

CASE NO. 05-1557

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PINAKI MAZUMDER, Ph.D.,
Plaintiff-Appellant, Pro Se

v.

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

Defendants-Appellees

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

BRIEF OF PLAINTIFF-APPELLANT,
PINAKI MAZUMDER

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

(Pro Se Appellant)

JURISDICTIONAL STATEMENT

Jurisdiction of District Court Eastern District of Michigan, Southern Division on Plaintiff-Appellant's Civil Rights suit pursuant to 42 U.S.C. § 2000e *et seq.*; Civil Rights Act of 1964, Title VII § 703 and § 704; and Elliott-Larsen Civil Rights Act, M.C.L.A. 37.2101 *et seq.* was proper. The judgment of the district court was entered on March 28, 2005 (R. 91, Judgment). Plaintiff-Appellant filed his notice of appeal on April 22, 2005 (R. 93, Notice of Appeal) with the Sixth Circuit Court of Appeals since its jurisdiction on Plaintiff-Appellant's lawsuit rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- A. Did the district court judge reversibly err in his summary disposition rulings under F.R.C.P. Rule 56?

Plaintiff-Appellant answers "YES".

- B. Do the district court's summary disposition rulings reflect a misunderstanding of "adverse employment actions" in a Title VII discrimination complaint as recognized by Court of Appeals for the 6th Circuit and other federal courts that apply employment-specific criteria to determine an adverse employment action instead of using a pre-defined narrow set of "ultimate employment decision" criteria?

Plaintiff-Appellant answers "YES".

- C. Did the district court err in summary judgment by inferring that Plaintiff would fail to establish his discrimination claims against the Defendant University of Michigan under the burden shifting criteria of *McDonnell-Douglas* framework?

Plaintiff-Appellant answers "YES".

- D. Did the district court err in summary judgment by inferring that Plaintiff would fail to establish his retaliation claims against the named Defendants under the burden shifting criteria of *McDonnell-Douglas* framework?

Plaintiff-Appellant answers "YES".

STATEMENT OF THE CASE

Procedural history: Plaintiff submitted a discrimination complaint to the University of Michigan Equity Diversity Office (hereinafter, "EDO") on April 26, 2002 and three formal grievances to the College of Engineering (hereinafter, "COE") on February 12, 2002 to obtain administrative remedies. Since EDO did not process his discrimination complaint for almost seven

months, Plaintiff submitted his EEOC Complaint on October 11, 2002 (R. 45, Ex. 1 P, 45-3, pp. 17, 35-50; Apx. 283-301). After notifying the University on October 17, 2002, EEOC issued a "Right to Sue" letter on January 10, 2003 giving Plaintiff up to 90 days to sue the Defendants for discrimination based on country of origin, ethnicity, ancestry, and religion which is unlawful under U.S.C. Title 42 § 2000e (R. 45, Ex. P, 45-3, p. 15; Apx. 302). On January 10, 2003, a COE Grievance Review Board (hereinafter, "GRB") issued a critical report upholding Plaintiff's grievance and specifically recognizing that Plaintiff's professional reputation was tarnished by Defendants' employment action. (R. 39, Motion for Summary Judgment, Ex. I, 39-4, pp. 10-13; Apx. 186-188). From January 10 to April 6, 2003 Plaintiff wrote several letters to Dean Steve Director (hereinafter, "Steve Director"), Provost Paul Courant and President Mary Sue Coleman regarding his monetary and reputation loss due to adverse employment actions. On April 8, 2003, Plaintiff filed a lawsuit at Washtenaw County Court at Ann Arbor, Michigan and then Defendants transferred the civil rights suit to the US District Court Eastern District of Michigan (R. 1, Copy of Complaint). On November 5, 2003, Defendants filed the Motion for Summary Judgment (R. 7, Motion) to dismiss Defendant Pramod Khargonekar (hereinafter, "Khargonekar"). It was granted on May 27, 2004 (R. 61, Opinion and Order). Then, on March 17, 2004 Defendants filed a new Motion for Summary Judgment (hereinafter, "MSJ") for dismissing the entire lawsuit (R. 39, MSJ, 39-1, pp. 1-31; Apx. 107-137). It was granted on March 28, 2005 (R. 91, Judgment). Plaintiff submitted the Notice of Appeal on April 22, 2005.

STATEMENT OF THE FACTS

Plaintiff Pinaki Mazumder (hereinafter, "Plaintiff") became employed by the University of Michigan (hereinafter, "University") in September 1987 after receiving his Ph.D. degree in Electrical and Computer Engineering from University of Illinois at Urbana-Champaign. Plaintiff works in the Division of Computer Science and Engineering (hereinafter, "CSE") which is one of the two divisions within the Department of Electrical and Engineering and Computer Science (hereinafter, "EECS"). Plaintiff's primary research is in the area of Very Large Scale Integrated Circuits and Computer-Aided Design of Integrated Circuits (hereinafter, "VLSI"). Plaintiff is a member of the Advanced Computer Architecture Laboratory (hereinafter, "ACAL") (R. 48, Amended Brief, 48, p. 5; Apx. 205).

Plaintiff is currently a tenured full professor and an IEEE Fellow for "his contributions in the field of VLSI". He has published 5 books and over 170 archival papers in prestigious journals and conference proceedings. He has regularly taught introductory undergraduate classes with enrollments exceeding 120 students, resulting in tuition income to the University of over \$200,000 per year. Plaintiff has brought in over \$5 million in research funds to the University and participated as investigators in collaborative proposals that have brought in over \$18 million. He has consistently provided between 20% and 40% of his annual salary from his research grants to relieve some fiscal burden of the University. A brief account of Plaintiff's accomplishments has been listed in ¶ 48 (R. 1, Complaint; 1, pp. 8-9; Apx. 17-18) while the details of his accomplishments can be found in his curriculum vitae (R. 45, Ex. A, 45-1, pp. 3-29; Apx. 228-254).

However, despite Plaintiff's accomplishments and solid contributions to the University, from 1996 Plaintiff has experienced discrimination and retaliation as described by Plaintiff in his EEOC Complaint (i.e., Form 5 and its attachment):

"... I have been subject to ongoing harassment, defamation, and discrimination at the University. This began six years ago when I was considered for a full professorship over some colleagues and continued through a series of

¹ R. 45, R. 46, R. 47 and R. 84 contain Plaintiff Brief Exhibits.

more recent administrative incidents and proceedings. The series of incidents are schematically represented in the accompanying diagram to illustrate causal relationship between these events. Instead of protecting my interest, the administrators of the University had intentionally victimized and stigmatized me on the basis of nationality of origin, race and religion." (R. 45, Ex. P, 45-3, p. 35; Apx. 284, ¶ 2).

The series of these inter-related incidents were described in EEOC Complaint (*Id.*, pp. 34-50; Apx. 284-307) and, subsequently, in Plaintiff's lawsuit Complaint (R.1, Complaint; pp. 4-47; Apx. 13-55) as: 1) Promotion Incident, 2) Course Evaluation Incident, 3) File Copying Incident, and 4) Ad Hoc Committee (hereinafter, "AHC") Investigation. Plaintiff has also attached two Exhibits (R. 84, Ex. Bg, 84-1, p. 36; Apx. 612), (R. 46, Exhibits, Ex. Am, 46-2, p. 20; Apx. 443) with his Brief to schematically illustrate the causal connection and temporal proximity of these series of adverse incidents. However, while granting summary judgment the district court viewed these as discrete, stand-alone and disparate events without scrutinizing the timeline and causal connection between them (R. 90, Opinion and Order).

The following statement of facts is divided into two sections. 1) At first, File Copying Incident and AHC Investigation are described establishing causal connections and temporal proximity between those two incidents. 2) Then, a chronology of other incidents is described briefly to establish a pattern of discriminatory treatment towards Plaintiff.

File Copying Incident and AHC Investigation are Causally Related

File Copying Incident started in January 2001 and the case was closed in February 2002 right after the Ad Hoc Committee was formed as a result of Plaintiff's pointing out factual errors and distortions in the investigation report issued by Jack Bernard (hereinafter, "Bernard") of the General Counsel's Office (hereinafter, "GCO"). Both these incidents are described in details in Plaintiff's lawsuit Complaint (R. 1, Complaint; 1, pp. 13-23; Apx. 22-32) and EEOC Complaint (R. 45, Ex. P, 45-3, pp. 41-49; Apx. 290-298).

In File Copying Incident, Defendants have discriminated against Plaintiff by allowing his valuable Intellectual Property to be copied by a post doc and afterwards starting the AHC Investigation to retaliate against Plaintiff when he protested to GCO for issuing a false and misleading report ascribing blame to Plaintiff for providing erroneous information while Bernard himself gathered that information through computer records.

The following facts are discussed below to establish the causal connection between File Copying Incident and AHC Investigation which are also temporally proximate as shown here.

Plaintiff had provided sufficient evidentiary documents to the district court along with his brief in order to establish that Steve Director and GCO associate vice president Daniel Sharphorn (hereinafter, "Sharphorn") had held an unprecedented, unfair, disciplinary, adjudicative format of investigation (R. 39, MSJ, Ex. I, 39-4, p.11-12; Apx. 187-188) through an AHC Hearing Procedure as a matter of retaliation to Plaintiff's critical response, through his attorney, to Bernard's file copying investigation report. Plaintiff's attorney wrote: "More to the point, however, why are stories changing now? DCO staff made certain statements in February that contradict the facts you now set forth in your November 19th letter." (R. 47, Ex. Bf, 47-2, p. 19; Apx. 511, ¶ 1).

Bernard made thorough investigation before writing three stern letters: In order to find out what type of research software files Plaintiff's doctoral advisee, named Bhattacharya, had downloaded from Plaintiff's research computers, Bernard had asked Don Winsor (hereinafter, "Winsor") of the Departmental Computing Office (hereinafter, "DCO") to create the list of files that his office copied to Bhattacharya. Winsor wrote in his e-mail (R. 45, Ex. AR, 45-6, p. 32; Apx. 383):

"The collections of files to be placed on the CDs were prepared and organized by Dr. Bhattacharya, and DCO staff member Hugh Batley recorded the CDs" (*Id.*; Apx. 383, ¶ 1).

