

CASE NO. 05-1557

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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PINAKI MAZUMDER, Ph.D.,

Plaintiff-Appellant

v.

UNIVERSITY OF MICHIGAN;  
UNIVERSITY OF MICHIGAN  
COLLEGE OF ENGINEERING;  
DEAN STEPHEN DIRECTOR;  
INTERIM CHAIRMAN RICHARD BROWN;  
PRAMOD KHARGONEKAR,

Defendants-Appellees

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On appeal from the United States District Court  
For the Eastern District of Michigan, Southern Division

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REPLY BRIEF OF PLAINTIFF-APPELLANT,  
PINAKI MAZUMDER

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Pinaki Mazumder  
Plaintiff-Appellant  
3620 Charter Place  
Ann Arbor, MI 48105

(Pro Se Appellant)

## ARGUMENT

### I. APPELLEES' EMPHASIS ON SALARY DISPARITY DIVERTS FROM THE FOCUS OF THE LAWSUIT, NAMELY, THE AHC INVESTIGATION AND THE FILE COPYING INCIDENT

In Plaintiff's 42-page Complaint, (R. 1, Copy of Complaint; Apx. pp. 13-55), Plaintiff had primarily described the causally-related and temporally proximate AHC Investigation and File Copying Incident because of their economic and non-economic impacts on Plaintiff's career. Only in Page 28 in the Complaint (R. 1; Apx. p. 40), Plaintiff cited a below average salary raise in July 2002 as an evidence of retaliation after Plaintiff filed a discrimination complaint to the University Equity Diversity Office ("EDO") in April 2002. Further, in two subsequent pages (R. 1; Apx. pp. 45-46), Plaintiff rebutted the salary analysis made in the Review Committee's Report (R. 45, Ex. AK; Apx. pp. 361-362) that was issued on March 17, 2002 almost 11 months after the EDO complaint was filed by Plaintiff.

In their Motion for Summary Judgment ("MSJ") Defendants did not postulate any legal arguments to proffer legitimate reasons for holding the AHC Investigation (R. 39, MSJ; Apx. pp. 126-136). Even after studying Plaintiff-Appellant's Brief on Appeals (hereinafter "Appellant's Brief") that provides a formal proof of *prima facie* Title VII discrimination under the *McDonnell Douglas Corp. v. Green* triumvirate "burden shifting framework", Defendants-Appellees' Brief on Appeal (hereinafter, "Appellees' Brief") (pp. 32-35) fails to articulate any legitimate, non-discriminatory or non-retaliatory reasons for holding any AHC Investigation in Step 2 of the above framework.

The district court had used the "ultimate employment action" criteria such as firing, suspension or demotion to rule that the AHC Investigation was not an adverse action. Further, the district court had failed to notice the causal connection between the three student e-mails and Bernard's three stern letters to Bhattacharya as Plaintiff pointed out in the Appellant's Brief (pp. 6-15). Notably, Defendants did not react to these "alleged" complaints for five months until Plaintiff complained about Bernard's false and misleading report. In *arguendo*, even if the AHC Investigation was non-retaliatory, the GRB pointed out that Defendants did not use sanctioned procedures for holding the investigation. Defendants used an unfair, unprecedented, adjudicative AHC procedure, (R. 39; Apx. p. 414), which eliminated the informal investigation phase and instead started with a Hearing involving the University and Plaintiff's attorneys. Plaintiff has established that his reputational damages due to this stigmatizing process were not merely speculative. Plaintiff actually lost an opportunity to become a "distinguished" chaired professor with higher compensations. Further, Plaintiff has argued that the effect of the AHC Investigation was perhaps even worse than suspension without pay of an employee.

On the contrary, Defendants primarily concentrated on Salary Increase dispute which was not the focus of Plaintiff's lawsuit Complaint (R. 1; Apx. pp. 13-55). However, Defendants' own salary data establish that between 1999-2003 at least 22 faculty members, including almost all non-tenured and tenured professors, had received higher raises than Plaintiff putting him in the bottom of the CSE pool of faculty (R. 47, Ex. CA; Apx. pp. 559-561; R. 45, Ex. B; Apx. pp. 259-265).

Notably, Plaintiff's July 2002 salary raise which is actionable by 300 day EEOC stipulation was "below average". In Appellant's Brief (pp. 60-62), Plaintiff has argued why a jury trial is needed to settle the salary dispute by pointing to the intrinsic drawbacks of the McDonnell-Douglas framework in resolving faculty salary disputes in research-oriented universities, where each professor displays unique and distinguishing characteristics.

Finally, Defendants resorted to "cherry picking" statements from depositions out of context and in *non sequitur*. Appellees' Statement of Facts and legal arguments mainly relied on erroneous quotations cited from their own witnesses or from Plaintiff's uncorrected and unsigned deposition transcripts (see footnote #4 in this brief) and were hardly corroborated by evidence like computer records, signed letters, and official documents. In Appellant's Brief (pp. 50-60), Plaintiff established that the district court reversibly erred in its summary ruling by chiefly relying on Defendants' faulty data and isolated quotes.

## **II. APPELLEES FAILED TO REBUT APPELLANT'S LEGAL ARGUMENTS THAT ESTABLISH HE WAS SUBJECTED TO ADVERSE EMPLOYMENT ACTION**

Contrary to district court's opinion (R. 92, Opinion; Apx. 97 ¶ 2), in Appellant's Brief (pp. 26-47) Plaintiff had established a *prima facie* case of unlawful discrimination, using the McDonnell-Douglas framework.

