SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LOUBNA HANNA-SKALLI, *Plaintiff*, v. **AMERICAN UNIVERSITY**, *Defendant*.	**Case No.: 2015 CA 7118 B** **Judge Michael L. Rankin**

ORDER

This matter comes before the court upon consideration of defendant American University's motion for judgment as a matter of law, or in the alternative, for a new trial, filed on November 7, 2018. For the following reasons, defendant's motion is denied.

PROCEDURAL HISTORY

On September 15, 2015, plaintiff Loubna Hanna Skalli filed a complaint against defendant American University ("the University"), alleging breach of contract and age discrimination in violation of the District of Columbia Human Rights Act arising from defendant's failure to award plaintiff tenure. After conducting discovery, both parties filed motions for summary judgment on February 16, 2017. On August 18, 2017, the court issued an order denying the motions. Thus, a jury trial was held as to both claims from September 17, 2018 to October 2, 2018. After plaintiff rested her case, defendant moved for a directed verdict. The court heard argument on the motion but reserved ruling, allowing the jury to consider both claims. On October 15, 2018—after deliberating for more than two weeks—the jury returned a verdict in favor of plaintiff on her age discrimination claim only, awarding plaintiff $1,326,000.00 in damages.

FACTUAL BACKGROUND

In 2003, the University's School of International Service ("SIS") hired plaintiff as a non-tenure track professor. In 2008, plaintiff received a renewable, two-year appointment as a tenure-track professor. Usually, tenure-track faculty members complete a six-year probationary period before being considered for tenure. At the end of each two-year appointment, the University conducts a review to determine whether to reappoint the faculty member and continue with the probationary period. Faculty members look to reviews for guidance as to what is required to achieve tenure. Plaintiff was reappointed for two-year appointments in March of 2010 and December of 2011. Therefore completing the six-year probationary period.

Plaintiff's Application for Tenure

On September 30, 2013, plaintiff filed her application for tenure—dubbed a file for action. The faculty manual, which is the employment contract for every tenure-track faculty member, sets forth the process for applying for tenure. There are multiple levels of review that occur when evaluating a file for action: (1) internal evaluation by a three-person committee ("3PC") of SIS-tenured professors; (2) review by the SIS Faculty Actions Committee ("FAC"); (3) review by the SIS Dean; (4) review by the University-wide FAC; and (5) external review by qualified individuals outside the University. Reviewers evaluate three general criteria: scholarship, teaching, and service. After all levels of review are complete, the file for action is sent to the Provost—the chief academic officer of the University—who has the ultimate, unilateral authority to decide whether to grant or deny tenure.

Plaintiff was recommended for tenure at each level of review, but ultimately was denied tenure by Provost Scott Bass. The first level of review—the 3PC—recommended plaintiff for tenure. Next, the SIS FAC voted 20 to 3 to award plaintiff tenure, with four faculty members

abstaining. Plaintiff's file for action then went to Dean Goldgeier, who concurred with the recommendations of the 3PC and the SIS FAC, and advanced her application to the University-wide FAC, which voted in favor of sending her tenure application to the Provost.

Usually, prior to review by the Provost, files for action are reviewed by the Dean of Academic Affairs to ensure that the file is complete and ready for final review. In plaintiff's case, the Dean of Academic Affairs, Phyllis Peres, was ill and requested the help of Associate Vice-Provost William LeoGrande. Leogrande reviewed the file and sent it to Provost Bass, who ultimately denied plaintiff's application in a letter dated April 28, 2014. Specifically, Provost Bass expressed concern with plaintiff's scholarship and her progress on a book project under contract with the Columbia University Press.

On July 24, 2014, plaintiff appealed the Provost's decision to the Committee on Faculty Grievances ("CFG"). Notably, the CFG does not consider the merits of a case, but determines whether sufficient evidence exists to support the grounds for appeal. The faculty manual requires that the CFG send its findings to the President of the University, who either approves, rejects, or amends the Provost's decision. In plaintiff's case, the CFG determined that no procedural errors occurred, but that "the overall process was not a fair one[.]" Namely, plaintiff did not receive enough warning signs during her reappointment reviews to indicate that she was in jeopardy of not receiving tenure. In response to an allegation in plaintiff's appeal that Provost Bass had engaged in unlawful discrimination based on gender and/or age, the CFG made no finding, but stated that the faculty manual required the Dean of Academic Affairs to address such issues.

