

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002111-MR

ANDREA WEICKGENANNT

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A STINE, V, JUDGE
ACTION NO. 09-CI-00432

THE BOARD OF REGENTS OF
NORTHERN KENTUCKY
UNIVERSITY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: Andrea Weickgenannt appeals the October 19, 2011 order of the Campbell Circuit Court granting summary judgment on her claim under the Kentucky Civil Rights Act (KCRA), in favor of her former employer, the Board of Regents of Northern Kentucky University (NKU). We reverse and remand.

I. Background

Weickgenannt was first employed at NKU in 2000 as an Instructor in the College of Business, Department of Accountancy. She continued in that capacity until she was hired for the 2002-2003 school year as an Assistant Professor. By accepting the Assistant Professor position, Weickgenannt was placed on the tenure track.

The Handbook defines the Assistant Professor position as follows:

An assistant professor holds an appropriate terminal degree (or the equivalent, as determined by such factors as work experience, publications, and national or regional reputation in the field). A person may be appointed as an assistant professor without holding the appropriate terminal degree or its equivalent, but if a terminal degree is required, it must be earned within the time stipulated in the initial contract of appointment. If an appropriate terminal degree is not received within the time set forth in the initial contract, the appointment at this rank will terminate. An assistant professor has demonstrated competence as a teacher and potential for scholarly and creative activity and institutional and public service.

Weickgenannt obtained Bachelor's and Master's degrees in business administration in addition to her Certified Public Accountant (CPA) license prior to employment at NKU. Her professional experience included independent consulting and several years' employment with the accounting firm Ernst & Young. Weickgenannt was hired for the value of her practical experience and was not required to get a Ph.D. to remain employed or to secure tenure.

The Handbook's description of the Associate Professor position follows:

An associate professor holds all of the qualifications of an assistant professor and has been judged effective: as a teacher; in scholarly and creative activity; and in institutional and public service activity. These criteria are listed in order of importance.

With respect to the scholarship requirement, the university handbook provides, “Scholarship can be in the form of research and discovery scholarship, the scholarship related to public engagement, or the scholarship of teaching.” The handbook states a preference for scholarly activities and publications which have undergone peer review.

The various colleges of NKU are permitted to supplement the university’s requirements for tenure, provided that they are approved as required by the university handbook; the College of Business opted to promulgate additional requirements. The College supplemented the university’s scholarship requirement with the statement that, “All works should be refereed, published in recognized academic or professional outlets, publicly available, and of good quality. The number of authors for each work will be taken into account.”

Under the College of Business’s supplemental guidelines, successful tenure applicants would be required to show completion of ten total works, which included having been a “major contributing author of at least three journal articles” published in peer-reviewed journals. Applicants for tenure in the College of Business were also required to demonstrate “continuing scholarship and active scholar status beyond the awarding of tenure and promotion.” The guidelines also

provided, in relevant part, that with regard to “journal articles, textbooks[,] or professional books with one, two, or three authors, all authors may qualify as major contributing authors[.]”

Decisions concerning a faculty member’s employment status, including whether to confer tenure, are made following a multilevel review process. The process begins with the faculty member’s application, which is first considered by the faculty-comprised Reappointment, Promotion and Tenure (RPT) Committee. Committee members make a recommendation whether to approve or deny the employee’s application. The matter is then submitted to the Dean of the College in which the applicant teaches for an independent recommendation. Finally, the university Provost considers the application and makes a recommendation. All faculty appointments, tenured and otherwise, are subject to the approval of NKU’s Board of Regents. An applicant dissatisfied with the decision of the Board may file an internal appeal.