"After a discussion with University of Michigan attorney Jack Bernard, DCO used backup tapes to obtain a list of likely files that Dr. Bhattacharya may have taken with him. This list was provided to Prof. Mazumder and to Jack Bernard." (*Id.*; Apx. 383, ¶ 3).

After looking through the 437-page list of 53,978 file names designated by Winsor and making a thorough investigation with the help of DCO staff, Bernard wrote to Bhattacharya on May 23, 2001 (R. 45, Ex. AM, 45-6, p. 5; Apx. 364):

"There is eyewitness and electronic evidence that, prior to your departure, you copied and/or removed an extensive number of electronic files from Dr. Mazumder's lab. Our data suggest that you copied approximately 54,000 files

Our investigation indicates that the types of files you took include the following: a) research work conducted (within the scope of employment) by you and others in the Mazumder lab; b) proprietary information made available to the University under non-disclosure agreements, c) software tools developed within the Mazumder lab;

This conduct may subject you to criminal or civil penalties and requires your immediate attention. "

When in February 2001 Bernard learned about the research files and intellectual property conversion by Bhattacharya, Bernard made a thorough investigation and followed the Copyright Policies of the University (<http://www.copyright.umich.edu/official-policy.html>) that states:

Students who create academic works while at the University (e.g., dissertations, theses, student projects) own the copyright to such works, unless: (1) the works qualify as works made for hire in the course of employment at the University; or (2) a written transfer of copyright is obtained.

Bhattacharya had received an all-paid doctoral degree from the University. Plaintiff gave full financial assistantship to Bhattacharya for 6.5 years from Plaintiff's federal research grants. That is why when Bhattacharya did not reply to Bernard's two letters dated May 22 and June 26, Bernard wrote to Bhattacharya on August 8, 2001 (R. 45, Ex. AM, 45-6, p. 7; Apx. 366):

"If I do not hear from you by August 20, 2001, the University will contact federal and state authorities. Your actions may result in both civil and criminal liability. In addition, I may be contacting the general counsel of your corporation."

Plaintiff's intellectual property had commercial value and enabled him to secure competitive research grants: During the first week of August 2001, Plaintiff and Technology Management Office (hereinafter, "TMO") also discussed possible licensing of Plaintiff's intellectual property. With the help of federal grants amounting to \$3 million, for over 11 years Plaintiff and his research group had developed cutting edge VLSI software program like BISRAMGEN memory compiler and Quantum and NDR SPICE programs (R. 45, Ex. AU, 45-6, pp. 45-50; ; Apx. 389-396; R. 47, Ex. Bk, 47-3, pp. 24-50; Apx. 514-548). Venture capital investors who were considering helping Plaintiff establish a start-up company at that time estimated the commercial value of Plaintiff's intellectual property was about \$2 million (R. 45, Ex. H, 45-2, p. 49; Apx. 273, ¶ 7). TMO then contacted Bernard about licensing Plaintiff's software to Avant! Corp. by bringing an EE Times article entitled "AVANTI PLEADS NO CONTEST" to Bernard's attention (R. 45, Ex. AN, 45-6, p. 9; Apx. 367). However, to date Bernard has not produced any communications he or other GCO attorneys made with Avant! Corp. to show what had transpired between the company and the University.

Bernard had switched sides and encouraged Bhattacharya to contact Plaintiff's ex-advisees: What is evident is that on the deadline of August 20, 2001, Bhattacharya sent an e-mail to Bernard claiming that he had not received Bernard's previous letters sent to Bhattacharya's work address at Avant! Corp. (R. 45, Ex. AQ, 45-6, p. 28; Apx. 380). However, the undelivered letters written on GCO stationery were not returned to Bernard, thereby raising suspicion of interference and manipulation by Avant! Corp. What is more surprising is that within 24 hours, on August 21, 2001, Bhattacharya sent an e-mail message to some of Plaintiff's past advisees claiming "Mr. Bernard would like to hear what Prof. Pinaki Mazumder's ex-students may have to say about him. ... While I'm writing this letter, the current Chair of EECS is trying to contact Mr. Bernard. Obviously under pressure from Prof. Mazumder, Mr. Bernard sent me a letter yesterday ..." (R. 45, Ex. AO, 45-6, pp. 21-23; Apx. 377-379). In order to convince them, Bhattacharya extensively quoted verbatim from Bernard's three stern letters ("This conduct may subject to criminal or civil penalties and requires your immediate attention." *Id.*; Apx. 378) instigating them to write against Plaintiff. To defend himself, Bhattacharya wrote: "I've had several invigorating conversations with the University's administrators and they are all on my side and are eager to end the menace". (*Id.*; Apx. 379). In addition to Bernard, Bhattacharya had spoken with Defendants Khargonekar who had joined University of Florida at that time, and Richard Brown (hereinafter, "Brown") before writing this e-mail (R. 46, Ex. BA, 46-4, p. 21; Apx. 484). Khargonekar called Brown, who was appointed the acting chairman of EECS by Steve Director, to intercede for Bhattacharya and wrote to Bernard without consultation with Plaintiff (*Id.*; Apx. 485). However, Bernard and others did not require Bhattacharya to produce any documents to show the list of files he had taken with him.

Though two of Plaintiff's past advisees, Kulkarni, who was Bhattacharya's roommate, and Gupta sent e-mail to Bernard on August 22, 2001 within 24 hours after Bhattacharya contacted Bernard, for over 5 months, from August 22, 2001 until January 30, 2002, no one in the University allowed Plaintiff to have an opportunity to rebut any of the statements made in these e-mail (R. 48, Amended Brief, 48, p. 8; Apx. 208). It is also clear from the beginning of the e-mail messages that Kulkarni and Gupta

wrote to defend Bhattacharya believing that Plaintiff had concocted the file copying incident. They were never told that Bernard had written those three letters after making his investigations.

When Plaintiff tried to find out from GCO about these e-mail, he was asked by Sharphorn to get a private attorney (R. 46, Ex. BH (Deposition), 46-5, p. 33; Apx. 488). Plaintiff contacted Brown, who was Acting Chairman of EECS at that time, about these e-mail. Instead of showing these e-mail, Brown asked Plaintiff to look for a job outside the University in order to solve his problem. Brown repeated the same thing to Prof. Meerkov when he tried to intervene on Plaintiff's behalf (R. 45, Ex. F, 45-2, p. 39; Apx. 271).

Neither had Bernard copied his three letters to Plaintiff before sending them to Bhattacharya nor did the University stand by its findings on the basis of computer record and e-mail messages. For over 5 months, there was no attempt to clarify these rambling e-mail messages through an established procedure. There was no attempt to find out from Plaintiff anything regarding those 53,798 files that Winsor had identified as the ones copied on to 2 CD ROM's for Bhattacharya (R. 48, Amended Brief, 48, pp. 5-11; Apx. 205-211).

Bernard's false and misleading report caused adjudicative AHC investigation: However, in November 2001, Bernard issued a report (R. 84, Ex. AS, 84-1, pp. 17-18; Apx. 604-605) contradicting his own letters written in May and June (*supra*). Despite irrefutable evidence of computer data and e-mail messages, Bernard wrote that Bhattacharya had taken only his personal files in a 3.5" diskette with 1.4 Mega-Bytes storage space in contradiction to Winsor's written statement indicating Bhattacharya had taken 53,798 computer files in 2 CD ROM's having a capacity of 650 Mega-Bytes in each. Plaintiff sent an e-mail message to his Dean regarding numerous discrepancies between computer records and Bernard's report. However, Steve Director did not reply to him. Plaintiff's attorney then rebutted Bernard's report by showing intentional errors, distortions of facts and mischaracterization in Bernard's letter asking him to reinvestigate the matter (*Id.*; Apx. 599-603).

In response to Plaintiff attorney's letter, Steve Director formed an adjudicative AHC investigation against Plaintiff on January 30, 2002 without discussing with Plaintiff or giving him an opportunity for an informal inquiry at first (R. 45, Ex. AX, 45, p. 21; Apx. 412). Notably, for 5 months the University did not act on rambling e-mail messages that Bernard received on August 22, 2001. However, as soon as GCO received Plaintiff attorney's critical response to Bernard's report, GCO and COE established an unprecedented, adjudicative Hearing procedure to discipline Plaintiff (R. 45, Ex. AY, 45, p. 24; Apx. 414). The GCO attorney directly controlled the AHC proceeding. In the AHC Hearing, as soon as Plaintiff started asking questions to Bhattacharya about the research files he had copied from Plaintiff's laboratory and about *exorbitant compensation* Bhattacharya received from Avant! Corp., the AHC Chairman in consultation with the GCO attorney evicted Plaintiff and his attorney from the Hearing room and plaintiff was denied any further opportunity to cross-examine Bhattacharya (R. 1, Complaint; 1, pp. 13-23; Apx. 22-32). Notably Bhattacharya turned down a good offer from IBM Watson Research Center to join Avant! Corp. and allegedly he received about \$300,000 per annum wages and salary from Avant! Corp. (R. 96, Transcript at TR 23-24; Apx. 645-646). After receiving a 42-page written response from Plaintiff regarding these complaints (R. 39, MSJ, Ex. E, 39-3, pp. 1-29; Apx. 139-168), the AHC

disbanded itself without issuing a Final Report. Details of the AHC investigation and its negative impacts on Plaintiff's career are given in Plaintiff's EEOC Complaint (R. 45, Ex. P; Apx. 283-301).

A chronology of other incidents establish a discriminatory pattern

1996: Plaintiff's promotion to full professor was denied even though the EECS Chairman and Executive Committee found him eligible for promotion. Chairman George Haddad's letter stated that Plaintiff's promotion was denied because of "hostility towards him" by other non-protected ACAL professors and because Brown, a non-protected ACAL faculty, was not considered for promotion at that time (R. 45, Ex. AA, 45-4, pp. 42-43; Apx. 322-323).

1997: Brown was promoted to full professor by Defendant Steve Director while Plaintiff was not promoted, though George Haddad's letter suggested that Plaintiff should be considered for promotion in 1997 (*Id.*; Apx. 323). Further, Brown was made an Associate Chairman in EECS department by Steve Director and Khargonekar.