### **A. Defendants Subjected Plaintiff To Adverse Employment Actions**

Plaintiff had experienced the following adverse impacts that include economic and non-economic damages.

1. Loss of Reputation and Loss of Chaired Professorship Opportunity
2. Denial of Repair of Financial Losses due to AHC Investigation
3. Economic Losses Suffered Due to Disparate Treatment
4. Creation of Paper Trail with Negative Remarks about Plaintiff

Details of these losses are described in Appellant's Brief at pp. 26-37. Defendant-Appellees failed to contest the above adverse employment actions and did not deny Plaintiff's loss of the chaired professorship opportunity and other monetary losses. However, the Defendants argued in Appellees' Brief (pp. 33-34), whether the "loss of reputation" is an adverse action. Plaintiff-Appellant rebuts their argument here.

### **B. Appellant's Arguments Establish that Injury To Plaintiff's Professional Reputation Constitutes Adverse Employment Action**

1. Other courts recognize loss of university professor's reputation is

### an adverse action

"In the case of a college professor, the court understands how injury to professional reputation could constitute adverse action within the meaning of antidiscrimination law." *Negusse v. Syracuse University*, 1997 U.S. Dist. LEXIS 3853, (N.Y. 1997) The Court noted that injury to professional reputation could constitute an adverse employment action for a university professor. In *Howze v. Virginia Polytechnic*, 901 F. Supp. 1091 (W.D. Va. 1995), the Western District of Virginia opined that a negative report issued by a university committee could conceivably "hinder the plaintiff in obtaining research grants, endowed professorships, publications, and other similar accoutrements of a tenured professor."

The District of Maine has also grappled with the question of whether injury to the professional reputation of a college professor rises to the level of an adverse employment action. *Nelson v. University of Maine Sys.*, 923 F. Supp. 275 (D. Me. 1996). In *Nelson* the plaintiff professor complained that his university's president placed a letter of reprimand in his file, and that student complaints were placed in his equal opportunity file. *Id.*, p. 281. Comparing these incidents to the negative report in *Howze*, the Judge observed that the report was much more public than the reprimand and student complaints, and that with respect to *Howze*, it "appears from the facts of the case that this report may have caused significant damage to the professor's reputation." *Id.*, p. 283.

The Sixth Circuit has noted in *White*, 310 F.3d 443, 455 (6<sup>th</sup> cir. 2002): "This reputational consequence, which exists to a lesser degree in the blue collar setting, can be damaging in the long-term to a university professor than a temporary suspension for a blue collar worker" referring to *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542, where the professor had raised allegations of damage to her professional reputation. Notably, the Sixth Circuit had compared *reputation loss* with *suspension* which is *an adverse employment action*. The Defendants claim that the Sixth Circuit had ultimately rejected Dobbs-Weinstein's appeal to weaken Plaintiff's argument.

## 2. Dobb-Weinstein's reputation loss was a speculative damage

Defendants fail to distinguish between the two remarkably different cases in the academic world. "The Court of Appeals takes a case-by-case approach in an employment discrimination to determine whether a given employment action is adverse". *Garcia v. Pueblo Country Club*, 299 F.3d 1233 (10<sup>th</sup> Cir. 2002).

In *Dobb-Weinstein, supra*, the professor was denied tenure by her Dean; however, an internal grievance review board had reversed the Dean's decision. She was then awarded tenure without making her suffer any monetary loss. Dobb-Weinstein, however, persisted with her lawsuit even after her university gave her tenure by expecting that a successful Title VII plaintiff should be compensated for reputational damage especially when it impacts her future employability and advancement. However, Dobb-Weinstein's reputation loss was a speculative damage ("basis for this speculative element of damages is unclear", *supra*) since no actual job offer from other places was withheld or declined due to the delay in granting her tenure. Further, tenure decisions "warrant a slightly different kind of scrutiny from the court", see *Zahorik v. Cornell Univ.*, 729 F.2d 85,

92-93 (2<sup>nd</sup> Cir. 1984), since “the granting of tenure is qualitatively different than other employment decisions.” *Lieberman v. Gant*, 630 F.2d 60, 64 (2<sup>nd</sup> Cir. 1980).

**3. Plaintiff suffered actual monetary loss and an opportunity for chaired professorship**

Plaintiff-Appellant had shown that he lost the opportunity to hold “distinguished” chaired professorship with substantial higher compensation (R. 46, Ex. Ap; Apx. pp. 459-474) after it was offered to him due to an unprecedented, stigmatizing and adjudicative AHC procedure that violated established administrative procedures (R. 39, Ex. I; Apx. pp. 186-188). Further, the GRB had upheld Plaintiff’s grievance and asked the Defendants to repair Plaintiff’s reputational losses, *Id.* The Defendants refused to undertake any steps to restore Plaintiff’s reputation including his loss of opportunities elsewhere.

The main difference is that Vanderbilt remedied Dobbs-Weisentein’s grievance by implementing the recommendation of internal grievance board, while Plaintiff-Appellant was denied remedy by Defendants even after GRB had upheld Plaintiff’s grievance. The Defendants discriminated and retaliated against Plaintiff by abusing their administrative power with the intention to stigmatize and victimize Plaintiff as soon as he pointed out that Bernard had prepared a false and misleading report regarding the conversion of Plaintiff’s intellectual property. Therefore, reputation damage is not a speculative loss in Plaintiff’s case. Plaintiff had actually suffered monetary loss and defamation due to the cloud of suspicion the AHC Investigation created about Plaintiff’s integrity, scholarship and character. These perceptions stamp an indelible stigma unlike any reputation loss caused by a tenure decision that is generally accepted as discretionary.

