

STATE OF MICHIGAN
COURT OF APPEALS

DUNCAN KRETOVICH,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 184785

Genesee Circuit Court
LC No. 94-277725-CL

UNIVERSITY OF MICHIGAN REGENTS,

Defendant-Appellee.

Before: Reilly, P.J., and White and P.D. Schaefer,* JJ.

WHITE, J. (dissenting).

I respectfully dissent. Viewing the facts and the inferences therefrom in a light most favorable to plaintiff, I conclude that plaintiff presented sufficient evidence to raise a question of fact whether retaliation played a significant role in defendant's decision to deny him tenure, and that plaintiff presented sufficient evidence that the reason given for denying him tenure, a poor research record, was pretextual.

Defendant attached to its motion for summary disposition affidavits of Moon, Lofti, Fortner, Hallam. Moon and Lofti's affidavits both stated that because plaintiff had not published a single article of significant scholarly value, they had voted against granting him tenure. Fortner's affidavit stated that the majority of the executive committee first charged with reviewing plaintiff's tenure in 1991-1992 voted in favor of tenure and promotion for plaintiff. Fortner stated that he had "some concerns" with plaintiff's publication record but plaintiff had a number of scholarly works in progress, and he gave plaintiff the benefit of the doubt when he forwarded the committee's recommendation that plaintiff be granted tenure to the Provost. Fortner's affidavit stated that he again served on the committee to evaluate whether plaintiff should be granted tenure in 1993-1994 and voted against granting tenure and promotion because plaintiff failed to publish several of his scholarly research projects that had been in the pipeline at the time of the 1991-1992 review.

* Circuit judge, sitting on the Court of Appeals by assignment.

Dean Hallam's affidavit stated that, after reviewing plaintiff's record in teaching, research and service in January 1994, his "independent analysis" of plaintiff's record led him to conclude that plaintiff had "a good but not superior record of teaching," "a good but not superior record of service," and "a very poor record of research." Hallam's affidavit stated plaintiff's publications were not significant scholarly contributions. Hallam's affidavit further stated that he attended the executive committee meeting where plaintiff's record was discussed, attended by professors Lofti, Moon, Fortner and Marquardt, and that he tallied the committee members' secret ballots. The vote was unanimous in opposing plaintiff's promotion and tenure.

Defendant did not submit an affidavit or deposition testimony of Marquardt in support of their motion.

Plaintiff attached to his response to defendant's motion his faculty performance reviews beginning in 1989,¹ the year after he was hired, through 1991. The performance reviews addressed three areas: Teaching; Professional Development, Research and Publication; and Service to the University and the Community, in that order. All of the reviews were signed by Dean Richard Fortner, and the 1990 and 1991 reviews each noted that "This year, the committee weighted teaching 45-55%, research 35-45%, and service 5-15% in its evaluation of individual faculty."

Plaintiff's 1989 review rated his teaching as "strong in both finance and accounting," and noted that plaintiff's "willingness to supervise a number of MBA independent study projects is recognized and appreciated." As to professional development, research and publication the review stated:

The committee judged your research and writing activities this year as being highly productive. With five items completed, including one in the working Paper Series, three projects in progress, and three papers presented at professional meetings, you have contributed significantly to the development of a strong research record. We look forward to these items flowing through to journal publication.

On service to the university and community, the committee stated that it recognized that this was plaintiff's first full year on the faculty and assessed his service activity as being limited. The committee congratulated plaintiff on his appointment as Book Review Editor of the Journal of International Finance. The committee noted in summary that plaintiff was assessed as "strong in teaching, very productive in research and somewhat less than desired in service."

Plaintiff's second review, dated July 1990, stated under teaching:

The Committee recognizes the consistent successes you have had in the classroom in a wide range of courses including accounting, finance and business policy. Your introduction of the new course in Working Capital Management (BUS 462) is a major contribution to the electives in the finance program.

As to professional development, research and publication, the review stated:

The Committee judged your research and publication record (a co-authored paper accepted for publication in Management Accounting, two papers presented at professional meetings, and two papers submitted to journals) as reflecting a highly successful year.

As to service to the university and the community, the review stated:

Your extensive participation in the university governance system is much appreciated. Memberships on the School's Executive, Curriculum, and Faculty Search Committees, Chair of the Graduate Board, and President of Beta Gamma Sigma all make a significant contribution to campus service activities.

The review noted:

In summary, the Executive Committee assessed your activities of the past year as being **outstanding** in teaching, research and service. The Committee has recommended you for a special merit award.

In August 1990, plaintiff's salary was increased for the second time, and a letter from Dean Fortner so stating also noted:

Your increase includes special acknowledgment of the contributions you have made during the past year, a recognition recommended by the School and approved by the Provost.