1999: Steve Director and Khargonekar gave "below average" raise to Plaintiff in fall 1999, in contrast to consistent high raises Plaintiff received since 1988 including a special raise in 1994 (R. 45, Ex. S, 45-4, p. 10; Apx. 321), when EECS had a different Chairman and COE had a different Dean. Despite Plaintiff's superior performance compared to most professors in the CSE division, the majority of active CSE faculty, about 22 professors received higher raises than Plaintiff (R. 47, Ex. CA, 47-4, pp. 47-50; Apx. 558-561). When Plaintiff asked for an explanation to Khargonekar and Steve Director, they could not explain what criteria and metric they used to adjudge Plaintiff's "below average" salary.

2000: Defendant Brown's doctoral student and Defendant Khargonekar became involved in an unprecedented handling of Plaintiff's course evaluation while Plaintiff was in California. Synopsis of Events, dated May 4, 2000, (R. 45, Ex. AB, 45-4, pp. 45-47; Apx. 324-326) and student letters (R. 45, Ex. AI, 45-4, pp. 18-28; Apx. 336-346) provide the details of the incident and establish that Plaintiff's version of facts are totally different from the version Defendants have created without conducting any formal investigation (R. 39, MSJ, 39-1, pp. 14-16; Apx. 120-122).

2000-2003: Defendants gave "below average" raises in all four years despite Plaintiff's consistent superior performance to others in the CSE. At least 22 faculty members, including almost all non-tenured and tenured professors, received higher raises than Plaintiff putting him in the bottom of the CSE pool of faculty (R. 45, Ex. B, 45-1, pp. 35-39; Apx. 259-265). Despite Plaintiff receiving chaired professor's offer from other universities, Plaintiff had received the cumulative lowest raise amongst the active faculty members in the CSE Division.

SUMMARY OF ARGUMENT

District court has reversibly erred in granting summary judgment in a *sui generis* discrimination lawsuit where a tenured professor has suffered significant reputation and monetary damages, without losing his tenured job status due to a sequel of prejudicial, unprecedented and unfair employment actions. District court has applied a narrow set of pre-defined "ultimate

employment decision” criteria to deny Plaintiff’s Title VII discrimination and retaliation claims without embracing the actual intent of 42 U.S.C. § 2000e. The Sixth Circuit Court of Appeals recognized that employment-specific criteria and tangible impact of unfair employment actions should be considered in determining adverse employment action and therefore the Court recommended employment-specific “...other indices that might be unique to a particular situation” in its seminal case, *Kocsis v. Multi-Care Mgt., Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) and later expounded the Court’s intentions in *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789 (6th Cir. 2004).

Further, the district court has treated Plaintiff’s alleged employment incidents as discrete and disparate even though Plaintiff has shown causal connections and temporal proximity amongst them. Therefore, the district court has failed to evaluate the “aggregate” effects of these connected employment incidents as well as discriminatory motives behind certain employment actions. Specifically, the district court ignored the overall adverse impact of administrative actions on Plaintiff’s career like loss of reputation, economic loss due to abusive use of authority in AHC Incident, papering with negative evaluations that remain in Plaintiff’s record, loss of chaired professorship with significant pay raise, and loss of opportunity to commercialize Plaintiff’s intellectual property. Notably even though Plaintiff had prevailed in an administrative grievance that challenged the AHC Incident, his legal and financial damages were not recompensed in contravention to norms established in state and federal administrative procedures.

In order to prevail in his *prima facie* case of unlawful discrimination as well as unlawful retaliation using the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Plaintiff has proved that Defendants’ proffered reasons to establish adjudicative AHC Investigation were false, diversionary and retaliatory. Even the GRB had rejected the Defendants’ proffered reasons pointing out that the procedure was unfair and was never used in COE. Defendants knowingly excluded the incident in their internal discrimination report. In fact, Defendants admitted that the AHC procedure was inappropriate and they would never use it. District court has inappropriately struck down many critical affidavits given by key witnesses and ignored important exhibits provided in Plaintiff’s Brief, thereby, misconstruing many genuine issues and material facts. A *de novo* review of these documents shows that in addition to circumstantial evidence establishing discrimination by burden-shifting framework, Plaintiff has provided direct and statistical evidence of discrimination indicating that Plaintiff’s nationality and religious background were factored into his employment actions.

Defendants, on the contrary, attempted to defeat Plaintiff’s discrimination claims in all employment matters by applying the McDonnell-Douglas burden-shifting framework only to the salary dispute while failing to articulate legitimate, non-discriminatory reasons for other alleged employment actions. However, application of the burden-shifting framework in resolving salary disputes in research-oriented universities has intrinsic drawbacks since employers can easily defeat Title VII discrimination claim of an aggrieved professor by showing two professors are not “similarly situated” because of their unique and distinguishable characteristics, even if salary charts, expert opinions and other facts establish an unfair salary disparity.

Plaintiff has further shown that district court did not comply with provisions of F.R.C.P. Rule 56, thereby inappropriately granting summary judgment despite many genuine disputes and uncontroverted material facts exist. Defendants did not

articulate legal argument for their employment actions in AHC Investigation and File Copying Incident though the burden of persuasion lies with movant. Nonetheless, district court had formed its conclusory legal opinions in favor of movants in those incidents by either disregarding or misinterpreting documents provided by non-movant to resist the summary judgment motion. A close scrutiny of these documents reveals that Plaintiff has not only established his discrimination and retaliation claims by applying the rigors of McDonnell-Douglas burden-shifting framework, but also that in a jury trial he can persuade jurors to reconstitute his damages.

ARGUMENT

Standard of Review

The Sixth Circuit Court of Appeals reviews a district court's grant of summary judgment *de novo*. *City Management Corp. v. United States Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). When reviewing a motion for summary judgment, the evidence, all facts, and any inferences that may permissibly be drawn must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith radio Corp.*, 475 U.S. 574, 587 (1986).

The district court concluded that Plaintiff had not been subjected to adverse employment action in the following employment matters: 1) Course Evaluation Incident, 2) File Copying Incident, 3) Ad Hoc Committee Investigation, and 4) Salary Increases (R. 90, Opinion and Order; 90). However, there are several deficiencies in the district court's analysis of Plaintiff's complaint that contributed to erroneous judgment.

Employment-Specific Criteria for Adverse Action

Firstly, the district court has applied "ultimate employment decision" criteria like "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguishable title, a material loss of benefits," *Kocsis, supra* to determine whether Plaintiff has been subjected to "adverse employment" in each of these discrete incidents. The district court has erred by overlooking that a court cannot list every possible employment action that falls into the definition of adverse employment and that is why to broaden the definition of "adverse action" the Sixth Circuit Court of Appeals has affirmed, "... or other indices that might be unique to a particular situation." *Kocsis, supra*.

Therefore, the district court had not followed the guideline of adverse employment criteria set by the Sixth Circuit Court of Appeals in the seminal "*Kocsis*" case with a view to accommodating the purpose of Title VII as envisioned by the Congress. The district court failed to note other relevant employment-specific criteria and their impacts on Plaintiff's career like 1) loss of Plaintiff's reputation due to administrative actions, 2) economic loss due to abusive use of authority by Defendant Dean Director to establish AHC Investigation, 3) creating a paper trail ("papering") of negative evaluations that remain in Plaintiff's record, 4) Plaintiff's loss of opportunity to receive "distinguished title" like chaired professorship with significant pay raise and discretionary research money, and 5) loss of opportunity to commercialize Plaintiff's intellectual property that was created at Plaintiff's research laboratory over a course of 12 years. The Sixth Circuit Court of Appeals has recognized reputation loss in a teaching

profession as having a long-term damaging impact on a professor's career, *White v. Burlington Northern & Santa Fe Railway Company*, 310 F.3d 443, 455 (6th Cir. 2002).

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court stated that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of 'disparate treatment of men and women' in employment" *Id.* at 64. District court has erred by overlooking that the Sixth Circuit Court of Appeals has affirmed that employment-specific criteria should be considered in recognizing adverse employment action by stating that "... or other indices that might be unique to a particular situation." *Kocsis, supra*. The Sixth Circuit judges, while writing their opinions, had recognized that Kocsis was an hourly-paid, at-will employee and that is why they expounded the criteria for adverse employment action in *White*, 364 F.3d 789. The entire employment spectrum, including tenured positions in academia and federal courts, cannot be judged by listing a narrow set of employment adverse actions. The Sixth Circuit specifically stated: "As we recognized in *Kocsis*, however, it is impossible to list every possible employment action that falls into the definition of adverse employment action and a court must consider "indices that might be unique to a particular situation" *Id.* at 799.

Several other circuits apply a broad view and do not rigidly adopt that an ultimate employment decision should constitute Title VII claims. First, Second, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits apply employment-specific criteria to determine adverse employment actions. "Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of adverse". *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2nd Cir. 1997). Generally, all courts make decisions by taking "a plaintiff's job-related attributes into account." *Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania*, 162 F.3d 235, 236 (3rd Cir. 1998) since "adverse actions can come in many shapes and sizes." *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996).

Causal Connection and Aggregate Impact Establish Adverse Action

Secondly, the district court has treated the above employment incidents as discrete, disparate, and stand-alone employment events without trying to examine any causal connections and temporal proximity amongst them. The court has overlooked Plaintiff's Exhibits attached to his Brief (R. 84, Ex. Bg, 84-1, p. 36; Apx. 612) and (R. 46, Ex. Am, 46-2, p. 20; Apx. 443) where he had schematically illustrated the causal connections amongst them. The district court did not evaluate the "aggregate" negative impact of these employment events, especially the combined effects of File Copying Incident and Ad Hoc Committee Investigation, on Plaintiff's career.