Following her initial appointment to an Assistant Professor position for the 2002-2003 school year, Weickgenannt was reappointed by this process every year through the 2007-2008 academic year. In recommending her reappointment year after year, the RPT Committee noted Weickgenannt’s high-quality teaching, adequate scholarly activity, and appropriate service, and the Dean and the Provost concurred. There were two exceptions. For the 2005-2006 school year, the university designated a “condition to be removed”¹ to Weickgenannt’s continued

¹ A “Condition to be Removed” has been described as feedback that “should help [Weickgenannt] to envision some directions that [she] might wish to take in order to strengthen [her] performance and portfolio[.]”

employment, namely, insufficient scholarly activity. After reviewing the following year's application, the RPT Committee, the Dean, and the Provost noted that Weickgenannt had improved her scholarly activity. Then, for the 2007-2008 academic year, the same "condition to be removed" was imposed – insufficient scholarly activity. Weickgenannt always received consistently good marks in teaching and service.

In accordance with the established procedures, Weickgenannt submitted her application for tenure and promotion to Associate Professor. Her *curriculum vitae* identified the requisite ten scholarly works, including three articles published in peer-reviewed journals; all three had been co-authored with other members of the Accountancy Department.

The RPT Committee recommended that Weickgenannt be promoted and tenured, specifically finding that Weickgenannt's scholarship was "more than sufficient." The Committee further noted Weickgenannt's co-authorship of a textbook, publication of three articles in peer-reviewed journals, a variety of other completed works, and additional works in progress.

The Dean and the Provost did not concur in the Committee's recommendation. More specifically, while the two did not dispute the high quality of Weickgenannt's teaching and service, they felt her scholarship was inadequate. The Dean cited a "[m]inimal number of articles in refereed journals of good quality" and a "[l]ack of evidence of a continuing commitment to scholarly activity in the future." He furthermore determined that one of Weickgenannt's articles had

been published in a journal of low quality and therefore should not be counted toward the required three peer-reviewed publications.

The Provost concurred in the Dean's recommendation, finding as well that Weickgenannt's scholarship was inadequate. In so doing, the Provost concluded that Weickgenannt should not have been credited for another of her peer-reviewed, published articles because her contributions were insufficient to make her a "major contributing author"; instead, the bulk of the academic work had been performed by the co-author. The application for promotion and tenure was denied.

Weickgenannt employed the university's formal appeal process, but she was unsuccessful. She filed suit in the Campbell Circuit Court in March 2009 alleging the denial of tenure and promotion was the product of gender discrimination, in violation of Kentucky Revised Statutes (KRS) 344.040.² On October 19, 2011, the circuit court entered summary judgment in favor of NKU stating: "the court finds no evidence from which a jury could conclude that a reason other than . . . Weickgenannt's failure to attain sufficient scholarship . . . motivated the decision not to give her tenure." The appeal was brought from this summary judgment.

II. Discussion

a. Standards of review

A motion for summary judgment must be granted if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure

² The complaint also asserted a number of other claims, all of which were resolved prior to the gender discrimination claim and which are not at issue on appeal.

(CR) 56.03. “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

Employers are prohibited from discriminating against employees or potential employees “because of the individual’s race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker” KRS 344.040.

When the plaintiff asserting a sex-based discrimination claim lacks direct evidence of discrimination, the defendant’s summary judgment motion must be met by applying and satisfying the test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973). *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005). That test is essentially a three-part burden-shifting analysis.

First, the plaintiff must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. at 1824. This is accomplished by showing: (1) that the plaintiff belongs to a protected class; (2) that she applied and was qualified for the promotion sought; (3) that she was rejected for the position; and (4) that a person outside the protected class was given a similar promotion. *See id.*

If the plaintiff establishes a *prima facie* case, “the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *Id.* At this stage, “[t]he defendant bears only the burden of production and this involves no credibility assessments.” *Williams*, 184 at 497 (citations omitted).

Finally, the burden shifts back to the plaintiff “to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 1091, 67 L.Ed.2d 207 (1981).

The *Burdine* requirement is met:

by alleging or proving discriminatory conduct, practices, or the existence of significant . . . disproportionate conduct. While intentional discrimination may be inferred from circumstantial evidence, there must be cold[,] hard facts presented from which the inference can be drawn that [retaliation] was a determining factor [in the employer’s decision to take a negative employment action].

Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 700 (Ky. App. 1991).

One method of meeting this requirement is to present evidence that a similarly situated employee outside the protected class received disparate treatment.