Further, Plaintiff suffered additional monetary loss (about \$40,000) when he was compelled to defend himself by hiring an attorney when the General Counsel’s Office (“GCO”) attorneys were involved in preparing the false file copying report (R. 84, Ex. AS; Apx. pp. 599-605) and also in establishing the adjudicative rules of the AHC procedure (R. 45, Ex. AY; Apx. p. 414). Further, GCO attorney Sharphorn directly controlled the AHC Investigation and stopped the investigation abruptly without allowing Plaintiff to cross examine the complainants (R.1; Apx. pp. 31-32). When Plaintiff’s attorney asked Bhattacharya (R. 46, Ex. Ab; Apx. p. 425) to retract his false and slanderous comments against Plaintiff, Sharphorn wrote on behalf of Bhattacharya stating that his office in GCO represented Bhattacharya (R. 46, Ex. Ac; Apx. p. 426). This precipitated the conflict between Plaintiff and the University while concurrently hindering Plaintiff from restoring his reputation and credibility.

**C. Appellant’s Arguments Establish That The File Copying Incident Was An Adverse Action Because He Suffered Financial Loss**

The district court and Appellees argue that the File Copying Incident was not an adverse action since Plaintiff did not suffer any monetary loss and also the Defendants handled the investigation correctly. Plaintiff shows, first, that he suffered monetary loss, and then he points out how invidious discrimination in the Advanced Computer Architecture Laboratory (“ACAL”)

against Indian-origin professors influenced the outcome of the File Copying Incident. Further, Plaintiff argues that district court erred in granting summary judgment when many unresolved and uncontroverted facts remained.

**1. Plaintiff has shown Financial Loss**

Pursuant to Bay-Dole Act of 1980, in August 2001 Robin Rasor in the Technology Management Office requested Bernard to directly contact Avant! Corp. for licensing Plaintiff's software packages (R. 46, Ex. BL; Apx. pp. 831-834). The University technology licensing policy would have allowed Plaintiff to receive 50% of any monetary transactions (R. 47, Ex. BI; Apx. pp. 549-553) generated from licensing of Plaintiff's intellectual property. Potential investors valued Plaintiff's intellectual property at \$2 Million (R. 45, Ex. H; Apx. pp. 272-274). Plaintiff invested about \$10,000 from his personal resource to commercialize the intellectual property developed in his research laboratory for over 13 years.

In his capacity as GCO attorney, Bernard had undertaken a responsibility to contact Avant! Corp. regarding licensing of Plaintiff's software. Bernard had a duty to Plaintiff. However, despite several requests through interrogatories and motion for document production (R. 9, Motion to Compel; Apx. pp. 652-679), the Defendants declined to turn in any official correspondences between Avant! Corp. and the University, thereby, leaving many questions unanswered and material facts uncontroverted.

**2. District court erred in granting summary judgment when facts remain unresolved and uncontroverted**

Why Avant! Corp. would give \$300,000 per annum salary and compensation to a fresh doctoral engineer having no industrial experience remains unanswered and uncontroverted. Plaintiff's attorney pointed out this to the trial court judge in her oral argument on January 2004 (R. 96, Hearing Transcript, TR at 23-24; Apx. 645-646). Before this hearing, Plaintiff's attorney, Ms. Faupel had specifically asked the following to attorney Bernard (R. 39, Bernard at 143-144; Apx. p. 830).

Faupel: You should have to agree, would you not, that if he was getting an exorbitant salary from Avanti, that might be evidence of piracy, right?

Well, if everybody else in the world that's a brand new post-doc was getting around a hundred thousand dollars a year to start, and Dr. Bhattacharya's started out at three hundred thousand dollars a year, that might raise a little cloud of suspicion, wouldn't you agree?

Bernard: I guess the only way I answer this question is by looking at professional sports. ....

Faupel: Instead of looking at professional sports, why don't we look at like Enron, and Arthur Anderson and WorldCom and some other areas of economy where money seems to influence people's judgment about what is legal or not? Okay?

Bernard: I just ...

Notably, Defendants did not dispute or prove that Bhattacharya, a named witness, did not receive alleged compensation by producing a written affidavit from Bhattacharya or his employer Avant! Corp. who had pleaded NO CONTEST in a criminal lawsuit for piracy of software. In August 2001, Avant! Corp. paid over \$195 Million to Cadence Design Systems in damages in the criminal lawsuit (R. 45, Ex. AN; Apx. pp. 367-373). Only in a trial by jury, the ultimate truth can emerge and genuine issues resolved.

In cases posing complex issues of fact and unsettled questions of law, sound judicial administration dictates that the court withhold judgment until whole factual structure stands upon solid foundation of plenary trial where proof can be fully developed, questions answered, issues clearly focused, and facts definitively found. *Petition of Bloomfield S.S. Co. v. Ludwig Mowinckles Rederi*, 298 F. Supp 1239 (NY 1969).

### **3. Invidious discrimination in ACAL influenced the outcome of the File Copying Incident**

Before sending three letters to Bhattacharya in May, June and August of 2001, Bernard had asked the DCO coordinator, Winsor to create the list of files that his office copied to Bhattacharya (R. 45, Ex. AR; Apx. p. 383). Based on the 437-page list of 53,978 files designated by Winsor, Bernard wrote to Bhattacharya: "Our data suggest that you copied approximately 54,000 files ..." (R. 45, Ex. AM; Apx. p. 364). It has been established that Bhattacharya had taken about 54,000 files in 2 CD ROM's. (R. 45, Ex. AR; Apx. pp. 381-385). The names of these 53,978 files, which were provided to Defendants as evidence that Plaintiff's attorney wanted to use in the trial, established that Bhattacharya had taken Plaintiff's intellectual property in violation to University Copyright Policy as Bernard had written in his May 23, 2001 letter, *supra*.