On November 17, 2014, after receiving the CFG's report, the President of the University at the time, Cornelius Kerwin, remanded the matter to the CFG for further review of plaintiff's

allegations of discrimination. On March 3, 2015, the CFG issued an addendum to its previous report, finding no evidence of gender discrimination, but stating that there was possible evidence of age discrimination. On April 28, 2015, President Kerwin advised the CFG that he had reviewed plaintiff's appeal, the CFG report and addendum, and the Provost's decision. President Kerwin concluded that, although the CFG had not found any procedural errors, the CFG discussed at length its disagreement with Provost Bass's evaluation of plaintiff's scholarship. Thus, President Kerwin found that the CFG had substituted its own judgment for that of the Provost, which is not permissible under the faculty manual. President Kerwin did not make any conclusions as to age discrimination. Ultimately, President Kerwin upheld the Provost's decision denying plaintiff tenure.

APPLICABLE LEGAL STANDARD

Pursuant to Rule 50, in ruling on a motion for judgment notwithstanding the verdict, "the court may (1) allow judgment on the verdict, if a verdict was returned; (2) order a new trial; or (3) direct the entry of judgment as a matter of law." D.C. Super. Ct. Civ. R. 50(b). The court may only grant judgment notwithstanding the verdict[1] in extreme cases, where "no reasonable juror, viewing the evidence in the light most favorable to the prevailing party, could have reached the verdict in that party's favor." *See Howard Univ. v. Roberts-Williams*, 37 A.3d 896, 912 (D.C. 2012). "If reasonable persons might differ, the issue should be submitted to the jury." *See Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States*, 698 A.2d 459, 465 (D.C. 1997). "[T]he evidence must be construed most favorably to the plaintiff; to this end [the

[1] After hearing defendant's motion for a directed verdict, the court converted defendant's motion into a motion notwithstanding the verdict. The standard for evaluating each motion is the same. *See Rich v. District of Columbia*, 410 A.2d 528, 532 (D.C. 1979) ("In determining whether or not to grant a motion for a judgment notwithstanding the verdict, the trial court should entertain the same considerations as it does in ruling on a motion for a directed verdict.").

plaintiff] is entitled to the full effect of every legitimate inference therefrom[.]" *Rich v. District of Columbia*, 410 A.2d 528, 532 (D.C. 1979). But a "mere scintilla of evidence is not sufficient"— the question is not whether there is any evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party upon whom the *onus* of proof is imposed[.]" *Id.*

ANALYSIS

The University moves for judgment notwithstanding the verdict on plaintiff's age discrimination claim, arguing that no reasonable jury could have found in favor of plaintiff on her claim based on the evidence presented at trial. According to the University, only limited evidence presented at trial supports that claim: (1) the expert testimony of statistician Dr. Bridget Bly; (2) comparator evidence; and (3) the statement, "old SIS 2006 book", written by President Kerwin on a meeting agenda. Def. Mem. at 2. Defendant further argues that—not only did plaintiff fail to present sufficient evidence—but that the evidence that was presented points overwhelming in the other direction. *Id.* at 3.

A. Dr. Bly's Expert Testimony

At trial, Dr. Bly presented statistical evidence, which plaintiff argued showed a statistically significant relationship between awards of tenure and the age of candidates. Dr. Bly based her analysis on tenure decisions between 2008—when Bass served as Provost—and 2015. However, Dr. Bly's analysis did not consider faculty who were awarded tenure after they moved laterally from other universities (as opposed to tenure-track faculty at the University).

The University contends that Dr. Bly's analysis was "based inappropriately on a narrow pool of tenure decisions which – not accidentally – skewed her opinion in favor of [plaintiff's] claim." *Id.* at 4. Significantly, Dr. Bly excluded 55 tenure awards from her analysis because

those awards were given to more senior professors recruited from other universities. *Id.* at 4-5. The University also takes issue with the fact that Dr. Bly did not consider *any* tenure decision after 2015, which excluded another 60 candidates. *Id.* at 5. The University argues that, on average, candidates who were granted tenure after 2015 were seven years older than plaintiff. *Id.* at 6. Because Dr. Bly's statistics did not include those decisions, the University argues that the analysis had little probative value, and could not serve as a basis for plaintiff's discrimination claim. *Id.* at 7.