Kirkwood v. Courier-Journal, 858 S.W.2d 194, 198 (Ky. App. 1993). “In order to show that a plaintiff is similarly situated to another, the plaintiff is required to prove that all of the relevant aspects of their employment situation were nearly

identical to those of the similarly situated employee.” *McBrearty v. Kentucky Cmty. & Technical Coll. Sys.*, 262 S.W.3d 205, 214 (Ky. App. 2008).

We turn now to the circuit court’s analysis under the *McDonnell Douglas* burden shifting test.

b. *Prima facie* case

The circuit court concluded Weickgenannt had failed to make a *prima facie* showing of discrimination. In so doing, the circuit court stated elements of a *prima facie* case as follows:

To prove a *prima facie* case of gender discrimination under KRS Chapter 344, a plaintiff must show that she was:

1. A member of a protected class;
2. Subjected to an adverse employment action;
3. Qualified for the job; and
4. Replaced by a person outside of the protected class, or treated differently from employees outside the protected class for the same or similar conduct.

(R. at 371). The circuit court went on to conclude that Weickgenannt could not establish the third or fourth elements because she could not show “that she was qualified to receive tenure [or] that she was treated differently from similarly . . . situated males.” (*Id.*)

This recitation and application of the elements of a *prima facie* discrimination claim is where we find the first error in the circuit court’s entry of

summary judgment. More specifically, the circuit court should not have conducted an inquiry into the treatment of “similarly situated” male employees at this stage of the analysis.³ Instead, the inquiry should have been whether someone outside the protected class, *i.e.*, a male faculty member, had received the promotion or benefit Weickgenannt had sought and been denied.

In their depositions, many of the university’s witnesses identified male faculty members who were given tenure by the university and promoted to higher positions as Associate Professors in the few years surrounding Weickgenannt’s application.⁴ This is sufficient for purposes of establishing a *prima facie* case of discrimination.

The second flaw in the circuit court’s treatment of Weickgenannt’s *prima facie* case was its “qualification” analysis. The circuit court characterized the matter of qualification as one left in the sound discretion of the employer and not to be interfered with by the courts. In so doing, the trial court accepted the employer’s determinations that Weickgenannt “had not met the minimum publication requirements or demonstrated a solid trajectory for future scholarship.”

³ The “similarly situated” analysis properly occurs, if at all, at the last step of the burden-shifting test. A plaintiff may show an employer’s legitimate, nondiscriminatory reason for the negative employment action is mere pretext for a discriminatory purpose by identifying similarly situated employees outside the protected class who were treated more favorably. *Kirkwood*, 858 S.W.2d at 198.

⁴ This portion of the analysis is necessarily different for university employers considering a tenure application than for other employers. Where a non-university employer has advertised a single position, we look to see who was actually given the promotion the plaintiff sought or, alternatively, whether that position remained open and the employer continued to seek someone to fill it. *See McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. at 1824 (footnote omitted). In a university setting, however, when the question is one of tenure, there is not typically an opening which the university is actively seeking to fill. Our assessment of relevant facts which might support a claim of discrimination must take such facts into consideration.

(R. at 373; footnote omitted). But, in light of its handbooks and accreditation guidelines, whether the employer was permitted to decide that Weickgenannt should not be granted tenure more properly belongs in the second portion of the *McDonnell Douglas* analysis – namely, whether the employer can identify a nondiscriminatory reason for its action.

Qualification, for purposes of the *prima facie* case, simply means that Weickgenannt was among the candidates who could properly be considered for tenure and promotion. *See Turner v. Pendennis Club*, 19 S.W.3d 117, 120 (Ky. App. 2000). She undoubtedly was. Weickgenannt had been in a tenure-track position for the correct number of years. She timely submitted a completed application which reflected the minimum requirements for tenure, including ten total scholarly works and three articles published in peer-reviewed journals. Based on these facts, Weickgenannt met her burden with respect to her *prima facie* case.

c. The employer’s legitimate, nondiscriminatory reason

The circuit court next found that, even if Weickgenannt had established a *prima facie* case of discrimination, NKU had met its burden of articulating a legitimate, nondiscriminatory reason for not promoting her to a tenured Associate Professor position. We agree.

