UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CIVIL ACTION NO. 1:17CV00165

MICHAEL RODRIGUEZ, Plaintiff, v. ELON UNIVERSITY, Defendant.	**DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

NOW COMES Defendant Elon University ("Elon"), in response to Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Opposition"), (D.E. 23, 24), and replies as follows:

INTRODUCTION

In his Opposition, Plaintiff raises a retaliation claim which cannot be considered at this stage because it is waived and unexhausted. In an attempt to salvage his claims of discrimination pursuant to Title VII and 42 U.S.C. § 1981, Plaintiff is relegated to relying on the opinions of others who were not involved in the promotion and tenure process. These uninformed outside opinions are insufficient to avoid summary judgment, and Defendant objects pursuant to Local Rule 7.6 to the portions of Plaintiff's evidence that should be stricken or disregarded as inadmissible. Because there is no evidence that Plaintiff was denied promotion and tenure based on discriminatory animus, Defendant is entitled to summary judgment on his claims.

ARGUMENT

I. Plaintiff Cannot Raise a Retaliation Claim for the First Time in Opposition to Defendant's Motion for Summary Judgment.

Plaintiff contends that Elon denied his application for promotion and tenure in retaliation for his complaints of discrimination. It is well-established that a Title VII plaintiff must exhaust his administrative remedies by filing a charge with the Equal Employment Opportunity Commission ("EEOC"). *See Miles v. Dell, Inc.*, 429 F.3d 480, 491 (4th Cir. 2005) (granting summary judgment where plaintiff did not check retaliation box or raise retaliation in narrative of EEOC charge). Further, a plaintiff cannot raise new claims without amending his complaint after discovery has begun. *See, e.g.*, *Barclay White Skanska, Inc. v. Batelle Mem. Institute*, 262 F. App'x 556, 563 (4th Cir. 2008).

Plaintiff did not exhaust this claim by raising it before the EEOC. (*See* EEOC Charge.) He neither checked the box for retaliation nor mentioned retaliation in the narrative. (*Id.*) Further, Plaintiff did not allege a claim of retaliation in his Complaint. (*See* D.E. 2.) Accordingly, the Court should not consider this newly asserted claim.

Moreover, even if Plaintiff's retaliation claim were properly before the Court, summary judgment would be appropriate because Plaintiff cannot establish a *prima facie* case. "To establish a prima facie case of retaliation, a plaintiff must prove . . . (1) that she engaged in protected activity, (2) that an adverse employment action was taken against her, and (3) that there was a causal link between the protected activity and the adverse employment action." *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 258 (4th Cir. 1998).

Plaintiff has not produced any evidence that he engaged in protected activity. Although Plaintiff makes conclusory allegations that he complained of "discrimination" to Provost Steven House, Dean Raghu Tadepalli, Faculty Ombudsman Mat Gendle, and then-Associate Dean Casey DiRienzo,[1] he has not provided any evidence that he complained of unfair treatment *based on his race or national origin*. (*See* D.E. 23-1 at ll. 61:10-62:1, 73:20-75:12, 78:18-79:4; *see also* D.E. 20-12 at ll. 13:5-14:2.)

Nor has Plaintiff established a causal link between any complaints and the denial of promotion and tenure. DiRienzo was not involved in the promotion and tenure process, and there is no evidence the Promotion and Tenure Committee (the "Committee"), which voted unequivocally not to recommend him and which vote Provost House gave significant weight, knew he had made such complaints. *See Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) ("[T]he employer's knowledge that the plaintiff engaged in protected activity is absolutely necessary to establish the . . . prima facie case.")

Finally, as explained below, even if Plaintiff could establish a *prima facie* case of retaliation, Elon has rebutted that presumption with a legitimate, nonretaliatory reason for the denial, which Plaintiff cannot show is pretextual. Accordingly, Defendant is entitled to summary judgment on Plaintiff's procedurally barred retaliation claim.

[1] Plaintiff mischaracterizes DiRienzo's deposition testimony as "conced[ing] a culture of harassment at LSB because she too had experienced harassment from her department chairman." (D.E. 24 at 6.) In fact, DiRienzo testified that she had "professional differences of opinion" with her department chair over the journals in which she was publishing and did not consider it an "HR violation." (D.E. 20-12 at ll. 14:8-24.)

II. Plaintiff Cannot Use the Opinions of Those Not Involved in the Process to Establish his Qualifications or Pretext.

In support of his discrimination claims, Plaintiff relies on affidavits from former Dean Mary Gowan, (D.E. 23-9), Plaintiff's former student Carl Hairston, (D.E. 23-7), Business School Board of Advisors member Karl Sherrill, (D.E. 23-8), and Plaintiff's former colleague Randy Moser, (D.E. 23-13). As explained below, because none of these individuals was involved in the promotion and tenure process when Plaintiff's candidacy was considered, their opinions cannot be used to establish Plaintiff's *prima facie* case or show that Elon's legitimate, nondiscriminatory reason for the denial was pretextual.

