until March 24, 2000 -- less than one year prior to May of 2000. (Aplt. App. at 57, 129)

In light of the above facts, a reasonable jury could disbelieve the University's explanation for refusing to grant the plaintiff tenure by default. In addition, to again paraphrase Reeves, a reasonable jury could further "infer from the falsity of [the University's] explanation that the employer is dissembling to cover up a [retaliatory] purpose." 530 U.S. at 147.

II. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO THE PLAINTIFF'S DUE PROCESS CLAIM UNDER §1983

In support of her §1983 claim, the plaintiff contends that the Chancellor and the Provost, in their official capacities, deprived her of her property interest in her continued employment without procedural due process, in violation of the Fourteenth Amendment. The plaintiff seeks an order declaring that the defendants have violated her constitutional right of due process, and enjoining the defendants to restore the plaintiff to her previous position as a tenured faculty member at the University. (Aplt. App. at 18-19, 34-35, 38) Such prospective relief is proper under §1983. See, e.g., Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000); Johns v. Stewart, 57 F.3d 1544, 1552-1553 (10th Cir. 1995).

A. Nature of Plaintiff's Property Interest

The Fourteenth Amendment's procedural due process protections only apply to an individual deprived of a recognized property or liberty interest. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). "Property interests are created

not by the Constitution itself, but may be defined by independent sources such as state statutes, regulations, municipal ordinances, university rules, and even express or implied contracts." Anglemyer v. Hamilton County Hosp., 58 F.3d 533, 536 (10th Cir. 1995) and cases cited therein. Emphasis added. See also Farthing v. City of Shawnee, Kan., 39 F.3d 1131, 1135 (10th Cir. 1994).

Here, the plaintiff contends that she had a legitimate expectation of continued employment as a tenured faculty member at the University, based upon an implied-in-fact contract of employment. (Aplt. App. at 28, 156) "Kansas contract law determines whether a public employee like [the plaintiff] has a legitimate entitlement to continued employment based on an implied contract theory." Anglemyer v. Hamilton County Hosp., 58 F.3d at 536. Under Kansas law, "a tenured teacher's right to continued employment is a property right subject to the protections of due process." McMillen v. U.S.D. No. 380, 253 Kan. 259, Syl. ¶ 5, 855 P.2d 896 (1993). Therefore, as the district court correctly recognized, the determinative question is whether the plaintiff gained tenure at the University, based upon an implied-in-fact contract of employment. (Aplt. App. at 155-156)

In Anglemyer v. Hamilton County Hosp., this court comprehensively reviewed the law of Kansas relating to implied contracts of employment. In the course of its review, this court emphasized two general principles. First, "[t]he existence of an implied contract depends on the intent of the parties, divined from

the totality of the circumstances." 58 F.3d at 537. Quoting from Morriss v. Coleman Co., 241 Kan. 501, 513, 738 P.2d 841 (1987), the court continued:

Where it is alleged that an employment contract is one to be based upon the theory of 'implied in fact,' the understanding and intent of the parties is to be ascertained from several factors which include written or oral negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.

58 F.3d at 537.

Second, "under Kansas law, summary judgment remains 'rarely appropriate' in implied contract cases because of the necessity of determining both parties' subjective intent to form a contract." 58 F.3d at 537, citing Brown v. United Methodist Homes for the Aged, 249 Kan. 124, 815 P.2d 72 (1992), and Masterson v. Boliden-Allis, Inc., 19 Kan. App. 2d 610, 873 P.2d 1377 (1994). See also Koopman v. Water Dist. No. 1, 972 F.2d 1160, 1164 (10th Cir. 1992); Wilkinson v. Shoney's, Inc., 269 Kan. 194, 4 P.3d 1149 (2000); Stover v. Superior Industries Int'l., Inc., 29 Kan. App. 2d 235, 29 P.3d 967 (2001).

Applying the principles recognized in Anglemyer to the present case, "the totality of the circumstances" includes all of the following factors: (1) the employment agreement signed by the plaintiff in 1992; (2) the annual notices of appointment signed by both the Chancellor and the plaintiff; (3) the policies and

practices adopted by the University; and (4) the regulations adopted by the Board of Regents. The district court erroneously focused exclusively on the first factor. (Aplt. App. at 156-161) As discussed in detail below, when all four factors are properly given due consideration, a reasonable jury could find that the plaintiff gained tenure at the University in May of 2000 at the latest. This in turn would mean that the plaintiff has been denied due process, since it is undisputed that the University has never afforded a due process hearing to the plaintiff. (Aplt. App. at 156)

B. Plaintiff's 1992 Employment Agreement

The employment agreement signed by the plaintiff in the summer of 1992 specifically states: "Tenure will accrue after 7 years of full-time teaching (or library service) unless notice to the contrary is provided in accordance with University and Board of Regents regulations on advance notice of non-reappointment." (Aplt. App. at 48) This provision is ambiguous because it is susceptible to two reasonable interpretations. Under Kansas law, a contract is ambiguous if it contains "provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language." Simon v. Nat'l Farmers Org., Inc., 250 Kan. 676, 679-80, 829 P.2d 884 (1992). See also Slawson Exploration Co. v. Vintage Petroleum, Inc., 78 F.3d 1479, 1481-82 (10th Cir. 1996).