Bhattacharya himself indicated in his 9/12/2001 letter (R. 45, Ex. AT; Apx. pp. 386-388) that the computer files he took were copied by using "compaction"<sup>1</sup> program and the capacity of files exceeded hundreds of Mega Bytes even after compaction. Nevertheless, Bernard issued a false and misleading file copying report (R. 45, Ex. AS; Apx. pp. 604-605). Damaging his own credibility (R. 46, Ex. BK, Winsor at 150; Apx. p. 836), Bernard admitted in his deposition that it was Brown who had told Bernard that Bhattacharya had taken only "personal" files that could fit into a 3.5" diskette with less than 2 Mega-Byte capacity (R. 46, Ex. BL, Bernard at 108; Apx. p. 835). Evidently after Brown contacted Bernard and Sharphorn in August 2001, the GCO attorneys decided to abandon the file copying investigation (R. 46, Ex. BA, Brown at 75-82; Apx. pp. 837-839). Instead, contradicting his own initial findings and three letters, Bernard held Plaintiff blameworthy for providing erroneous information (R. 45, Ex. AS; Apx. pp. 599-603), though the information was generated by Winsor from computer records with Bernard's assistance (R. 45, Ex. AR; Apx. pp. 381-385). Moreover, Bernard altogether ignored that he had a duty to Plaintiff regarding Plaintiff's software licensing with Avant! Corp.

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<sup>1</sup> Computer files are compacted and archived by using tar.gz program that can compress computer files by a factor of 3 to 10.

Further, when Plaintiff pointed out the mistakes in Bernard's report (*supra*), Sharporn and Steve Director used the AHC procedure to retaliate against Plaintiff. Defendants cannot show any other example where a tenured professor in the University was subjected to this type of disparate and discriminatory treatment when his intellectual property was at stake. Both Brown and Steve Director are members of ACAL. In Appellant's Brief (pp. 45-47), Plaintiff had presented statistical evidence and direct evidence showing that "nation of origin" based invidious discriminatory practice exists in ACAL.

**D. Appellant's Arguments Establish That The AHC Investigation Was Worse Than A Suspension Without Pay And Therefore It Constitutes Adverse Employment Action**

Defendants' proffered reasons for establishing AHC Investigation was rejected by the GRB (see Appellant's Brief, p. 39). Defendants claim that AHC Investigation was not an adverse employment action since Plaintiff was not suspended, demoted or fired. However, a tenured professor like Plaintiff cannot be suspended if there are no just causes. Nevertheless, the professor can be made to endure substantial economic and non-economic damages by unleashing administrative abuse of power if the Court considers that the AHC Investigation was not an adverse action. Unlike in corporate businesses where employees can be suspended or fired, Defendants were obligated to follow the University rules and by-laws promulgated by the Board of Regents and the faculty governance to initiate any adjudicative procedure against a tenured professor (R. 45, Ex. AV; Apx. pp. 397-409). Defendants ignored the standard practices and well-established rules to subject Plaintiff to a stigmatizing, discriminatory, and adjudicative procedure that was never used in the 125 year history of the College of Engineering. The GRB specifically pointed out that the Defendants should have used the existing investigative procedures, and not an adjudicative procedure (R. 39, Ex. I; Apx. pp. 187-188).

Plaintiff argues that the impact of the AHC Investigation was worse than a suspension without pay for several months of an employee. The district court entirely missed this line of legal reasoning before applying a narrow set of pre-defined adverse employment criteria to dismiss Plaintiff's claim of adverse action, reputation loss and monetary damages. Clearly, the district court misinterpreted the employment-specific "other indices that might be unique to a particular situation" criteria in *Kocsis v. Multi-Care Mgt., Inc.*, 97 F.3d 876, 886 (6<sup>th</sup> Cir. 1996).

By the time GRB issued its report in January 2003, Plaintiff had already spent \$40,000 from his salary towards legal costs, which tantamount to 6 months of Plaintiff's take-home salary, causing severe economic hardship for his family (R. 46, Ex. Ak; Apx. pp. 439-441). Plaintiff sought a judicial remedy after being denied administrative remedies despite the fact that Plaintiff had prevailed in the administrative grievance procedure. In the process, Plaintiff was compelled to spend almost \$100,000 to pay all legal, medical<sup>2</sup> and other costs associated with this lawsuit.

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<sup>2</sup> The District Court Judge had ordered (R. 28; Apx. pp. 684-686) psychological tests (MMPI II, PAI and Rorschach tests) for Plaintiff that involved two psychologists and two psychiatrists. Plaintiff had to spend \$12,000 to hire his own experts and depose expert witnesses.

Plaintiff had to perform all his normal duties without any reprieve during those *five months* when AHC Investigation was conducted placing Plaintiff under a cloud of suspicion in academic circles. The AHC Investigation itself was delayed by another *five months* after Bernard collected complaints subjecting Plaintiff to extraordinary mental anguish. During the AHC Investigation, Plaintiff was forced to respond to a flood of office memos, write an elaborate 42-page response to rebut defamatory and false allegations, and prepare his defense in the AHC Hearing against false allegations because Plaintiff's attorney was not permitted to interrogate complainants or talk to the Committee members. Though the AHC disbanded itself without writing the final report, Defendant Steve Director refused to reimburse Plaintiff's economic loss, thereby compelling him to pursue the COE grievance procedure for another *seven months*. Notably, the GCO attorney Sharporn had asked Plaintiff to hire his attorney and then Sharporn advised the AHC. Finally, the University refused to repay Plaintiff's legal costs (R. 84, Ex. Aj; Apx. pp. 795-801) even after the GRB issued its report upholding Plaintiff's grievance. Both State of Michigan (2410.03) and Federal (5 U.S.C. § 580; C.F.R. Title 5 § 1208.15) Administrative Procedures allow the prevailing individual to recover legal costs and other financial damages. Appellant's Brief (pp. 32-35) cited *Leveille v. New York Air National Guard* (1999) to support his claim.