Recognizing that "[t]enure is one of the most difficult of all academic decisions," *Smith v. Univ. of N.C.*, 632 F.2d 316, 345 (4th Cir. 1980), the Fourth Circuit has declined to substitute its "judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure." *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995) (quotation marks omitted). This is exactly what Plaintiff asks this Court to do by relying on opinions of people entirely outside of the process. Hairston, Sherrill, and Moser base their opinions not on the portfolio Plaintiff submitted in support of his application for promotion and tenure or the written criteria in the Faculty Handbook, but rather on their general "experience . . . in the private sector and academia." (D.E. 23-8 at ¶ 17; *see also* D.E. 23-7 at ¶ 12; D.E. 23-13 at ¶ 15.) Gowan stepped down as dean in 2011, over three years before Plaintiff came up for promotion and tenure, and left Elon in 2013, over a year before Plaintiff came up for promotion and tenure, (D.E. 23-9 at ¶ 5); Hairston graduated from Elon in 2011, over three years before

Plaintiff came up for promotion and tenure, (D.E. 23-7 at ¶ 7); and neither Sherrill nor Moser participated in the promotion and tenure process when Plaintiff was considered.[2] This is just the kind of second-guessing of Elon's academic judgment against which the Fourth Circuit has warned. *See Jiminez*, 57 F.3d at 376-77 (holding courts "'do not sit as super personnel council to review tenure decisions'").

Further, these uninformed opinions cannot establish that Elon's legitimate, nondiscriminatory reason for the denial was pretextual. Courts do not sit "to appraise [the decision makers'] appraisal. Rather [the Court's] sole concern is whether the reason for which the defendant discharged the plaintiff was discriminatory." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000). On this point, the opinions of Plaintiff's colleagues, who were not decision makers, and students as to the quality of his work are "close to irrelevant." *Id.*

III. There is No Evidence that the Decision Makers Were Influenced by Discriminatory Animus.

Plaintiff's argument that his denial was discriminatory rests on his speculation that Dean Tadepalli and another faculty member, Bill Burpitt, conspired to defeat his application for promotion and tenure, infecting the entire University-wide promotion and tenure process. First, Plaintiff has produced no evidence that Burpitt played any role in the promotion and tenure process, and indeed, he did not. Moreover, there is no evidence that Dean Tadepalli was motivated by discriminatory animus or, even if he was, that he influenced recommendations of the Committee or Provost House.

[2] In fact, there is no evidence that Sherrill or Moser *ever* participated in the promotion and tenure process.

A. The Undisputed Evidence Shows that the Committee Never Voted to Recommend Plaintiff for Promotion and Tenure During the Process.

The crux of Plaintiff's argument is that Dean Tadepalli infected the process by convincing the Committee to vote not to recommend Plaintiff. (*See* D.E. 24 at 9.) Establishing this theory is the only way he can survive summary judgment. However, the following undisputed facts regarding the consideration of Plaintiff for promotion and tenure during the 2014-2015 academic year defeat this argument:

- The 2014-2015 Faculty Handbook governed Elon's review of Plaintiff's candidacy. (D.E. 20-13 at ¶ 6; Moore Supp. Aff. at ¶ 3; *see also* D.E. 20-9 at ¶ 5.)
- During the 2014-2015 academic year, "a super majority (6 of 8 members) [was] required for a positive recommendation" from the Committee. (Ex. A to Moore Supp. Aff. at ELON0002493; Moore Supp. Aff. at ¶ 3.)
- The Committee's deliberations and votes were entirely separate from Dean Tadepalli's deliberations and without any external input beyond the portfolio submitted by Plaintiff. (D.E. 20-13 at ¶¶ 4, 20, 22.)
- The Committee held a preliminary vote at its first meeting for each candidate. (D.E. 20-13 at ¶ 8.)
- The Committee's October 6, 2014 preliminary vote of 5 yes to 3 no on Plaintiff's candidacy was not a supermajority and, even if it had been a final vote, would have been insufficient to recommend him. (*See* Moore Supp. Aff.

at ¶ 5; Ex. A to Moore Supp. Aff. at ELON0002493; D.E. 20-13 at ¶ 9; D.E. 23-10 at 1.)