By letter from Dean Fortner dated September 12, 1990, plaintiff was reappointed as Assistant Professor of Finance without tenure for a second term of three years. The letter noted that "Members of the Committed are pleased with your teaching and research efforts and with your involvement in service activities."

Plaintiff's third performance review, dated July 5, 1991, again rated him as outstanding in teaching, research and service and plaintiff was again recommended for a special merit award. The review also stated "The Committee encourages you to apply for promotion/tenure this fall." This was a committee recommendation that plaintiff apply for early tenure. The review stated under teaching:

You provided considerable strength and flexibility for the teaching schedule and made a major contribution to the finance program. Your willingness to teach an overload in the Winter semester and to supervise seven MBA independent study projects over the past year is noted.

As to professional development, research and publication, the review stated:

Your research record continues to develop with the publication of an article in Journal of Business Forecasting, two presentations at professional meetings, and submissions to

three other journals. You are congratulated for receiving the faculty fellowship to support your research this summer.

Under service to the university and community, the review stated:

You have made a major contribution to University governance through service on the School's faculty recruiting, curriculum, and executive committees and as the chair of the graduate board. Other professional service includes reviewing of submitted papers for presentation at professional meetings.

By letter dated August 12, 1991, Dean Fortner advised plaintiff of another salary increase and again noted that the increase "includes special acknowledgment of the contributions you have made during the past year, a recognition recommended by the School and approved by the Provost."

In December 1991, a letter to Dean Fortner from a reviewer retained to do an external faculty evaluation of plaintiff's research and scholarly work stated in pertinent part:

Having thoroughly reviewed the research papers that you have sent to me, my overall appraisal of Professor Kretoich's scholarly and professional work is positive. While I do not believe that Professor Kretoich is likely to publish in the top theoretical research journals in the field of finance, I do believe that he will be able to publish in applications-oriented journals.

Judging from the samples of his work sent to me for review, I believe that Professor Kretoich exhibits good research potential in areas of financial and management pedagogy and business practice. His work has important implications for the areas of deregulation, transportation system management and small business finance. In my opinion, he could well become a nationally recognized academic consultant and researcher in these areas and should be encouraged to continue to sharpen his research focus on these topics. . . .

* * *

From a review of Professor Kretoich's vita, it is clear to me that he has been actively engaged in research activity of importance, even if he has not published in volume. I have also taken note of the fact that he has been a major reviewer of finance textbooks. With this experience, his own prospects for textbook publishing seem to be above average. Perhaps this should also be encouraged.

An internal memorandum from Dean Fortner to Provost Wong dated February 10, 1992, recommended plaintiff for promotion/tenure and stated the reasons for the recommendation. The memo stated under teaching:

. . . He brings a great flexibility to the teaching activities of the School because of his degree in finance and accounting and his willingness to teach in both fields. In the past four years, he has taught or co-taught 12 different courses . . . including six in finance, four in accounting, and two in business policy-strategy. His use of computer applications in courses . . . has been a real plus for the finance program. . . .

He has emerged as the School's leading faculty member in finance, and is closest to the students in a program which graduates 30-40 majors a year . . .

Under Research, the memo stated:

While his publications to date are somewhat limited, he has produced a stream of papers since his Ph.D. in 1985 leading to 10 presentations at academic conferences, four publications in proceedings, three items in the School's Working Paper Series, three papers currently submitted to journals, and two journal publications. He has worked with five co-authors. In addition, he has reviewed four textbook manuscripts . . . for publishers and is the co-author of the Study Guide to Accompany Principles of Financial Management, an introductory text in finance. He is book review editor for the Journal of International Finance.

The external reviewers valued highly his contributions to the study of deregulation issues and one reviewer cited his potential for contributions to education through textbooks and related materials.

As to service, the memo stated that plaintiff "has made a significant contribution in service activities both on and off-campus." The memo concluded:

In summary, the Executive Committee has given Dr. Kretovich outstanding evaluations and recommended him for special merit each of the past two years. In its July 1991 evaluation letter, the Committee encouraged him to apply for promotion/tenure in Fall 1991. His success and visibility as a member of our faculty make him an attractive prospect for other schools. If he were to leave, the School would essentially be starting over again in staffing the finance program.

The majority of the executive committee reviewing plaintiff's tenure in 1991-1992, including Fortner, voted to grant him tenure. Moon voted against tenure. The Provost decided not to grant plaintiff tenure in 1991-1992.