Inadequate scholarship was NKU’s stated reason for declining to promote Weickgenannt and to offer her tenure; of particular concern were the number and quality of articles published in peer-review journals and the question of whether Weickgenannt had demonstrated the ability to independently generate her own

research in the field. The Dean and the Provost reported that they had closely examined the scholarly works submitted, and found them lacking. This was a legitimate, nondiscriminatory reason for their decision.

d. The employee's rebuttal

The circuit court was not persuaded that Weickgenannt had met the final burden, rebuttal of the employer's proffered nondiscriminatory justification. Weickgenannt argues entry of summary judgment was inappropriate because she did successfully rebut the university's stated reason by identifying similarly situated male employees who were given more favorable treatment. We agree with the appellant.

The circuit court determined, to the contrary, that Weickgenannt had not identified a similarly situated male faculty member at all. Such a member, the circuit court ruled, "must have been from the same department, a candidate for tenure, judged by the same criteria, and reviewed within the same time period and by the same individuals who . . . allegedly treated [Weickgenannt] unfavorably[.]" (R. at 373).

This definition was far too narrow because not all of the requirements identified by the circuit court were truly relevant. A properly circumscribed pool of similarly situated male faculty members includes those who were subject to the same standards as Weickgenannt, had presented similar evidence of scholarly activity, and had been given tenure in accordance with NKU's established procedures. It was not necessary that Weickgenannt identify fellow members of

the Accountancy Department; there were no standards which were particular to members of that department. Rather, the proper cohort includes the tenure candidates in the College of Business. Like Weickgenannt, those candidates were subject to the tenure guidelines promulgated by both the College and the university.

Weickgenannt has identified one male candidate for tenure who was similarly situated and received disparate treatment, Richard Gilson.⁵ Gilson was a faculty member who taught Management, also in the College of Business. Gilson's tenure application was submitted and reviewed one year before Weickgenannt's, and the two were subject to identical standards from both the College of Business and the university. Like Weickgenannt, Gilson's application materials evinced only three scholarly articles published in peer-reviewed journals, and all were co-authored. He was similarly situated and was treated differently than was Weickgenannt. Nevertheless, Gilson was given tenure and a promotion, while Weickgenannt was not. This sufficiently rebuts NKU's asserted

⁵ Weickgenannt has identified by name three other tenure candidates whom she claims were also similarly situated and received more favorable treatment. She has not, however, presented the basis for this conclusion, stating, instead that, "Details about [the three candidates] are contained in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, and are not repeated here due to space constraints. . . . Weickgenannt does not waive any arguments that these males are also similarly situated to her." (Appellant's Brief at 17, n.3).

We disagree that the failure to present an argument with respect to these three candidates or to identify the evidentiary basis for such argument does not constitute a waiver for purposes of our consideration of her arguments on appeal. *See* CR 76.12(4)(c)(v). Furthermore, where space constraints present an obstacle to an appellant's thorough presentation of arguments on appeal, she is permitted to request additional space. CR 76.12(4)(b)(1). Weickgenannt did not do so, and neither did the body of her brief fill the entire standard twenty-five page limit. She has waived the right to have us consider the other three male employees in our "similarly situated" analysis. However, the waiver does not preclude her, on remand, from presenting evidence of the three male faculty members' circumstances to the jury, if it is appropriate to do so as an evidentiary matter.

nondiscriminatory reason for not giving tenure to Weickgenannt to warrant submitting the matter to a jury.

III. Conclusion

The evidence was sufficient to raise a material question as to whether NKU's denial of tenure to Weickgenannt was discriminatory. The circuit court improperly entered summary judgment in favor of the employer. We reverse the circuit court's summary judgment and remand this case for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Sheila M. Smith
Kelly Mulloy Myers
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Michael W. Hawkins
Kathleen A. Carnes
Cincinnati, Ohio

Drew B. Millar
Lexington, Kentucky