- The Committee reviewed each decision at a second meeting, with special attention to decisions to deny promotion and/or tenure. (D.E. 20-13 at ¶ 10.)
- After discussing Plaintiff's candidacy at the second meeting, on December 4, 2014, the final vote on Plaintiff's application was two (2) "yes" and six (6) "no." (Moore Supp. Aff. at ¶ 7; D.E. 20-13 at ¶ 17; D.E. 20-14.)
- The Committee did not learn Dean Tadepalli's recommendation until after it had finalized its vote not to recommend Plaintiff, when it attended a joint meeting of the Provost, the Committee, and Dean Tadepalli on January 28, 2015. (D.E. 20-9 at ¶ 13; D.E. 20-13 at ¶ 22; Moore Supp. Aff. at ¶ 9.)
- Indeed, Dean Tadepalli's recommendation letter is dated December 29, 2014, almost a month after the Committee reached its final decision. (D.E. 20-10.)

Plaintiff has provided no evidence to dispute these facts. While Plaintiff speculates that Dean Tadepalli convinced the Committee to vote not to recommend Plaintiff for promotion and tenure, (D.E. 24 at 9), this speculation lacks any basis in the undisputed evidence.

i. Gowan's Testimony About the 2014-2015 Process Is Not Based on Personal Knowledge and Should be Stricken or Disregarded.

Plaintiff attempts to rely on an affidavit from Gowan, who was not involved in the process and had not been for more than three years before Plaintiff came up for

promotion and tenure, mischaracterizing the import of the Committee's ***preliminary*** vote. (*See* D.E. 23-9 at ¶ 5.) Such testimony should be stricken or disregarded by the Court.

Even at summary judgment, Gowan can only testify based on personal knowledge. *See* Fed. R. Civ. P. 56(c)(4); *see also Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996). "When an affidavit contains both inadmissible and admissible portions courts are free to strike only the inadmissible portions." *Hill v. Se. Freight Lines, Inc.*, 877 F. Supp. 2d 375, 381 (M.D.N.C. 2012) (internal quotation marks omitted), *aff'd* 523 F. App'x 213 (2013).

Gowan states in her affidavit that "[a] simple majority is sufficient to recommend advancement to promotion and tenure by the P&T Committee. This vote by the P&T Committee was sufficient to recommend Dr. Rodriguez for promotion and tenure." (D.E. 23-9 at ¶ 26.) Further, she speculates:

> Dean Tadepalli's negative recommendation of Dr. Rodriguez, in contrast to the P&T Committee's positive recommendation, would have triggered a meeting between the Dean, Provost and P&T Committee whereby the Dean could convince the parties to vote against Dr. Rodriguez for promotion and tenure or the committee could convince the dean to change his mind.

(*Id.* at ¶ 31.)

There is nothing in Gowan's affidavit to establish personal knowledge of the 2014-2015 voting requirements or meetings. Further, there is nothing in Gowan's affidavit to even suggest that she had personal knowledge of the 2014-2015 Handbook, the promotion and tenure process generally, or the promotion and tenure process as applied to Plaintiff. *See Hill*, 877 F. Supp. 2d at 381-83 (striking portions of affidavit of former coworker because coworker's employment had ended prior to subjects on which

he opined). Accordingly, the Court should strike or disregard the above testimony from paragraphs 26 and 31 of Gowan's affidavit.

B. There is No Evidence of Discriminatory Animus that Played a Role in the Promotion and Tenure Process.

Plaintiff has done nothing more than speculate that his denial was discriminatory. "When a plaintiff alleges disparate treatment, liability depends on whether the protected trait . . . actually motivated the employer's decision. That is, the [protected trait] must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000).

Here, the identity of the decision makers and the decision-making process are undisputed: the Committee and Dean Tadepalli *separately* considered Plaintiff's portfolio and submitted independent recommendations to Provost House, who made the ultimate recommendation not to promote Plaintiff or grant tenure. (*See* D.E. 21 at 7.) Plaintiff has produced no evidence that the Committee members[3] or Provost House harbored discriminatory animus towards him. His only argument as to a decision maker is that Dean Tadepalli conspired with Burpitt to defeat his application for promotion and tenure.

[3] Plaintiff's argument that the absence of a Committee member from the Business School was a procedural violation does not establish pretext. (*See* D.E. 24 at 6, 15-16.) He has not proffered any evidence that Elon required a Committee member from the Business School other than Gowan's affidavit about her personal experience, which is not enough to establish a 2014-2015 procedural requirement. Even if Plaintiff had provided evidence of a procedural violation, this alone would be insufficient to establish pretext. *See, e.g.*, *Ivanova-Nikolova v. E. Carolina Univ.*, 4:08-CV-209-BR, 2011 WL 2462468, at * (E.D.N.C. June 17, 2011).

i. There is No Evidence that Dean Tadepalli's Decision not to Recommend Plaintiff was Motivated by Plaintiff's Race or National Origin.