Therefore, the "adverse" employment action that Defendants had subjected Plaintiff to was, in some sense, worse than a suspension without pay for several months. "Suspension without pay constitutes "adverse employment action," as required to establish *prima facie* claim for employment discrimination under Title VII". *Page v. Connecticut Dept. of Public Safety*, 185 F. Supp.2d 149 (2002).

Citing *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F. 3d 208, 223-24 (2<sup>nd</sup> Cir. 2001), (holding that a suspension without pay for one week was an adverse employment action even though the employee was later reimbursed for lost wages because the employee "suffered the loss of the use of her wages for a time"), the Sixth Circuit has noted: "Taking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, it violates Title VII.", *White v. Burlington Northern*, 364 F.3d 789 (6<sup>th</sup> Cir. 2004).

### III. APPELLEES HAVE FAILED TO ARTICULATE REASONS IN STEP 2 AND REBUT APPELLANT'S ARGUMENT IN STEP 3 OF "BURDEN SHIFTING FRAMEWORK"

#### A. Appellant Has Proved That Defendants' Proffered Reasons Were Pretexts

In Appellant's Brief (pp. 39-44), Plaintiff made extensive argument on the following points which Defendants failed to contest in Appellees' Brief:

1. Defendants knowingly excluded AHC Investigation in its internal discrimination report.
2. GRB rejected Defendants' proffered reasons.
3. Defendants admitted AHC Investigation was inappropriate.
4. AHC Investigation was retaliatory.
5. Evidence of deceit which proves Defendants' reasoning is pretext.

6. Evidence of Motive for constructive discharge.
7. Defendants admit that they will never use AHC procedure.

**B. Appellees Have Failed To Refute Plaintiff's Evidence That Shows Plaintiff Was Treated Less Favorably Than Similarly-Situated Individuals**

In order to show that the University has treated him less favorably than similarly-situated individuals outside of the protected class, in Appellant's Brief (pp. 37-38) Plaintiff has provided the names of non-Indian advisors and supervisors who were sued by graduate students and post docs like Phinney, Zorza, Kurt Hoop and Anderson alleging plagiarism, misappropriation of intellectual property, research works, inventions, etc. The University never conducted AHC Investigation against their advisors and supervisors. Contrastingly, the University defended them in the lawsuits and even paid off \$1.8 Million in damages. Like Plaintiff, their advisors and supervisors were tenured professors in the University. The district court ignored Plaintiff's evidence (R. 39, Mazumder at 557-558; Apx. p. 200) and made erroneous conclusion (R. 90, Opinion and Order; Apx. p. 95). In Appellees' Brief, Defendants again failed to rebut the comparative evidence provided in Appellant's Brief (pp. 37-38).

**IV. APPELLANT HAS ESTABLISHED A PRIMA FACIE CASE OF UNLAWFUL RETALIATION**

Appellees have failed to rebut Plaintiff's argument presented in Appellant's Brief (pp. 47-50) where Plaintiff had made his retaliation claim under ELCRA M.C.L.A. § 37.2101 *et seq.* by establishing that as a consequence of his protected activity, namely EEOC Complaint, on October 11, 2002, Defendant Steve Director refused to pay Plaintiff's legal costs, and did not undertake any steps to repair Plaintiff's reputation. On October 17, 2002, EEOC notified the Defendants about Plaintiff's Complaint. Further, Plaintiff has also established the causal connection between the adverse action and Plaintiff's EEOC Complaint that was critical of Steve Director's decision to establish the AHC Investigation.

**V. APPELLANT'S SPECIFIC REBUTTAL TO APPELLE'S BRIEF ON APPEAL**

**A. Appellees' Proffered Reason For Failing To Restore Plaintiff's Reputation Is False**

In Appellees' Brief (p. 20) Defendants claim that Steve Director stated in his deposition "Mazumder responded by telling Dean Bean not to bother with a letter" by pointing to Plaintiff's March 13, 2003 letter (R. 39, Ex. K; Apx. p. 191). However, in this letter Plaintiff did not tell the Dean and Associate Dean not to write a letter. Plaintiff said letter alone would be inadequate as Plaintiff stated below:

"... you consider drafting a reasonable proposal in line with my March 5 letter where I outlined a list of remedies and damages that would be acceptable. I provided this same list of proposed remedies to Jimmy Myers on November 15, 2003. ....

Finally, a mere letter from you will never restore my reputation. A wide group of people are now aware of the Ad Hoc Committee process and some or all of the spurious "allegations" at issue. ..."

Plaintiff provided the list of remedies (R. 84, Ex. Aj; Apx. pp. 795-801) to EDO Director, Jimmy Myers upon his request as well as to Steve Director. However, in the end Steve Director did not even write a letter to restore Plaintiff's reputation.