A natural and reasonable interpretation of the phrase "7 years of full-time teaching" leads to two conflicting meanings: 7 years calculated on a semester-

by-semester basis, or 7 years calculated on a year-by-year basis. The language used in the 1992 agreement does not clearly indicate which of these two meanings was intended by the parties. Furthermore, the 1992 agreement specifically states that it is "subject to all provisions...of the regulations, policies, minutes and resolutions of the Board of Regents and the University of Kansas...." (Aplt. App. at 48) As discussed below, the regulations and policies of the Board of Regents and of the University may reasonably be interpreted as indicating that "7 years of full-time teaching" must be calculated on a semester-by-semester basis, rather than on a year-by-year basis.

C. Plaintiff's Annual Notices Of Appointment

The plaintiff's 1992 employment agreement specifically states that "[t]his appointment is subject to annual renewal...." (Aplt. App. at 48) Including the initial notice of appointment in 1992, the plaintiff received eight annual notices of appointment, signed by the Chancellor of the University, from July of 1992 through July of 1999. (Aplt. App. at 86-93) Chancellor Hemenway testified that the annual notices of appointment are directly related to the gaining of tenure. He explained that "when you have had seven annual appointments at full-time status, then you have ended your probationary period." (Aplt. App. at 69B)

Of the eight annual notices of appointment received by the plaintiff, only one of them -- the one dated July 1, 1997 -- indicates an appointment for less than "1.00 FTE." (Aplt. App. at 91) All seven of the other annual notices state that the appointment was "1.00 FTE." (Aplt. App. at 86-90, 92-93) Chancellor

Hemenway testified that an annual notice stating that the appointment was "1.00 FTE" indicates full-time employment, unless there were other notes on the notice that would indicate otherwise. (Aplt. App. at 69C) The Chancellor further testified it is the University's custom and practice that, if a faculty member is not on a full-time appointment for a semester or for a year, that fact will be noted on the annual notice of appointment. (Aplt. App. at 69C)

By May of 2000, the plaintiff had received and fulfilled seven annual appointments at full-time status. (Aplt. App. at 86-90, 92-93) Based on this fact and the Chancellor's own testimony, a reasonable jury could find that by May of 2000, the plaintiff had completed her probationary period of seven years, and therefore she had gained tenure. Under Kansas law, the testimony of a supervisor is sufficient to establish an implied-in-fact contract of employment. See, e.g., Koopman v. Water Dist. No. 1 of Johnson County, 972 F.2d at 1165; Wilkinson v. Shoney's, Inc., 269 Kan. at 215; Brown v. United Methodist Homes for the Aged, 249 Kan. at 139; Morriss v. Coleman Co., 241 Kan. at 513.

D. The University's Policies And Practices

When the plaintiff took FMLA leave in the fall of 1994, she specifically told Dr. Keel that she did not want to go below 100% full-time employment. (Aplt. App. at 72) Dr. Keel testified that the plaintiff's FMLA leave was structured so that she would not go below 100% full-time employment, and she would "not lose a penny of her salary." (Aplt. App. at 71) Provost Shulenburger testified that when a faculty member takes paid sick leave, the faculty member continues to be

on full-time service. (Aplt. App. at 78, 127) Based on this evidence, a reasonable jury could conclude that the plaintiff continued to be on full-time service during the fall semester of 1994, and therefore the fall semester of 1994 should be included in calculating whether the plaintiff completed "7 years of full-time teaching" under her 1992 employment agreement.

The plaintiff returned from her FMLA leave at the beginning of the spring semester of 1995. (Aplt. App. at 128) The University's FMLA policy specifically states: "Upon return from family and medical leave, an employee is guaranteed that he/she will be returned to the same or equivalent position." (Aplt. App. at 85) Because the plaintiff was in a tenure-earning position prior to her FMLA leave, she automatically returned to her tenure-earning position at the beginning of the spring semester of 1995 under the University's FMLA policy. Accordingly, a reasonable jury could conclude that the spring semester of 1995 should be included in calculating whether the plaintiff completed "7 years of full-time teaching" under her 1992 employment agreement.