As an initial matter, Plaintiff does not even contend that this alleged conspiracy between Dean Tadepalli and Burpitt was motivated by discrimination; rather, he contends that it was in retaliation for his complaints about harassment, a new claim which cannot be considered. *See* discussion *supra* Part I.

Even assuming Plaintiff means to argue that this conspiracy was discriminatory, he has provided no evidence of such. Plaintiff's entire argument rests on a single email chain, dated over a year before his consideration for promotion and tenure. In the email, Dean Tadepalli expresses frustration over Plaintiff's conflict with Department Chair Coleman Rich and attempted resignation from the Director position. Burpitt speculates that the Committee will likely vote to recommend Plaintiff for promotion and tenure even if Dean Tadepalli does not, giving Provost House a "hard call." (D.E. 23-6 at 294-96.)

Nowhere in this exchange is Plaintiff's race or national origin even alluded to. Rather, the exchange is focused on Plaintiff's conflicts with his department chair. (*See id*.) Plaintiff does not dispute that he had unresolved conflict with Rich,[4] and he has not put forth evidence that such conflict was based on his race or national origin. Dean Tadepalli's legitimate criticism of Plaintiff's unwillingness to resolve this conflict with his supervisor is not discrimination. *See, e.g.*, *Hawkins*, 203 F.3d at 282 (4th Cir. 2000)

[4] Indeed, much of Plaintiff's Complaint is focused on his conflict with Rich to no avail, since Rich recommended Plaintiff for promotion to associate professor and tenure. (D.E. 20-6 at 160-62.)

("Law does not blindly ascribe to race all personal conflicts between individuals of different races. . . . Otherwise, supervisors . . . could not evaluate employees of different races without the prospect of a lawsuit.").

ii. There Is No Evidence that Provost House's Ultimate Recommendation for Denial was Infected by Any Discriminatory Animus.

Even if there was evidence that Dean Tadepalli's recommendation was motivated by discriminatory animus (which there is not), there is no evidence that Provost House's decision was affected by it. The undisputed evidence is that when the Committee's recommendation differs from the dean's, Provost House gives credence to the Committee's recommendation. (D.E. 20-2 at ¶ 10.) Here, the Committee, uninfluenced by Dean Tadepalli's recommendation or any discriminatory motive, recommended denial. Accordingly, Provost House would not have recommended promotion and tenure, regardless of Dean Tadepalli's recommendation. Plaintiff has not otherwise provided evidence that Provost House's decision was motivated by Plaintiff's race or national origin.[5] Indeed, Plaintiff himself indicated that he believed the decision was based on Plaintiff not supporting Dean Tadepalli during the dean's search. (*See* D.E. 20-5 at 2.)

iii. **Plaintiff's Laundry List of Alleged Unfair Treatment Does Not Amount of Actionable Discrimination.**

Plaintiff also identifies a number of isolated incidents, unconnected to the decision makers or the denial, which he alleges are discriminatory. (*See* D.E. 24 at 4-5.)

[5] In fact, Provost House did not recommend five other candidates—all of whom were outside Plaintiff's protected class—and did recommend the other Hispanic candidate under consideration, which further demonstrates that neither race nor national origin was a consideration in the process. (*See* D.E. 21 at 20.)

There is no evidence that these incidents played any role in the promotion and tenure process. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.2d 277, 291 (4th Cir. 2004), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

Further, Plaintiff has failed to allege that most such incidents were at all related to his race or national origin. (*See* D.E. 24 at 4-5.) The only allegations that even mention Plaintiff's race and national origin are his unsupported testimony that he was the subject of "occasional insensitive comments" by unnamed faculty peers, none of whom he alleges were Committee members, and regarding the cancellation of an Hispanic student's research project. (D.E. 24 at 5.) Again, Plaintiff cannot rely on his own speculation to establish that he was discriminated against, and he has provided no evidence to support these claims. Further, there is no evidence that the cancellation of the research project had anything to do with Plaintiff or the student's race or national origin.

Thus, because Plaintiff has not produced evidence that the denial of his application for promotion and tenure was motivated by his race or national origin, his discrimination claims fail. Defendant is entitled to summary judgment.

CONCLUSION

Defendant respectfully requests that the Court grant its Motion and dismiss all of Plaintiff's claims with prejudice. Defendant further requests that the Court strike or disregard paragraphs 26 and 31 of Gowan's affidavit pursuant to Federal Rule of Civil Procedure 56(c)(4) and Local Rule 7.6.

This the 2nd day of February, 2018.

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CERTIFICATE OF WORD COUNT

I hereby certify, in reliance upon the word count feature in Microsoft Word, that the foregoing document contains 3112 words and complies with Local Rule 7.3(d)(1).

Respectfully submitted this the 2nd day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, the foregoing **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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