#### **B. Discrepancies In Statement Of Facts**

Statement of Facts in Appellees' Brief is identical to the one in Defendants' MSJ and similar to the Facts included in district court's Opinion (R. 90; Apx. pp. 61-67). These were rebutted by Plaintiff in Appellant's Brief (pp. 55-59) and also in Plaintiff's Brief (R. 84; Apx. pp. 205-211) by pointing to various referenced Exhibits furnished by Plaintiff to the district court. Some notable Exhibits like Synopsis of Events (R. 45, Ex. AB; Apx. pp. 324-326), Student Letters (R. 45, Ex. AI; Apx. pp. 336-346), and Letters to GRB (R. 45, Ex. AZ; Apx. pp. 415-424) contradict "Facts" provided by Defendants in Appellees' Brief (pp. 12-16) describing the Course Evaluation Incident. Plaintiff's version of File Copying Incident, described in Complaint (R. 1; Apx. pp. 22-28), is different from the ones described in Appellees' Brief (pp. 16-18). Appellant's Brief (pp. 56-58) points out the discrepancies between these two versions. Plaintiff's version of AHC Incident as described in EEOC Complaint (R. 45, Ex. P; Apx. pp. 294-298) and Appellant's Brief (pp.6-13, 58-59) differ from Appellees' Brief (pp.18-20). A few notable misrepresentations of facts in Appellees' Brief are mentioned below.

In Appellees' Brief (p. 16), Defendants reiterated that "Mazumder could not name any specific University policy he believes was violated". However, in Appellant's Brief (p. 52-53), Plaintiff had extensively rebutted this statement by pointing to the University Copyright Policies.

In Appellees' Brief (p. 33), Defendants reiterated that University's attorney Bernard was "doing his job right" as their argument in the File Copying Incident. In Appellant's Brief (pp. 53-54), Plaintiff has extensively rebutted this statement and quoted *Parmelee v. Chicago Eye Shield Co.*, 157 F.2d 582 (10<sup>th</sup> Cir. 1946) to establish that the district court did not comply with provisions of Rule 56.

The Statement of Facts, therefore, underscores the material disputes and disagreements between the parties. However, it must again be emphasized that for summary judgment purposes, the existence of such dispute requires the court to deny summary relief, not grant it, as the district court did.

#### **C. Appellees' Analysis Fails To Establish Similarly-Situated Employees Criterion In Other Employment Matters**

In Appellees' Brief (pp. 35-39), Defendants claim that Plaintiff-Appellant could not establish that similarly-situated employees were treated more favorably by applying their argument to salary dispute. Plaintiff's Brief to resist MSJ refuted this claim making appropriate legal argument (R 48; Apx. pp. 213-219). The district court used Defendants' flawed data, disputed by Plaintiff (R. 65; Apx. pp. 739-742), obtained from Wait's affidavit to justify that Plaintiff could not prove that similarly-situated

employees were treated favorably. In Appellant's Brief (pp. 60-62), Plaintiff explained why salary dispute requires a jury trial where expert witnesses with significant administrative experience can interpret the multi-dimensional employment-specific data to explain whether Plaintiff's salary increases were substantially low after Defendants Khargonekar, Brown and Steve Director got authority over Plaintiff's salary increases.

On the other hand, Defendants have failed to rebut Plaintiff's comparative evidence in Appellant's Brief (pp. 37-38) where Plaintiff established that similarly-situated employees were treated favorably. Therefore, Appellees' claim that Plaintiff could not establish that similarly-situated employees were treated more favorably in "all other" employment matters is incorrect. The district court overlooked Plaintiff's list of names of students and post docs, who alleged plagiarism, misappropriation of intellectual property, research works, etc. by their advisors and finally sued their "non-protected" advisors and the University (R. 39, Mazumder at 557-558; Apx. p. 200).

**D. Plaintiff Has Established That Race, National Origin or Religion Was A Factor In The Employment Actions**

Defendants repeatedly claimed that Plaintiff could not establish that race, national origin or religion was a factor in the employment actions. However, in Appellant's Brief (pp. 45-47), Plaintiff has produced statistical evidence of bias against Indian-origin professors in ACAL. He also produced direct evidence of discrimination in his 1996 Promotion Incident where the Chairman of Plaintiff's department had pointed out in his letter how Plaintiff, being the sole minority Indian professor in ACAL, became a victim of employment discrimination (R. 45, Ex. AA; Apx. pp. 322-323). Both Brown and Steve Director were members of ACAL and they were involved in the alleged File Copying Incident and AHC Investigation. Brown's interference altered the File Copying Incident as deposed by Bernard (*supra*, Apx. p. 835). Brown also asked Prof. Meerkov to ask Plaintiff to leave the University (R. 45, Ex. F; Apx. p. 271) while denying Plaintiff to view and rebut the e-mail complaints. Steve Director started AHC Investigation and then refused to repair Plaintiff's financial and reputational damages.

**VI. APPELLEES MISREPRESENTED PLAINTIFF'S SALARY INCREASES IN THEIR MSJ THAT CONTRIBUTED TO DISTRICT COURT'S ERRONEOUS RULING**

Defendants knowingly misrepresented Plaintiff's salary raises by quoting from his September 11 deposition: "Plaintiff testified his salary increases for 2001 and 2003 were "average". He felt that his increase for 2000 was "just around average" or "maybe just slightly above average". (R. 39; Apx. p.120). However, they failed to state under what circumstances Plaintiff was deposed.