Moreover, the district court interpreted that the adverse action in each employment matter individually did not rise over the threshold that is based on "ultimate employment decision." However, the Sixth Circuit Court and other circuit courts have also recognized the possibility that while some employment actions viewed alone would not be an adverse employment action, when viewed with others, they could become adverse employment actions. "At summary judgment the trial court must consider defendant's alleged conduct both in context and in totality, not merely assess the respective allegations in isolation." *Simas v.*

First Citizens' Fed. Credit Union, 170 F. 3d 37, 47 (1st Cir. 1999). Appeal court upon reviewing *de novo* held that several employment actions, "viewed in the aggregate, could be considered "materially adverse" *Id.* at 50. The Sixth Circuit Appellate Court stated: "At any rate, even if these employer actions individually were not sufficiently adverse, the conduct in the aggregate created a situation that constituted a materially adverse employment action". *White*, 310 F.3d 443 at 459.

In order to prove that Plaintiff had experienced discriminatory adverse employment action, in the present Brief plaintiff primarily concentrates on the AHC Investigation since this is clearly actionable by the 300 day EEOC statutory stipulation (R. 90, Opinion and Order; 90, p. 15; Apx. 75). File Copying Incident is also actionable by the 300-day statutory limit because the GCO closed the case in February 2002 after Plaintiff challenged Bernard's report and Plaintiff's grievance was rejected by Defendants in June 2002 (R. 45, Ex. AZ, 45, pp. 26-35; Apx. 415-424).

The Argument section is divided into three parts:

- I. PLAINTIFF CAN ESTABLISH A PRIMA FACIE CASE OF UNLAWFUL DISCRIMINATION
- II. PLAINTIFF CAN ESTABLISH A PRIMA FACIE CASE OF UNLAWFUL RETALIATION
- III. DISTRICT COURT REVERSIBLY ERRED IN SUMMARY JUDGMENT RULING.

I. PLAINTIFF CAN ESTABLISH A PRIMA FACIE CASE OF UNLAWFUL DISCRIMINATION

The district court has applied the "three-step burden-shifting analysis" of McDonnell-Douglas framework (R. 90, Judgment, pp. 10-12; Apx. 70-72) to analyze Plaintiff's Claim of Discrimination under the Title VII of the Civil Rights Act of 1964, U.S.C. Title 42 Chapter 21, Subchapter VI, § 2000e, *et seq.* and ELCRA M.C.L. 37.2101, *et seq.* According to this framework, to make a *prima facie* case of discrimination, in the *first step* Plaintiff must show: 1) that he is a member of the protected class; 2) the employer subjected him to an adverse employment action; and 3) the employer treated him less favorably than similarly-situated individuals outside of the protected class. *Clayton v. Meijer, Inc.* 281 F. 3d 605, 610-611 (6th Cir. 2002); *Sieciniski v. Blue Cross and Blue Shield of Mich.*, 469 Mich. 124, 133-134. Once the defendants in the *second step* articulate a legitimate, non-discriminatory reason for the adverse employment action, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981), in the *third step* Plaintiff must then demonstrate by a preponderance of the evidence that the proffered reason: 1) has no basis in fact; 2) did not actually motivate the adverse action; or 3) was insufficient to motivate the adverse action. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F. 3d 1078, 1084 (6th Cir. 1994).

A. Plaintiff's Proof of Step 1 in McDonnell-Douglas Framework

1. Plaintiff Belongs to the Protected Class

It is undisputed that Plaintiff is a member of the protected class since he was born in Calcutta, India in a Hindu Kayastha (by religion) family (R. 45, Ex R, 45-4, p. 8; Apx. 320).

2. Plaintiff Proves that the Employer Subjected Him to an Adverse Employment Action

2.1 Reputation is foremost in Plaintiff's employment situation

In order to understand the job-related attributes of Plaintiff's employment at a top-ranked engineering department (EECS Department has been ranked as high as 5th in USA), one needs to study his annual Faculty Activity Reports (R. 47, Ex. CC -- Ex. CE; Apx. 562-598) which show that typically in every year Plaintiff teaches large undergraduate and advanced graduate classes, brings in over \$400,000 research grants from various industrial and governmental funding agencies to conduct innovative and cutting-edge research works in his field of expertise, advises over half a dozen doctoral students, and participates in societal and University service works like editing prestigious journals, serving on the program committees of international conferences, formulating curricula for undergraduate students, and so on. In order to successfully carry out Plaintiff's educational works, Plaintiff had pointed out in his EEOC Complaint :

"... in order to succeed in a top-notch engineering school, in addition to excelling in teaching and service, a professor has to function in the model of an entrepreneur in order to excel in research that often requires a laboratory, people, money, and instruments. A professor has to accomplish multiple goals like acquisition of research funds, management of large research programs with the help of post docs and graduate students, dissemination of research results through archival papers in journals and conference proceedings, scholarly service to professional societal organizations, etc. Respect and authority are paramount in order to positively interact with a wide network of intelligent, fiercely competitive, and perhaps idealistic people who form the nexus of the academic world." (R. 45, Exhibits, 45-3, Ex P, p. 47-48; Apx. 296-297).

The Sixth Circuit Appellate Court District Judge recognizes the attribute of reputation in a teaching profession. "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." *White*, 310 F.3d 443 at 455.

Evidence of Reputation Damages as Adverse Action

2.1.1. Loss of reputation due to Ad Hoc Committee

The College of Engineering had never used in its 125 years of history, a prejudicial adjudicative procedure like the one used against Plaintiff, thereby indelibly stigmatizing him (*Id.*, pp. 44-49; Apx. 294-298). A COE Grievance Review Board had noted that AHC Hearing Procedure was not adopted by faculty governance, it did not presume Plaintiff's innocence and had abrogated Plaintiff's faculty right to have a confidential initial factual inquiry (R. 39, MSJ, Ex. I, 39-4, p.11; Apx. 187). GRB had acknowledged that Plaintiff's reputation had suffered due to application of AHC Investigation and the GRB had recommended to Steve Director as the decision-maker to restore Plaintiff's reputation (*Id.*, p. 12; Apx. 188). Plaintiff has listed names of several witnesses who are leaders in academia. They can explain to a jury in a trial how AHC Investigation can adversely affect the long-term career of a professor in a top-ranking university. AHC Investigation had cast a cloud of suspicion in the minds of Plaintiff's

colleagues, the University staff, and outside the University to other schools who have learned of this through various avenues. As evidence for loss of reputation, Plaintiff provides the following information (R. 1, Complaint, 1, ¶¶ 280-286; Apx. 39).

2.1.2 Plaintiff lost chaired professorship opportunity

As a direct evidence of loss of reputation, Plaintiff has provided several written documents regarding chaired professorship offers from other universities. On March 26, 2001, prior to formation of AHC, Plaintiff had received a written e-mail offer to join the University of California at Riverside as a chaired professor with 25% salary increase and a discretionary \$35,000/year that can be drawn as summer month salary. (R. 46, Ex. Ap; Apx. 459-474). Between April 2001 and July 2001, numerous communications took place including finding a suitable job for Plaintiff's wife who is an Assistant Professor at Cleary university (*Id.*, p. 5; Apx. 467). In June 2001, University of California had arranged a job for Plaintiff's wife. Then, both parties decided to process the paperwork right after the summer break in 2001.

On October 9, 2001, the Chairman Jay Farrell (listed as Plaintiff's witness) wrote to Plaintiff: "Please tell me your preferred timeline so that I can try to move things along here at the appropriate pace" (*Id.*, p. 2; Apx. 464). However, once Ad Hoc Committee was formed on January 30, 2002, University of California never contacted Plaintiff again and abandoned its effort to recruit Plaintiff. It was really incongruous, because between October 2000 and July 2001, Vice Chancellor and Dean of Engineering (listed as Plaintiff's witness) had personally requested Plaintiff to join their university in order to strengthen its teaching and research activities in Computer Engineering.

Plaintiff was also nominated by Prof. Nancy Amato of Texas A&M University (listed as Plaintiff's witness) for a \$4.3 Million chair professor's position (R. 46, Ex Aq, 46-3, p. 14; Apx. 475). However, after a Texas A&M professor visited Ann Arbor to talk to Plaintiff in around April 2002 when AHC was conducting its Hearing, the chair search committee which informed Plaintiff of his nomination and the professor who talked to Plaintiff, did not proceed further (R. 39, MSJ, 39-6, p. 29; Apx. 198).

University of Texas at Austin was also trying to recruit Plaintiff because of his expertise and research accomplishments in VLSI and nanoelectronics. Prof. Jacob Abraham, a Chaired Professor (R. 6, Witness list, Apx. 636-643), will testify that his university contacted Plaintiff for a tenured professorship. However, after AHC was formed, the University of Texas did not pursue any further.

Loss of Reputation in Other Employment Incidents

2.1.3 Loss of reputation due to promotion incident

By denying Plaintiff's promotion in 1996 without any valid reasons, false rumors and slanderous speculations had spread in other universities including at Wayne State University where his spouse was working at that time. She had reported this matter to Khargonekar who was the chairman of EECS in 1997. (R. 45, Exhibits, Ex I, 45-3, pp. 2-3; Apx. 275-276). When an employer

takes employment actions that lead to loss of reputation of an employee, courts have held employers liable for reputation damages, <http://www.careerjournal.com/myc/legal/19990503-spolter.html>.

2.1.4 Loss of reputation due to file copying incident

Plaintiff's attorney pointed out to Bernard's May 23, 2001 letter (R. 45, Ex. AM, 45-6, p. 5; Apx. 364) where Bernard claimed "eyewitness" (Hugh Batley) and "electronic evidence" (a 437-page listing of about 54,000 files created by Don Winsor) existed. Winsor in his November 2002 e-mail claimed that he discussed with Bernard about this matter (R. 45, Ex. AR, 45-6, p. 32-34; Apx. 383-385). However, Bernard prepared a false and misleading report that was rebutted by Plaintiff's attorney:

"In view of your "case of CD-ROMs" comment, someone now appears to be twisting the facts to suggest that Professor Mazumder grossly exaggerated the size of the files Dr. Bhattacharya copied from his laboratory machines. You appear to be conflating what DCO staff said about Dr. Bhattacharya's copying with Professor Mazumder's initial report about his missing directories and work that was moved to Dr. Bhattacharya directory. ..