The University also points to this court's prior ruling on plaintiff's previous motion *in limine*, which sought to exclude all evidence of Provost Bass's tenure awards to lateral hires from other institutions. The court denied that motion, stating that grants of tenure to lateral candidates were relevant and would not be excluded. The University seems to assert that the court's prior ruling implies that Dr. Bly was *required* to consider lateral hires.

The court is not persuaded by the University's argument with respect to Dr. Bly's testimony. The University disagrees with the scope of decisions that Dr. Bly included in her analysis—not how she conducted the analysis itself. If the University believed that another set of statistics was necessary to present an alternative theory, it should have presented such evidence in its defense. Moreover, the decision to include certain candidates and not others in statistical analysis is the sort of subject ripe for cross examination. However, the exclusion of lateral candidates for arguably thoughtful reasons, *i.e.*, that their journey to tenure was procedurally different than tenure-track professors, does not make Dr. Bly's methods unreliable.

B. Comparator Evidence

The University next contends that plaintiff's comparator evidence was not sufficient for a reasonable jury to conclude that age discrimination occurred. *See* Def. Mem. at 8. The

University asserts that only four of plaintiff's nine comparators were discussed in detail. And that, with respect to those four, plaintiff cherry picked details out of their tenure files to mislead the jury about their scholarly work. *Id.* at 9. Significantly, plaintiff focused too much on those candidates' published works (or lack therefore), as opposed to the progress that those candidates were making on scholarly work, which is what Dr. Bass actually considered when he awarded those candidates tenure. *See id.* at 9-10, 15. The University also argues that the comparators largely took the opportunity to respond to criticism by their reviewers during their application process—while plaintiff did not. *Id.*

Plaintiff, on the other hand, asserts that she "presented evidence that similarly situated younger applicants were held to more lenient standards, and were granted tenure despite receiving negative recommendations and having lesser qualifications than [plaintiff]." Pl. Opp. at 16.

Whether "two employees are similarly situated ordinarily presents a question of fact for the jury[.]" *Burton v. District of Columbia*, 153 F. Supp. 3d 13, 67 (D.D.C. 2015). The court should only decide whether they are similarly situated as a matter of law "if a reasonable jury would be unable to find that the plaintiff and the comparator were similarly situated[.]" *Id.* Here, plaintiff presented sufficient evidence as to each proposed comparator from which a reasonable juror could find that he or she is similarly situated to plaintiff. Specifically, plaintiff named nine comparators, each of whom was younger than plaintiff and had been awarded tenure. Plaintiff argued that those tenure candidates were similarly situated to her with respect to their qualifications for tenure—if not less qualified—and that they were awarded tenure, while plaintiff was not. Although plaintiff may have highlighted certain comparators, or certain facts within their application for tenure, it was the University's obligation to cross-examine the

evidence. The University's argument that plaintiff did not highlight, in their opinion, the right facts, is not compelling.

C. "Old SIS"

Lastly, the University argues that no reasonable jury could have found the note presented by plaintiff, with the writing "Old SIS", sufficient to support a finding of age discrimination. Specifically, the University contends that "Dr. Kerwin provided explanations for the note which had nothing to do with age, and he testified that he and Dr. Bass never discussed [plaintiff's] age." *See* Def. Mem. at 17. But this type of dispute is exactly the type of factual issue to be decided by a jury. Multiple explanations for the note were presented at trial, and it was for the jury to weigh the evidence and credibility of the witnesses to resolve that dispute.

CONCLUSION

When viewing the evidence in the light most favorable to plaintiff, and giving her the benefit of every reasonable inference, it is apparent that a reasonable juror could have found in plaintiff's favor as to age discrimination. Although the evidence was prone to different interpretations, it is for the jury to weigh the evidence and credibility of the witnesses. Thus, the instant motion for judgment as a matter of law is denied.

Accordingly, it is this 5th day of February, 2019 hereby:

ORDERED, that defendant's motion for judgment as a matter of law, or in the alternative, for a new trial is **DENIED**.

SO ORDERED.

Associate Judge Michael L. Rankin

Copies to:
Counsel of Record
Via CaseFileXpress