The district court believed the Defendants' MSJ and used these misplaced quotes from Plaintiff's deposition in its Opinion and Order (R. 90; Apx. pp. 78-79) to conclude that Plaintiff had received "just average" salary increases and, therefore, Defendants did not take any adverse action against Plaintiff. However, the district court erred in making its ruling since

Defendants' own salary data establish that between 1999 and 2003 at least 22 faculty members, including almost all non-tenured and tenured professors, had received higher raises than Plaintiff putting him in the bottom of the CSE pool of faculty (*supra*).<sup>3</sup>

Plaintiff was informed of his deposition for the *first time* in the afternoon of September 9, 2003, right after Plaintiff returned from Europe attending a scientific research meeting in Poland.<sup>4</sup> As Plaintiff was traveling in Europe, he had had no opportunity to study over 2900 pages of documents that the University had forwarded to Plaintiff's attorney responding to Plaintiff's Interrogatories regarding salaries, casebooks, teaching evaluations, etc. Although Plaintiff, then suffering from jet lag, requested to reschedule his deposition so that he could go over the documents provided by the University, the deposition started on September 10, 2003.

Consequently, on September 11, 2003 deposition when Defense counsel asked about Plaintiff's salary increases in 2000-01 and 2001-02, Plaintiff answered that his raises were near "average" on the basis of what Plaintiff was told by the then chairman, Khargonekar. After Plaintiff had a chance to study the documents sent by Defendants, Plaintiff pointed out to Defense counsel in his October 27 deposition that he had consistently received "below average raise" and also by writing to the district court (R. 37, Addendum Supplemental Brief; Apx. pp. 691-693). Defendants still used the flawed statistics in their MSJ to mislead the district court regarding Plaintiff's salary increases. As pointed out in Appellant's Brief (pp. 60-62), in a jury trial, the truth regarding salary disparity and other factual distortions will emerge.

## VII. DISTRICT COURT ERRED IN STRIKING DOWN AFFIDAVITS THAT SUPPORT PLAINTIFF'S ARGUMENT

Plaintiff also appealed (R. 93, Notice of Appeal; Apx. p. 105) this erroneous Order (R. 92; Apx. p. 103-104). Due to the page constraint, Appellant's Brief briefly mentioned that several supporting affidavits were inappropriately struck down by the district court. Appellant here points out that the district court failed to comply with F.R.C.P 56 (e) by striking down affidavits in entirety.

There is no requirement, however, that every statement in the affidavit must meet this test, (referring to Rule 56 (e)). Where the affidavit includes both competent and incompetent evidence, the Court should disregard

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<sup>3</sup> Plaintiff had provided Prof. Alangar's salary charts to the district court to rebut the factual inaccuracies in Defendants' MSJ (R. 45, Ex. B; Apx. pp. 259-265).

<sup>4</sup> Plaintiff's attorney brought this matter to the district court judge's attention during the January 24, 2004 Hearing. She told in her oral argument (R. 97, Transcript at TR at 17-18; Apx. pp. 650-651):

**"During one of the days of deposition, Professor Mazumder just arrived a few hours before. He went to Poland, and complained of jet lag, and Mr. Seryak unrelentingly said, we will carry on here, and then some several pages errata when the transcript arrived. Fortunately, it was videotaped. Professor Mazumder watched videotape, compared it to the transcript and prepared the corrections to that, ..."**

The court reporter, who prepared the 686-page transcript of Plaintiff's 3-day deposition, had difficulties in following Plaintiff's non-native English accent. Consequently, Plaintiff's deposition transcript was replete with mistakes that altered the meaning of sentences in numerous places. Though Plaintiff provided a long list of corrections to Defendants, they did not incorporate those corrections. Defendants used the faulty transcript in their MSJ and Appellees' Brief, though Plaintiff did not sign his deposition transcript.

incompetent evidence but give full consideration to that which is competent. This is nothing more than procedure which would be followed at trial. The Court would not strike entire testimony of a witness merely because portion of his testimony is incompetent. The same rule is to be applied to supporting affidavits. *Dickheiser v. Pennsylvania Rly. Co.* 155 F.2d 266, (3<sup>rd</sup> Cir. 1946).

Defendants in their Motion to Strike the Affidavits (R. 49; Apx. pp. 701-704) failed to identify the specific segments of the affidavits where their reasons apply so that only those segments should have been stricken down. Plaintiff resisted Defendant's motion by establishing that the examples used by Defendants to justify their motion, were clearly misconstrued by Defendants (R. 56, Plaintiff's Response; Apx. pp. 712-721). Specifically,

1) Judge struck down Prof. Alangar's affidavit (R. 45, Ex. B; Apx. pp. 259-265) that contained salary charts which were compiled from the annual faculty salary listings published by the University. Defendants could not challenge the accuracy of these charts since they are consistent with Defendant's answers to Plaintiff's Interrogatories (R. 47, *supra*). Nevertheless, Defendants complained that photocopies of salary listings, which would have taken over 100 pages, were not attached to the affidavit.

2) Judge struck down Dr. Chirukapalli's affidavit which stated that Plaintiff's intellectual property was valued at \$2 Million. (R. 45, Ex. H; Apx. pp. 272-274).

3) Notably, Defense continued taking Plaintiff's deposition (without resting) for 3 days aggregating to over 14 hours of deposition, thereby violating the F.R.C.P. Rule 30 that limits the deposition of a witness to 7 hours. Consequently, during the discovery period of the lawsuit, Plaintiff's attorney could not cross-examine him to address issues that Defense did not cover or permit Plaintiff to answer during his deposition. Therefore, in his Order dated December 03, 2003, Magistrate Judge Pepe specifically advised Plaintiff to submit those supporting information at the time of trial or in an affidavit under 28 U.S.C. § 1746 to resist summary judgments (R. 20, Order; Apx. p. 683, ¶ 1). The district court judge struck down Plaintiff's affidavit *erroneously* pointing to Plaintiff's 686-page transcript.