Your exaggerated reference to needing a "case of CD ROM's to copy" is therefore inaccurate and of serious concern to Prof. Mazumder. Indeed, the sheer outrageousness of that statement exposes my client to ridicule and is damaging to his reputation." (R. 47, Ex Bf; 47-2, p.19; Apx. 511).

Bernard distributed his report outside the University and did not correct his report. Instead, AHC was formed by Steve Director to discipline Plaintiff.

2.1.5 Loss of reputation due to course evaluation incident

Plaintiff's reputation was damaged by the way Defendants had handled the Course Evaluation Incident. When Plaintiff was traveling to California, Khargonekar had opened Plaintiff's course evaluation package without verifying that the evaluations were tampered with and typed up many false and libelous comments in anonymous evaluation forms entering them in computer, thereby enabling electronic distribution (R. 45, Ex AB, 45-4, pp. 45-47; Apx. 324-326). Even though several students affirmed that those comments were false by writing letters to the University (R. 45, Ex AI, 45-5, pp.18-28; Apx. 336-346) and Plaintiff made repeated plea to Chairman (Khargonekar) (R. 45, Exhibits, Ex AC, 45-4, pp. 49-51; Apx. 327-329), Associate Dean (Katehi) (R. 45, Ex AD, 45-5, pp. 3-6; Apx. 330-333), and University (R. 45, Ex AZ, 45-5, pp. 26-35; Apx. 415-424), the University steadfastly refused to investigate the incident (R. 45, Ex AH, 45-5, pp. 16; Apx. 325). Instead, it prepared a version of facts that is disputed by Plaintiff and other students (R. 45, Ex. AI, 45-5, pp. 17-28; Apx. 336-346).

2.2 Denial of Repair of Financial Losses due to AHC Investigation

Prevailing party in administrative proceedings can recover financial losses. Both State of Michigan (2410.03 Administrative Procedures Act) and Federal Administrative Procedures (5 U.S.C. § 580, C.F.R. Title 5 § 1208.15) allow an individual to recover

legal costs and other financial damages if the individual can prevail in an adjudicative administrative proceeding where private attorneys are involved.

In *Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999), (find at www.oalj.dol.gov/public/wblower/decsn/94tsc03c.htm), Plaintiff Leveille filed a complaint at the Labor Department "alleging that she has been discriminated engaging in conduct prohibited under the whistleblower protection provisions of six environmental statutes." As a prevailing party in administrative investigation, the Court awarded her for mental pain and anguish; for injury to professional reputation; for past and future medical expenses; and for attorney fees.

Plaintiff was subjected to severe disparate treatment by compelling him to go through the AHC Hearing procedure that was authorized by Steve Director who, in fact, had no authority to substitute University procedures by a prejudicial adjudicative procedure. Plaintiff and his attorney had formally protested to the University by 1) identifying many prejudicial and discriminatory aspects of AHC Hearing procedure (R. 45, Ex AV, 45, pp. 14-15; Apx. 407-408), 2) requesting to process his grievance regarding faculty due process rights at the University of Michigan before holding the AHC hearing (*Id.*, p. 14; Apx. 407), 3) pointing out that AHC procedure was never used in the history of College of Engineering and it was retaliatory (*Id.*, p. 15; Apx. 408), 4) pointing out that the AHC procedure had no provision for informal fact finding (*Id.*, p. 14; Apx. 407), 5) showing that the AHC procedure presumes guilt (*Id.*, pp. 4-10; Apx. 397-402), and 6) showing AHC Committee was hand picked by Steve Director and Plaintiff had conflicts with two Committee members (*Id.*; Apx. 407-408).

Further, the AHC Procedure was unnecessary since officially sanctioned investigative procedures like Rackham Graduate School and "Procedures for Investigating Allegations of Misconduct in the Pursuit of Scholarship and Research" (http://www.research.umich.edu/policies/um/integrity_policy.html) were available, as pointed out by GRB (R. 39, MSJ, Ex. I, 39-4, p.12; Apx. 188).

GRB had noted that respondent Steve Director had chosen not to follow the University policies and the GRB strongly recommended "that the existing "Ad Hoc Hearing Procedure" should not be used in an investigative process as it fails to separate investigative and adjudicative functions" (*Id.*, p.12; Apx. 188). Steve Director had exceeded his authority by invoking an unprecedented AHC procedure that has not been approved by faculty governance body. The GRB concluded that "the decision by the respondent to use the "Ad Hoc Hearing Procedure" to investigate the factual basis of allegations against the grievant constitutes a failure to use a fair and commonly known decision-making process" (*Id.*, p.11; Apx. 187).

The GRB further recommended that Dean should restore Plaintiff's reputation and never apply such a prejudicial procedure. The GRB did not have authority to award monetary damages, but it allowed Plaintiff to request monetary damages from the University. Under Title VII 42 U.S.C. § 2000e-5(k), a prevailing party is usually awarded "a reasonable attorney fees." In *White*, 364 F.3d 789 at 798, the Sixth Circuit Court of Appeals specifically stated:

“The Supreme Court also observed that: A tangible employment action in most cases inflicts direct economic harm ... Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates”

By asking Plaintiff to hire his private attorney to face frivolous charges and denying attorney fees after Plaintiff prevailed in GRB which determined that AHC procedures damage the reputation of any accused professor, Defendants caused Plaintiff to spend about 50% of his take-home salary (about \$40,000) by the time the GRB issued its recommendation to Steve Director. However, he did not implement any recommendations made by the GRB. At the end, the Defendants merely offered to write letters to 3 administrators within the COE to correct Plaintiff's loss. When Plaintiff had pointed out that his reputation loss had spread beyond three persons and Plaintiff had suffered monetary losses (R. 46, Ex Ag, 46-1, p. 49; Apx. 432), Steve Director did nothing including writing any letters at all. Provost Courant also refused to do anything (R. 46, Ex Ai, 46-2, p. 4; Apx. 435).

2.3 Other Economic Losses Suffered Due to Disparate Treatment

Bay-Dole Act of 1980 (codified at 35 U.S.C. §§ 200, et seq.) was intended to facilitate university professors to transfer their innovations and technologies, developed from federal research grants, for commercial use and societal benefits. Regents and University administrators encourage faculty members to start companies from their research works. Plaintiff had spent more than \$10,000 from his pocket to raise seed funds to start a company. Investors who were interested in providing funds appraised the value of Plaintiff's intellectual property like BISRAMGEN as \$2 million (R. 45, Ex H, 45-2, pp. 49-50; Apx. 273-274). By initiating AHC investigation that lasted for 6 months and GRB for another 7 months, Plaintiff was diverted to defend false allegations and thereby lost an opportunity to commercialize his research works (*Id.*, p. 50; Apx. 274).

2.4 Creation of a Paper Trail with Negative Remarks about Plaintiff

In the name of AHC investigation, Defendants created a paper trail that mischaracterizes Plaintiff and potentially harms his future employment since these are kept in his personal record. 1) AHC suddenly abandoned its investigation without giving an opportunity to Plaintiff to cross-examine complainants (R. 84, Ex. Bg, 84-1, p. 33; Apx. 609). AHC provisional report does not meet any professional standard. The Committee did not even issue a Final Report and the hand-picked Committee members made evasive comments in its report in order to protect the Dean and the University. Despite receiving a 45-page Plaintiff's response proving that the allegations were false and defamatory (R. 39, MSJ, pp. 1-46 in 39-3; Apx. 138-185), the Committee repeated some of those allegations in its Report to justify the formation of AHC. 2) File copying report was false as pointed out by Plaintiff (R. 84, Ex AS, 84, pp. 12-16; Apx. 599-603) and the report stays in his file. 3) Report of Investigation (R. 45, Ex AJ, 45-5, pp. 30-41; Apx. 347-358) prepared by the Defendants to protect themselves in the lawsuit also contained many false and defamatory information to portray Plaintiff negatively. In *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997), the court included “papering” of an employee's file with negative reports as one of the ultimate employment decision criteria (ultimate decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job,

"papering" of an employee's file with negative reports and reprimands even though employee was "not discharged, demoted, or suspended."). In *Leveille v. New York Air National Guard*, *supra*, Plaintiff Leveille was awarded over \$200,000 in damages since she asserted discrimination due to negative letters defendants kept in her personal record.

B. Comparative Evidence -- Plaintiff Has Shown that the University Treated Him Less Favorably than Similarly-Situated Individuals Outside of the Protected Class

In his deposition, Plaintiff had given the names of students and post docs who sued their White advisors and the University alleging plagiarism, misappropriation of intellectual property, research works, inventions, etc. by their advisors and supervisors (R. 39, MSJ, Mazumder (Deposition), 39-6, p. 31; Apx. 200) at 557 and 558. Compared to *three* rambling e-mail messages that were used as justification for establishing a prejudicial AHC adjudicative investigation, in these lawsuits actual wrongdoings were shown by students and post docs against their advisors and supervisors. For example, post doc Carolyn Phinney in *Phinney v. Perlmutter, Verbrugge, and Adelman, and University of Michigan*, 222 Mich. App. 513; 564 N.W.2d 532 (1997) won in trial at the Washtenaw Circuit Court and she was awarded \$1.8 Million in damages. In *Zorza v. Vest, Wilson, and Goldstein*, 568 N.W.2d 87; 1997 Mich. LEXIS 1748, and in *Zorza v. University of Michigan, Abrams, Cohen, Lucchesi*, 1996 Mich. LEXIS 298, plaintiff Zorza was another post doc working at the University of Michigan. In *Kurt Hoop v. Nesse, Buss and University of Michigan*, 2001 Mich. App. LEXIS 2596, Hoop, the graduate student, alleged plagiarism. In *Anderson v. University of Michigan, Martin, Filisko, Robertson, et al.*, 1999 U.S. Dist. LEXIS 14481, plaintiff Anderson was a doctoral student in the College of Engineering. In all these examples, University defended White and non-protected "similarly-situated" professors who were named as some individuals in the above lawsuits. Further, in EEOC Complaint Plaintiff had mentioned that a similarly situated White professor in Plaintiff's department, Yale Patt was allowed to leave the University of Michigan quietly and join the University of Texas at Austin without having to face any adjudicative hearing even though egregious charges were brought against him by some students.