The plaintiff took a reduction of 40% in her appointment for the fall semester of 1997, due to the death of her husband. (Aplt. App. at 128) The University's policy governing reductions in appointments specifically states that a faculty member who enters into a reduced appointment "may automatically reenter the tenure-earning position if he or she returns to full-time status within one academic or calendar year of the beginning of the reduced appointment." (Aplt. App. at 96) The policy further states that the "resulting total probationary

period will not exceed seven years." (Aplt. App. at 96) The plaintiff returned to full-time status at the beginning of the spring semester of 1998. (Aplt. App. at 55) Because the plaintiff was in a tenure-earning position prior to her reduced appointment, she automatically reentered her tenure-earning position at the beginning of the spring semester of 1998 under the University's policy. Consequently, a reasonable jury could conclude that the spring semester of 1998 should be included in calculating whether the plaintiff completed "7 years of full-time teaching" under her 1992 employment agreement.

For the reasons discussed above, a jury could conclude that the plaintiff completed "7 years of full-time teaching" by May of 2000, and therefore gained tenure, based on two alternative interpretations of the University's policies and practices. One alternative interpretation is that the plaintiff continued to be on full-time service during the fall semester of 1994. This in turn would mean that the 1994/1995 academic year should be included in calculating the plaintiff's seven-year probationary period. Under this interpretation, the plaintiff completed seven years of full-time service by May of 2000, consisting of the following academic years: 1992/1993; 1993/1994; 1994/1995; 1995/1996; 1996/1997; 1998/1999; and 1999/2000.

The other alternative interpretation is that the plaintiff automatically returned to her tenure-earning position at the beginning of the spring semester of 1995, and at the beginning of the spring semester of 1998. This in turn would mean that both the spring semester of 1995 and the spring semester of 1998

should be included in calculating the plaintiff's seven-year probationary period. Under this interpretation, the plaintiff completed seven years of full-time service by May of 2000, consisting of the spring semester of 1995; the spring semester of 1998; plus the following six academic years: 1992/1993; 1993/1994; 1995/1996; 1996/1997; 1998/1999; and 1999/2000.

E. The Board of Regents' Regulations

The University is subject to the Board of Regents' rules, regulations, and policies. (Aplt. App. at 123) The Board of Regents' regulations governing tenure state that "the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education...." (Aplt. App. at 50) The Board of Regents' tenure regulations are based on the 1940 Statement of the AAUP and the amendments thereto. (Aplt. App. at 123)

According to the current Associate Secretary of the AAUP, Dr. Martin Snyder, the AAUP standards should be interpreted to allow two semesters in two different academic years to be combined for purposes of calculating the seven-year probationary period. (Aplt. App. at 106-107, 133) Similarly, Dr. Elmer Hoyer, the Past President of the AAUP Kansas Conference, testified that the phrase "full-time service," as used in the Board of Regents' regulations, should be interpreted to mean full-time service calculated on a semester-by-semester basis, rather than on a year-by-year basis. (Aplt. App. at 80-81)

Based on the opinions of Dr. Snyder and Dr. Hyer, a reasonable jury could conclude that the Board of Regents' tenure regulations should be interpreted so

that "full-time service" is calculated on a semester-by-semester basis, rather than on a year-by-year basis. This in turn would mean that both the spring semester of 1995 and the spring semester of 1998 should be included in calculating the plaintiff's seven-year probationary period. Under this interpretation, the plaintiff completed seven years of full-time service by May of 2000, consisting of the spring semester of 1995; the spring semester of 1998; plus the following two-semester academic years: 1992/1993; 1993/1994; 1995/1996; 1996/1997; 1998/1999; and 1999/2000. The end result is that the plaintiff gained tenure in May of 2000 under the Board of Regents' regulations.

CONCLUSION

For the reasons discussed above, the evidence in this case is not so one-sided that the defendants must prevail as a matter of law as to either of the plaintiff's theories of recovery. As a result, the distinct court's order of summary judgment must be reversed, and the case remanded for trial on both of the plaintiff's claims.

CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed.R.App.Pro. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 11,368 words. I relied on my word processor to obtain this count, and it is Microsoft Word 2000.

Respectfully submitted,

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ORAL ARGUMENT

Oral argument is requested in this case because it is factually complicated, and oral argument may assist the court in sifting through the facts.

CERTIFICATE OF SERVICE

I do hereby certify that I have served a true and correct copy of the above and foregoing document on counsel of record by (x) placing the same in the U.S. mail, postage prepaid, () facsimile to the phone number(s) listed below, and that the transmission was reported as complete and without error and that the facsimile machine complied with Supreme Court Rule 119(b)(3), or () hand delivery, on this, the 6th day of March, 2003, to:

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