Contrastingly, the district court refused to grant Plaintiff's motion to strike down the incorrect data in Wait's affidavit (R. 65, Motion to Strike; Apx. 739-742). Plaintiff has established that in some segments in Wait's affidavit, Plaintiff's research expenditures were significantly reduced from the actual data provided by the University, while research expenditures for Laird were significantly increased from the actual data provided by Laird. Further, the district court persistently used these flawed data (R. 90, Opinion and Order, pp. 22-23; Apx. 82-83) in order to unfavorably compare Plaintiff's performances with Laird, Brown, and Sakallah. As a result, the district court incorrectly concluded that these individuals were not similarly-situated as Plaintiff.

Grant of motion for summary judgment under Rule 56 should not be based on District Court's finding that "one party's documentary evidence is inherently more "reliable" or "accurate" than that of the opposing party and his witnesses. The party opposing a motion for summary judgment, with evidence competent under Rule 56, is to be believed, it is for jury

at trial, not for judge on a pretrial motion, to decide whose evidence is more credible." *Leonard v. Dixie Well Service & Supply, Inc.* 828 F.2d 291 (5<sup>th</sup> Cir. 1987).

**VIII. PLAINTIFF'S WINTER 2004 COURSE EVALUATION WAS TAMPERED WITH AND THE DISTRICT COURT ERRED IN DENYING THE APPELLANT'S AMENDMENT**

In its Order and Opinion on May 27, 2004, the district court belittled (*de minimis* action) the adverse impact of the Winter 2000 Course Evaluation on Plaintiff's career (R. 61, Opinion and Order; Apx. pp. 626-634). Afterwards, in July 2004, when Plaintiff notified to COE administrators that Plaintiff's Winter-2004 Course Evaluation was tampered with, they refused to investigate the matter in contravention to the University policies.

The EECS Chairman gave contradictory explanations that failed to elucidate why at least two original evaluation forms with high ratings were removed from the evaluation process and replaced by two fake evaluations containing the lowest rating along with some disparaging written comments. The original ones were discarded after fake copies were photocopied and then white-out/tape was added on fake forms to conceal the original high rating. (R. 87, Motion to Amend Complaint; Apx. pp. 802-811). These two comments are in stark contrast with Plaintiff's previous years' teaching commendations (R. 46, Ex. Ax; Apx. pp. 476-483) and student feedback (R. 47, Ex. Bc; Apx. pp. 812-829).

Witnesses like Driscoll, Lehman and Stark (R. 6; Apx. pp. 636-643) are University professors who can explain to the jury how such mean-spirited incidents can marginalize the aggrieved faculty, notwithstanding their innocence, by isolating them from staff, graduate students and other faculty who tend to align with their chairmen and deans when such disputes erupt.

The district court had, therefore, erred in granting MSJ to defendants by trivializing the adverse impacts of the Winter-2000 Course Evaluation Incident on Plaintiff. Further, the district court erred in not allowing Plaintiff to amend his complaint and give him relief. *Jenkins v. United States Corp.*, 400 F.2d 28, 32-33 (5<sup>th</sup> Cir. 1968) has therefore recognized "what is small in principal is often large in principle". Eleventh Circuit also stated likewise: "Title VII gives courts no license to decide that any injury resulting from discrimination, however insignificant, may be regarded as *de minimis*." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546. (11<sup>th</sup> Cir. 1996).

**IX. SUMMARY OF PLAINTIFF-APPELLANT'S BRIEF ON APPEAL**

Plaintiff Professor Mazumder has established that the Defendants made him endure economic harm in addition to his reputational and other non-economic damages. "Title VII claim of employment discrimination requires allegation that employee endured "objectively tangible harm." *Higbee v. Billington*, 246 F. Supp 2d 10, (D.C. Cir. 2003). Further, the Court must recognize that an "Adverse employment action suffered by Title VII claimant does not refer only to ultimate employment decision to discharge employee." *Shannon v. Bellsouth Telecommunications Inc.*, 292 F.3d 712, (11<sup>th</sup> Cir. 2002). Therefore, "the elements

of that prima facie case of employment discrimination must not be applied woodenly, but must rather be tailored flexibly to fit circumstances of each type of illegal discrimination." *Olson v. General Electric Aerospace*, 101 F.3d 947, (3<sup>rd</sup> Cir. 1996).

Plaintiff has established his Title VII discrimination and retaliation claims by applying the rigors of McDonnell-Douglas triumvirate burden-shifting framework. Defendants have failed to rebut Plaintiff's argument in Step 1 and Step 3 of the framework and to refute the comparative evidence Plaintiff-Appellant has provided to claim discriminatory and disparate treatment. Further, Plaintiff has provided statistical evidence and direct evidence of discrimination at the time of Plaintiff's 1996 promotion to establish that Plaintiff's nationality and religious background were factored into his employment actions.

Most importantly, Defendants have not fulfilled their duty before persuading the district court to grant summary judgment. The Defendants have not diligently addressed the main claims of discrimination and retaliation, namely adverse impacts of AHC Investigation. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the Supreme Court mandated that "the movant bears the initial burden of persuading the court that the record demonstrates "the absence of a genuine issue of material fact." Summary judgment is used not as a substitute for trial, but only when "it is quite clear what the truth is and that no genuine issue remains for trial." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

#### CONCLUSION

For the foregoing reasons, Plaintiff Professor Mazumder respectfully requests the Court of Appeals for the Sixth Circuit to reverse the district court's rulings in summary judgment and remand the case for jury trial on its merits.

Respectfully submitted,

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Pinaki Mazumder, Ph.D.  
Plaintiff-Appellant

Dated: October 11, 2005