C. Plaintiff's Proof of Step 3 in McDonnell-Douglas Framework

Preponderance of Evidence Shows that the Proffered Reasons are Pretexts

3.1 Defendants failed to proffer articulate reasons in Step 2 of "burden shifting framework"

In their MSJ, Defendants have not made any legal argument to proffer any reasons for holding AHC investigation and thereby failed to "articulate a legitimate, non-discriminatory or non-retaliatory reason for the adverse employment action" as required by McDonnell-Douglas framework (R. 39, MSJ, 39-1, pp. 20-31; Apx. 124-137).

3.2 Defendants knowingly excluded AHC investigation in its internal discrimination report

In its internal discrimination investigation, the Review Committee's Report knowingly excluded AHC investigation (the main item in EEOC Form 5) altogether and the Provost denied discrimination to Plaintiff on the basis of an incomplete investigation (R. 45, Ex. AK, 45-5, pp. 45-49; Apx. 359-363).

3.3 GRB rejected Defendants' proffered reasons

In their Statement of Facts, Defendants have tentatively pointed to student complaints as reasons for holding AHC investigation. However, GRB had studied the validity of this argument by holding a near 3-hour long taped Hearing (audio tape is entered as testimonial evidence) and studying numerous documents from Plaintiff and Defendants. In its Final Report, the GRB pointed out that the proffered reasons provided by Defendants do not justify the Dean to ignore the existing University sanctioned procedures (R. 39, MSJ, 39-4, pp. 10-12; Apx. 186-188). Plaintiff's due process faculty rights were violated by denying an informal investigation at first without having to bring an attorney and go to Hearing directly to exculpate himself in the adjudicative AHC proceeding.

3.4 Defendant admitted AHC investigation was inappropriate

Dean had agreed with GRB's findings that AHC Procedure was adjudicative and he wrote that he would ask Rules Committee to develop a COE procedure. (*Id.*, p.15; Apx. 190). The Supreme Court reasoned that the 42 U.S.C. § 2000e-2(m) "unambiguously states that a plaintiff need only 'demonstrate' that an employer used a forbidden consideration with respect to 'any employment practice'" *Desert Palace v. Costa*, 539 U.S. 90 (2003). Further, the Court noted that the statute does not mention - much less require - that a plaintiff make a heightened showing through direct evidence.

3.5 AHC investigation was retaliatory

Plaintiff further claimed in his EEOC complaint that AHC was formed as retaliation to Plaintiff attorney's letter to GCO. The letter established that Bernard had authored a flawed and misleading report falsifying the amount of files Bhattacharya had copied from Plaintiff's laboratory. On December 14, 2001 Plaintiff's attorney wrote to Bernard:

"I must formally request a reinvestigation of the "facts" regarding the size of the files at issue. As mentioned above, Professor Mazumder was informed by computer staff that the files reflected in the 400 page list of file names could actually be stored on 2 CD's, each having a capacity of 700 megabytes. Your exaggerated reference to needing "a case of CD ROM's to copy" is therefore inaccurate and of serious concern to Professor Mazumder.". (R. 47, Ex. Bf, 47-2 p. 19; Apx. 511).

Instead of re-investigating and correcting the report, Sharphorn closed the investigation soon and Steve Director established AHC to summon Plaintiff to a Hearing without saying what rules, policies or laws Plaintiff allegedly had broken. (R. 45, Ex. AW, 45, p. 18-19; Apx. 410-411). When Steve Director was asked to justify under what authority he had established this unprecedented and prejudicial AHC procedure, Sharphorn pointed to an inappropriate Regent's Bylaw 5.06 that merely authorizes a Dean to form an Executive Committee of a unit (R. 45, Ex. AV, 45, pp. 4-8; Apx. 397-402).

3.6 Evidence of deceit to prove Defendants' reasoning is pretext

This has two parts proof. In Part 1, Plaintiff points out that no students had ever complained against him before August 21, 2001. In Part 2, Plaintiff shows that Bernard had talked to Bhattacharya and within 24 hours he "caused" two of Plaintiff's past advisees along with Bhattacharya to write complaints against Plaintiff.

Part 1: Defendants cannot explain why before August 21, 2001, in 14 years Plaintiff had taught thousands of students in the University, there were no complaints against him. Complainant Bhattacharya worked as a doctoral student with Plaintiff for 5 years until November 1999. Then Bhattacharya stayed back on his own accord to work with Plaintiff until January 2001. He had never complained against Plaintiff to the University during all those years. Complainant Kulkarni also stayed back after finishing his Ph.D. in November 1999 until April 2001. Complainant Gupta had written three papers with Plaintiff after he left the University in 1996 to join Intel Corporation. Brown admitted that he contacted Plaintiff's advisees while leaving Plaintiff in the dark (R. 46, Ex. BA; Apx. 484-487). Therefore, Defendants could not prove that any students had ever complained against Plaintiff before August 20, 2001 when Bhattacharya received Bernard's three stern letters for the first time. Plaintiff had received commendation letters for his teaching from previous Dean of COE, Atkins and EECS Associate Chairman, Senior (R. 46, Ex. Ax, 46-4, pp. 4-6; Apx. 476-477). Plaintiff also received the EECS Department Research Excellence Award in 1995. All these students worked with Plaintiff, wrote several research papers and Plaintiff had given strong recommendation letters for their jobs and awards. Plaintiff helped Bhattacharya to receive a job offer from IBM Watson Research Center and recommended Kulkarni for a Teaching Excellence Award.

Part 2: However, after August 21, 2001 within 24 hours of Bhattacharya trying to contact Bernard, Bhattacharya wrote to two of Plaintiff's advisees that he had "invigorating" discussion with many administrators in the University and Bernard had sent those three stern letters being pushed by Plaintiff. Further, Bhattacharya wrote that Bernard was waiting to hear from Plaintiff's advisees some complains against Plaintiff (R. 45, Ex. AO, 45-6, pp. 21-23; Apx. 377-379). Then Brown started contacting Plaintiff's advisees without even informing Plaintiff. See (R. 46, Ex. BA, 46-4, (Deposition), p. 33; Apx. 487) at 276-277. Further, Bernard pointed out that Brown had told him that Bhattacharya had taken his personal files, though Bernard's own letters stated otherwise ("... software tools developed within the Mazumder lab;") and, furthermore, Brown had no knowledge about files Bhattacharya had copied from Plaintiff's computer.

Evidence establishes that Defendants encouraged these students to write complaints against Plaintiff when Defendants decided to abandon the file copying investigation. Pretext requires evidence of deceit, ("pretext" means deceit used to cover one's tracks, *Kulumani v. Blue Cross Blue Shield Association*, 224 F.3d 681, 684 (7th Cir. 2000). Plaintiff shows deceit on the part of Defendants and thereby proves that Defendants' reasoning is pretextual. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), the Supreme Court has noted: "Proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."

3.7 Evidence of Motive for Constructive Discharge

The student e-mail complaints were intentionally withheld from Plaintiff for 5 months, and those were not made available to him in his employment files in violation of Bullard-Placwecki Employee Right To Know Act, M.C.L.A. §§ 423.501 et seq., M.S.A. §§17.62 (1) et seq. Instead, Defendant Brown, while he was serving as Acting Chairman, asked Plaintiff to leave the University without giving him an opportunity to review rambling e-mail messages from Plaintiff's three past advisees. Further, Brown repeated his intention to get rid of Plaintiff by asking Prof. Meerkov to advise Plaintiff to leave the University (R. 45, Ex. F, 45-2, p. 39; Apx. 271). "Proof of discriminatory motive ... can in some situations be inferred from the mere fact of differences in treatment." *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335.

3.8 Defendants admit that they will never use AHC procedure

Defendant Steve Director wrote to Plaintiff and GRB on Jan 2003: "We agree that the document causing the confusion will not be used again in an investigative matter" (R.39, MSJ, 39-4, p.15; Apx. 190). Therefore, Defendants agreed that they had used a discriminatory adjudicative investigation procedure to discipline Plaintiff. Employer can escape liability through the "same decision" affirmative defense. Supreme Court justices have stated that

"We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by providing by preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. 258 (1989).

D. Additional Proof of Discrimination beyond McDonnell-Douglas Framework

4.1 Direct Evidence of Discrimination against Plaintiff in the Promotion Incident

Plaintiff was considered for promotion to Full Professor in 1995 because Chairman George Haddad's letter stated that "... his contributions in research are excellent, in teaching very good and in service adequate and therefore, based on these facts," (EECS Executive Committee felt that they), "would recommend him for promotion." (R. 45, Ex. AA, 45-4, pp. 42-43; Apx. 322-323). However, due to tremendous hostility and opposition from some non-protected professors in ACAL, Plaintiff was denied promotion without being given any oral or written reasons by the University. However, Chairman Prof. Haddad pointed out in his letter how Plaintiff, being the sole minority Indian professor in ACAL, became a victim of employment discrimination. Haddad wrote in his letter:

"There is a question in my mind relative to his colleagues and their treatment of him which goes back for many years ... I never realized and was never informed of the degree of hostility towards him. The fact that the

Committee Chair did not solicit letters from several senior faculty members until he was asked to is also somewhat troublesome." (*Id.*, p. 42; Apx. 322).

Plaintiff's promotion casebook Committee Chairman was Trevor Mudge, a White Professor in ACAL. He was close to Defendant Brown. Haddad's letter pointed out this causal relationship between denial of Plaintiff's promotion and how White professors in ACAL preferred non-Indian professors: "I believe that the fact that the College Executive Committee did not approve my request to evaluate Rich Brown and Karem Sakallah this year had a significant impact on this case." (*Id.*). In his confidential input to the COE, Chairman Haddad wrote: "Even though I honestly believe that Pinaki deserves a promotion, I think it is best to postpone the decision for another year and I would like to speak to the Executive Committee about this case." (*Id.*)

Steve Director joined the University as the Dean of COE and also became a member of ACAL in July 1996. He did not implement EECS Executive Committee's recommendation for Plaintiff's promotion in 1997. Instead, in 1997 Steve Director gave promotion to Brown and to Sakallah, who was Director's past advisee, though earlier the COE and EECS Executive Committees had determined that Plaintiff had superior performance to them. Plaintiff subsequently received promotion in 1998 without receiving any back pay. Denial of Plaintiff's "deserved" promotion in 1996 and "delay" of promotion to 1998 while non-protected employee, Brown was promoted in 1997 constitutes a direct evidence of discrimination under Title VII.