Plaintiff's affidavit, attached to his response to defendant's motion, stated that the controversy over Johnson was the most emotional affair that occurred during his six years at the School of Management. Plaintiff averred that Johnson was treated in a much more hostile manner than the non-black candidates by Lofti and Moon, and that plaintiff complained to the search committee chairman, the assistant chancellor and Professor Velthouse. An affidavit of Velthouse's confirmed plaintiff's statements.² Plaintiff's affidavit also stated that Marquardt strongly indicated to him that he was upset

by plaintiff's allegation of racial discrimination in the dean search, and that Marquardt contemptuously referred to Johnson as "plaintiff's candidate."³ Plaintiff's affidavit stated that after the Johnson incident, the attitudes of Lofti, Moon and Marquardt changed toward plaintiff completely, and that when plaintiff learned in 1993 that the three were on the executive committee that would make a recommendation on plaintiff's tenure he was horrified and requested a different committee from Dean Hallam. Plaintiff further averred that in 1992 Fortner told him that the recommendation of the tenure executive committee was an extremely important part of any candidate's application for tenure, and that plaintiff's tenure decision was Hallam's first. Plaintiff averred that he had observed that in all relevant substantive decisions made by Hallam, Hallam had been heavily influenced by the relevant executive committee.

In response to Dean Hallam's affidavit, plaintiff averred that Hallam, who had mentioned three of plaintiff's publications in the affidavit, ignored a paper that was accepted for publication at the time of plaintiff's tenure review. Plaintiff's affidavit denied that his publications were not scholarly work, noted that Hallam is in a different academic field than plaintiff while the external reviewers that rated plaintiff well on research were in the same field as plaintiff, and explained why his publications were significant scholarly work and that the journals in which they were published are respected. Further, plaintiff averred that Hallam and Fortner consistently told plaintiff that "practical" scholarship was desired, and that business writing should be along the lines of application and education, rather than strictly for academe.

Also attached to plaintiff's response to defendant's motion were excerpts from plaintiff's deposition, at which he testified that he believed that Lofti and Marquardt discriminated and retaliated against him in his tenure review in 1993-1994 because of his opposition to racial discrimination against Johnson. Plaintiff testified that Professor Velthouse and two others at the university told him that Lofti was enraged at plaintiff because of Johnson visiting the campus. As to Moon, plaintiff testified that he believed that had he not openly questioned the issue of race in the committees' consideration of Johnson, Moon would have found his research and publication history acceptable for tenure. Plaintiff testified that Marquardt had commented negatively to him about plaintiff's having gotten Johnson into the pool of the candidates for the deanship.

Plaintiff testified at deposition that he did not believe that Fortner discriminated or retaliated against him, and plaintiff answered "no," when asked if he believed that Dean Hallam retaliated against him with respect to the 1993-1994 tenure review. Nonetheless, as plaintiff argues, that does not mean that Hallam was not influenced by committee members Lofti, Marquardt, and Moon. Dean Hallam had not been hired when the alleged racially discriminatory conduct took place in the 1992 dean search. In fact, Hallam was hired as dean of the School of Management as a result of that search. Hallam was thus not present when plaintiff raised with various faculty and officials of defendant that the conduct of the dean search had been tainted with racial discrimination, and thus was not in a position to "retaliate" against plaintiff in the sense that Loftie, Moon and Marquardt were.

I conclude that there was evidence that, when viewed in a light most favorable to plaintiff, raised an issue of fact whether Hallam's analysis of plaintiff's record was tainted by the opinions of Moon, Lofti, and Marquardt, and whether retaliation played a significant role in those opinions. Hallam's

affidavit stated that he attended the tenure review committee's 1993-1994 discussions of plaintiff, and that he tallied the ballots. Plaintiff testified at deposition that Hallam had been unfair towards him in the tenure decision in evaluating the quality of his research as low. Plaintiff's affidavit stated that Hallam's past conduct indicated that his decision making had been heavily influenced by executive committees' recommendations and that the decision whether to grant plaintiff tenure was Hallam's first tenure decision.

Thus, I conclude that there were questions of fact regarding whether retaliation played a significant role in the tenure recommendation, and whether Hallam's decision was influenced by the committee's recommendation.

I would reverse.

/s/ Helene N. White

¹ Plaintiff was hired into a tenure track position in 1988 as assistant professor, and given six years to achieve tenure.

² Velthouse's affidavit was also attached to plaintiff's response to defendant's motion and stated that Lofti and Moon had a significant adverse reaction with respect to Johnson's candidacy, that Lofti called for a faculty meeting to discuss Johnson's candidacy and made an extremely sarcastic comment concerning Johnson and plaintiff. Velthouse also averred that a vice-chancellor who was on the dean search committee stated that Johnson was being treated differently because of his race.

³ Plaintiff testified at deposition that during the dean search process Marquardt was openly critical of Johnson, that Marquardt was mad at plaintiff for having gotten Johnson into the pool, and that plaintiff's relationship with him changed after the dean search committee.