4.2. Statistical Evidence of Bias against Indian-origin Professors in ACAL

In order to establish a pattern of discriminatory behavior against other Indian-origin professors in ACAL, Plaintiff had noted in his lawsuit that when Plaintiff joined the University in 1987, there were four, competent, Indian-born assistant professors in ACAL. Three of the Indian professors were denied reappointment, promotion, and tenure, and the fourth Indian professor left on his own. Between 1988 and 2002, the only persons who did not receive tenure within ACAL were three Indian professors, while all other White professors were tenured in that period (R. 1, Complaint; 1, pp. 7-8; Apx. 16-17). Between 1990 and 1994, when these three Indian professors left the University, their positions in ACAL were filled by White professors. Though afterwards many Indians applied for tenure-track positions in ACAL, no one was hired. ACAL has now only one Indian faculty who is Plaintiff Pinaki Mazumder. This constitutes statistical evidence showing that "nation of origin" based discriminatory practice exists in ACAL.

II. PLAINTIFF CAN ESTABLISH A PRIMA FACIE CASE OF UNLAWFUL RETALIATION

To make a *prima facie* case of unlawful retaliation, Plaintiff must demonstrate by a preponderance of the evidence that: 1) he engaged in protected activity; 2) defendant knew that he engaged in this protected activity; 3) the defendant subsequently took an employment action adverse to Plaintiff, and 4) a causal link existed between the protected activity and the adverse employment action exists. *McDonnell Douglas Corp., supra* .

Plaintiff can establish a prima facie case of unlawful retaliation under ELCRA MCL 37.2101 et seq. as well as under Title VII § 704. It may be noted that:

- 1) Plaintiff filed his EEOC complaint on October 11, 2002. (R. 45, Ex. P, 45-3, pp. 34-50; Apx. 283-301).
- 2) On October 17, 2002, EEOC notified to University of Michigan through Form 131 about Plaintiff's EEOC Complaint (R. 39, MSJ, 39-5, p. 19; Apx. 192).
- 3) Defendant refused to pay Plaintiff's legal cost after GRB issued its report on January 10, 2001 indicating that Plaintiff's reputation was harmed. GRB did not have authority to award damages to Plaintiff because monetary compensations are given by Dean and Provost who control the fiscal matters in the University. GRB deferred to Steve Director about Plaintiff's legal and other expenditures incurred by Plaintiff due to the establishment of AHC Hearing procedure requiring Plaintiff to hire a private lawyer. GRB also noted that Steve Director could have used one of many well-tested procedures used in faculty misconduct. Plaintiff had by that time spent about 50% of his take-home monthly salary to cover attorney costs. On the other hand, despite agreeing to implement GRB recommendations and admitting that COE would never use the AHC Procedure again, Steve Director did not remedy Plaintiff's loss or implement any of GRB recommendations.
- 4) Because of temporal proximity of these two events (EEOC complaint and refusal of remedy to Plaintiff), Plaintiff can establish that there is a causal connection between Plaintiff's protected activity and adverse action. Further, witness Prof. Ulsoy, the Chairman of Mechanical Engineering Department, has written in response to Defendants' interrogatories: "Dean Director's decisions appeared to me to often be based on protecting those who are his "yes men," and punishing those who question his actions, and the actions of those who are loyal to him. Thus, I am not surprised at the allegations in the complaint by Professor Mazumder regarding unfair and punitive treatment by Dean Director." (R. 45, Ex. L, 45-3, p. 11; Apx. 282). Another Indian-origin professor in COE, Dr. Saigal also stated that Steve Director had retaliated against him. "This all ended with my being fired from all administrative positions." (R. 45, Ex. K, 45-3, p. 7; Apx. 278). Like other ACAL professors who were identified by Chairman Haddad as hostile towards Plaintiff, Steve Director, also an ACAL faculty, was hostile. Further, Plaintiff's EEOC complaint was mainly critical of formation of AHC and "below average" salary raises for which Steve Director was primarily responsible.

III. DISTRICT COURT REVERSIBLY ERRED IN SUMMARY JUDGMENT RULING

Further to showing that Plaintiff can prove his claim of discrimination and retaliation as permissible by Title VII under "burden-shifting" framework, Plaintiff establishes here that the district court has reversibly erred in granting summary judgment to Defendants though their MSJ lacked the required elements of the F.R.C.P. Rule 56. The moving

party is not entitled to summary judgment unless it presents uncontroverted facts showing it is entitled to judgment as a matter of law.

A. Defendants Refused to Conduct Internal Investigations and Thereby They Could Not Establish Uncontroverted Facts

Plaintiff had asserted that AHC Hearing procedure was discriminatory and it was established to retaliate against Plaintiff after Defendants received Plaintiff's rebuttal to Bernard's File Copying Report (R. 45, Ex. AV, 45, p. 12; Apx. 405). Both these incidents were grieved by Plaintiff through administrative redress procedures by filing timely grievances (R. 84, Ex. Bg, 84-1, pp. 37-46; Apx. 613-622). Defendants made no diligent effort to discover "uncontroverted facts" and "material evidence" through their own internal grievance procedures that include hearing, witness testimony, and other evidentiary materials. In their depositions, Brown, Khargonekar and Bernard had even admitted this as fact (R. 97, Transcripts at TR 36; Apx. 647).

Plaintiff filed a grievance on February 12, 2002 grieving against Bernard asserting (R. 46, Ex. Ad, 46-1, pp. 24-28; Apx. 427-431):

1. "Failure to properly investigate my complaints regarding file copying by post doc.
2. Dissemination of misleading information of file copying incident
3. Failure to correct misleading information as requested."

However, Defendants refused to investigate this grievance.

On the other hand, AHC Hearing was held despite vigorous protest by Plaintiff (R. 45, Ex. AV, 45, pp. 14-16; Apx. 407-409). However, the AHC chairman suddenly ejected Plaintiff and his attorney from the room as soon as Plaintiff started cross-examining Bhattacharya about the file copying incident and exorbitant compensation Bhattacharya received from Avant! Corp.

After the EEOC informed Defendants in October 2002 about Plaintiff's complaint regarding the AHC Incident, Defendants, who initially refused to process Plaintiff's EDO discrimination complaint for seven months, denied discrimination, but excluded the AHC Incident in their report of investigation and review (R. 45, Ex. AK, 45-5,. 45-49; Apx. 359-363).

B. Defendants Did Not Articulate Legal Argument Adequately in Their Motion for Summary Judgment

Lacking any factual data, Defendant submitted an MSJ without any legal argument for justifying AHC Incident and Bernard's file copying report. Therefore, district court erred by granting summary judgment to Defendants when they failed to establish through legal argument that there are no "genuine" and undisputed "material facts" that may persuade the jury to award a verdict in Plaintiff's favor.

"The moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on his motion." *Union Planters Nat. Leasing v. Woods*, 687 F.2d 117 (5th Cir. 1982).

C. District Court Had Failed to Meet the Standard of F.R.C.P. Rule 56

Defendants had no factual data to back up their versions of "Statement of Facts" in their MSJ. On the other hand, Plaintiff's response to MSJ and accompanying exhibits had rebutted Defendants' "statement of facts". For example:

1. Defendants claimed: "Plaintiff could not name any specific University policy he believes was violated." Defendants show Page 553 of Plaintiff's deposition for verification (R.39, MSJ, Mazumder, (Deposition), 39-6, p. 30; Apx. 199). However, if the judge had read Page 552 which is a part of the same quadrant formatted page of Plaintiff's deposition, he would have known that Plaintiff was referring to the University copyright policy that adopts the "work made for hire doctrine" and does not allow students to copy research materials developed by them if they receive research assistantships. Plaintiff also pointed out that his Response to Ad Hoc Committee (R. 39, MSJ, 39-3, pp. 21-26; Apx. 160-165), Discrimination Complaint (R. 45, Ex. P, 45-3, pp. 41-49; Apx. 290-298), and other attached exhibits to his Brief rebutted Defendants' version of the File Copying Incident establishing that Bernard had failed to perform his duty by not producing any evidence that he contacted Avant! Corp. in regards to Plaintiff's intellectual property even after TMO had asked him while also forwarding the EE Times article (R. 45, Ex. AN, 45-6, pp. 9-10; Apx. 367-368).

"Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention - the court must consider both before granting a summary judgment." *John v. State of Louisiana*, 757 F.2d 698, 712 (5th Cir. 1985).

2. Defendants further claimed that Bernard had conducted a good investigation by stating: "Plaintiff believes that attorney Bernard was "doing his job right" when investigating Plaintiff's allegations (364)" (R.39, MSJ, Mazumder, (Deposition), 39-6, p. 16; Apx. 196). However, if the district court judge had read the Pages 351-371 (Apx. 193-197) in the Deposition, he would have known that Bernard was doing his job right initially by asking the computer staff to help prepare the list of files that were copied to Bhattacharya. Bernard verified what sorts of research and other files Bhattacharya had taken, and then he sent letters to Bhattacharya. However, after Brown and Khargonekar got involved, Bernard prepared a false and misleading report. Plaintiff had filed a grievance asking the University to investigate the whole matter because Bernard's version of facts in the report contradicted his own initial findings established in his letters (R. 46, Ex. Ad, 46-1, pp. 24-28; Apx. 427-431). Defendants refused to conduct any investigation. Instead, they set up an AHC to discipline Plaintiff.

When Defendants' Motion for Summary Judgment is so lacking and movant has failed to articulate their reasons, the district court erred by dismissing Plaintiff's lawsuit. On the other hand, even being non-movant, Plaintiff has provided sufficient reasons

to establish that discrimination had occurred by providing evidentiary materials like computer data, GRB report, and about 100 exhibits spanning over 900 pages that were cross-referred in Plaintiff's brief.

Summary judgment procedure is generally considered drastic remedy, and strict compliance with provisions of Rule 56 is required. *Parmelee v. Chicago Eye Shield Co.*, 157 F.2d 582 (10th Cir. 1946).

D. District Court Favored Moving Party Instead of Non-Moving Party

Federal district courts are guided by the following principle: "In considering whether to grant a motion for summary judgment, the district court must view the evidence in light most favorable to the party resisting the motion." *Simon v. United States*, 711 F.2d 740, 743 (5th Cir. 1983).

The district court judge had disregarded the above principle in his rulings for summary disposition. Plaintiff can point to numerous instances where the judge had entirely disregarded documents provided by him and made conclusory statements in favor of Defendants from their documents.

For example, in describing "Facts" in his Opinion and Order, the district court judge primarily relied on selective inputs provided by Defendants and he assembled informational factoids in a way that the overall inference of purported facts would portray Plaintiff negatively and would conceal any wrongdoing by Defendants. Therefore, Plaintiff's Brief and documents provide diametrically opposite viewpoints from the judge's presentation of facts in Course Evaluation Incident, File Copying Incident and AHC Incident.

5.1 Discrepancies between Plaintiff's version of facts and Court's interpretation of facts in Course Evaluation Incident

Synopsis of Events (R. 45, Ex. AB, 45-4, pp. 45-47; Apx. 324-326) supported by student letters (R. 45, Ex. AI, 45-5, pp. 18-28; Apx. 336-346) presents Plaintiff's version of facts that contradict facts inferred by district court judge. The judge had ignored all these evidentiary materials in preparing his version of facts.

5.2 Discrepancies between Plaintiff's version of facts and Court's interpretation of facts in the File Copying Incident

In File Copying Incident again judge had ignored a number of exhibits provided by Plaintiff to establish that Bernard's file copying report was false and damaging to Plaintiff's reputation as a professor. Even Bernard had admitted his mistake and he said that he followed Brown's instruction (R. 48, Plaintiff's Brief, 48, pp. 6-8; Apx. 206-208) . Therefore, despite the fact that Winsor had prepared the 437-page listing with about 54,000 names of files in consultation with Bernard and the list was provided to Bernard before he authored three stern letters, at the end due to interference by Brown and Khargonekar, Bernard's file copying report stated that Plaintiff had erroneously informed Bernard about the amount of files Bhattacharya had copied from Plaintiff's laboratory computers. In *Reeves, supra* the Supreme Court recognized that evidence that a defendant's explanation for

an employment practice is “unworthy credence” is “one form of circumstantial evidence that is probative of intentional discrimination and it may be quite persuasive.”

5.3 Genuine dispute and uncontroverted material facts exist

Judge had extensively quoted from Bernard’s letter to show that there were discrepancies between Bernard’s report and Plaintiff’s brief along with supporting exhibits. Further, Plaintiff had established he suffered adverse action because of Bernard’s misrepresentation. This constitutes a legitimate ground for denying MSJ. However, on the contrary, the district court trivialized the impact of the file copying incident.

As a matter of fact, at MSJ Hearing judge had stated that it was alright for Bhattacharya to copy intellectual property from Plaintiff’s computer as long as Plaintiff had a copy of the software, “he had it as well as someone else had it.” (R. 97, Transcript at TR 38; Apx. 648-649). By this statement, Court gives a *carte blanche* copyright to the students who are working on large software development projects to download the entire software package developed over many, many years, though a student may be involved in developing a small portion of the software package.

Further, judge had struck down two key affidavits concerning the file conversion incident. Prof. Kauffman’s affidavit proved that Bernard’s report was false and misleading (R. 45, Ex. E, 45-2, pp. 19-21; Apx. 266-268). Affidavit of Chirukapalli, Director of Cypress Semiconductor stated that the commercial value of Plaintiff’s software packages were worth \$2 million at that time (R. 45, Ex. H, 45-2, pp. 49-50; Apx. 272-274). The fact that Plaintiff had spent \$10,000 from his own pocket to raise venture capital funds was also ignored by the district court.

On the contrary, to discredit Plaintiff’s loss, the district court wrote in its Opinion and Orders that Plaintiff had failed to establish whether Avant! Corp. ever used Plaintiff’s intellectual property. The main weakness of this line of argument is that Bernard and University had a “fiduciary duty” to Plaintiff since the University technology transfer policy allows Plaintiff to receive 50% of any transaction resulting from licensing of Plaintiff’s software (R. 47, Ex. BI, 47-4, p. 22; Apx. 552).

5.4 Discrepancies between Plaintiff’s version of facts and Court’s interpretation of facts in the AHC Incident

District court overlooked that Plaintiff had provided numerous exhibits establishing causal connection between file copying incident and the establishment of AHC. The temporal proximity (about 1 month despite the Christmas break) between Plaintiff’s response to Bernard’s file copying report claiming misrepresentation of facts is closer than the 5 months separation between August 21, 2001, when student e-mail messages were gathered by Bernard and Brown by spreading misinformation, and January 30, 2002, when AHC was established.

District court also overlooked documents provided by Plaintiff in his brief including the GRB Report that had determined that AHC investigation was inappropriate since Defendants failed to apply regular investigation methods.

District court did not cite or react to an extensive 42-page response Plaintiff had provided to AHC that clearly showed that Bhattacharya and other students had made false allegations. Consequently, district court erroneously concluded that Plaintiff had not proved that those allegations were concocted.

Further, in Plaintiff's deposition (R.39, MSJ, Mazumder, (Deposition), 39-6, p. 31; Apx. 200) on Pages 557 and 558, Plaintiff had pointed out that the University did not establish AHC Hearing against advisors and supervisors of Phinney, Anderson, Hoop and Zorza who alleged plagiarism, misappropriation of research grants, harassment, and other form of faculty misconducts in their internal complaints and ensuing lawsuits. University defended their advisors, supervisors and other named administrators. Notably, the University even paid \$1.8 million in restitution of damage to Phinney. Defendants failed to reveal this information in their argument and claimed that Plaintiff could not establish that similarly-situated non-protected professors were treated differently.

In *White*, 364 F.3d 789 at 804, the Sixth Circuit noted: The Supreme Court held that a jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability, *Reeves v. Sanderson*, 530 U.S. 133 (2000).

E. Below Average Salary Increases between 1999 and 2003

In order to show salary disparity and Plaintiff had received "below average" raises from 1999 to 2003, Plaintiff did the following.

- He used extensive amount of salary charts compiled from University faculty salary listings (R. 45, Ex. B, 45-1, pp. 35-41; Apx. 259-265).
- He quoted Defendants' responses to Plaintiff's interrogatories regarding salary increases (R. 47, Ex. CA, 47-4, pp. 47-50; Apx. 558-561).
- He analyzed salary data provided by Defendants in their MSJ (R. 39, MSJ, 39-8, p. 37, Apx.), and
- He referred to Plaintiff's letters of recommendation procured by the Defendants during Plaintiff's promotion and tenure to show that his performance is comparable to chaired professors at top-ranked universities (R. 47, Ex. Be, pp. 43-50 in 47-1, pp. 1-14 in 47-2; Apx. 494-508).

However, there is a controversy concerning who in CSE and EECS can be considered similarly-situated to Plaintiff since normally in research-oriented universities each professor displays unique and distinguishing characteristics. Because of this innate legal loophole, application of McDonnell-Douglas framework is inappropriate in resolving the salary dispute in Plaintiff's case. Conversely, using their own criteria, Defendants cannot name any professors in ACAL or CSE who can be similarly-situated to Plaintiff.

However, Plaintiff notes that Defendants have contradicted in their MSJ by acknowledging:

"He was promoted to Associate Professor with tenure in 1992, which was an early tenure promotion. Plaintiff was considered for early promotion to the rank of Full Professor in 1995. Review for promotion only four years after receiving tenure was an honor, considering some Associate Professor never reach the rank of Full Professor." (R. 39, MSJ, 39-1, p. 13; Apx. 119).

This statement constitutes an admission from Defendants that Plaintiff is not below average or even average. Plaintiff's promotion letters show that Plaintiff's performance is comparable to many chaired professors at other universities (*supra*). Plaintiff himself received chaired professorship offer from elsewhere (R. 46, Ex. Ap, 46-2, pp. 47-50; Apx. 459-462).

However, Defendants cannot explain, why then after Khargonekar, Brown and Steve Director got authority over Plaintiff's salary raises, Plaintiff had been annually receiving "below average" salary raises at the bottom rank in CSE (R. 45, Ex. B, 45-1, pp. 35-39; Apx. 259-263). Defendants' own answers to Plaintiff's interrogatories show that from 1999 to 2003, in each year at least 22 assistant, associate and full professors had received higher salary raises than Plaintiff (R. 47, Ex. CA, 47-4, pp. 48-50; Apx. 558-561). Before 1996, when the individual Defendants were not COE administrators, Plaintiff had consistently received raises within top few in CSE in commensuration with his yearly performance (R. 45, Exhibits, Ex. S, 45-4, p. 10; Apx. 321).

It will be more appropriate if jurors are given the responsibility to resolve the salary disparity claim by examining multi-dimensional employment-specific data and opinions of the experts who had given salary raises in the past in COE. Salary raises are direct evidence of discrimination and only jury can fairly decide whether Plaintiff's claim of salary disparity is supported by testimonies of expert witnesses with significant administrative experience.

Both Defendants and Plaintiff listed such expert witnesses. For example, witness Prof. Haddad had served as EECS Chair for 17 years, witnesses Prof. Shin and Prof. Teorey served as CSE Associate Chair, witness Prof. Ulsoy served as Chair of Mechanical Engineering Department, witness Prof. Kuh served as Dean of Engineering at University of California, and witness Prof. Fuchs presently serves as Dean of Engineering at Cornell University. In fact, Prof. Ulsoy has stated that Plaintiff's performance is within top 25% in EECS (R. 45, Ex. L, 45-3, p. 10; Apx. 281) and Steve Director gives salary raises "without even looking at the professional metrics". (*Id.*, Apx. 282).

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Professor Pinaki 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,
Pinaki Mazumder, Ph.D.
Plaintiff-Appellant