STATE OF MICHIGAN

COURT OF APPEALS

CHATHAPURAM S. RAMANATHAN, Plaintiff-Appellant, v WAYNE STATE UNIVERSITY BOARD OF GOVERNORS and LEON CHESTANG, Defendants-Appellees.	UNPUBLISHED April 6, 2010 No. 289147 Wayne Circuit Court LC No. 98-810999-NO

Before: JANSEN, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

This appeal addresses an employment discrimination claim filed by plaintiff Chathapuram S. Ramanathan against defendants Wayne State University Board of Governors (WSU) and Leon Chestang, a former WSU dean.[1] Plaintiff appeals as of right challenging an October 2008 circuit court order granting WSU summary disposition.[2] We reverse and remand for further proceedings.

I. BACKGROUND FACTS

In *Ramanathan v Wayne State Univ Bd of Governors (Ramanathan I)*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2002 (Docket No. 227726), slip op at 1-2, this Court succinctly summarized the following portion of the facts underlying the parties' dispute:

[1] The circuit court directed Chestang's dismissal from the case in October 2008, a decision that plaintiff does not contest in this appeal.

[2] This Court has previously decided two other appeals in this case, each of which followed circuit court summary disposition rulings. *Ramanathan v Wayne State Univ Bd of Governors (Ramanathan I)*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2002 (Docket No. 227726), and *Ramanathan v Wayne State Univ Bd of Governors (Ramanathan II)*, unpublished per curiam opinion of the Court of Appeals, issued January 4, 2007 (Docket No. 266238).

In 1992, defendant Wayne State University (WSU) hired plaintiff as an associate professor in the School of Social Work. Plaintiff is of Asian Indian descent. In October 1993, plaintiff met with his supervisor, Leon Chestang, Dean of the School of Social Work, to share concerns about interactions with Professor Alison Favorini, plaintiff's colleague. Plaintiff alleged that Favorini had made discriminatory remarks to him based on his race and culture. After the meeting, plaintiff sent a follow-up memorandum to Chestang, indicating that he planned to file a complaint with WSU's Equal Opportunity Office (EEO), as Chestang had suggested during their meeting. In turn, Chestang responded by memorandum, denying that he had recommended that plaintiff approach the EEO. He instead characterized the situation as plaintiff's problem in communicating with others.

In October 1993, plaintiff filed a complaint with WSU's EEO, where he alleged that defendants had revoked travel funds. Plaintiff also listed two race-based comments made by Favorini. He contended that he was discriminated against based on his gender[3] and race or national origin.

[2] Plaintiff has abandoned the gender discrimination claim.

In two faculty meetings in late 1993, Chestang allegedly characterized a sitar as an "obscure" instrument and commented about a sacrificial lamb and added that he would not want to be "curried." Several other faculty members heard these remarks and felt that they were negatively directed toward plaintiff's race.

In May 1994, plaintiff filed another complaint with the EEO alleging discrimination and a hostile work environment. That complaint reflected that plaintiff believed that he was the victim of continuing retaliation for his previous complaints to the EEO. Plaintiff also contended that his salary was less than that of other similarly-situated faculty members. He believed that Chestang repressed a positive performance evaluation to avoid giving plaintiff a merit increase and that others had been encouraged to denigrate him. In his reply memorandum to the EEO, Chestang denied all of the allegations. Thereafter, the EEO issued a Notice of Disposition, where it closed the matter with no finding of probable cause for discrimination or retaliation.

Plaintiff applied for tenure in October 1994. WSU's "Tenure and Employment Security Status Procedures," which are embodied in an agreement between WSU and the American Association of University Professors (AAUP), contemplate several levels of review that culminate in the provost's final tenure decision. In 1995, the tenure process required that the School of Social Work's Promotion & Tenure (P & T) Committee vote whether to recommend

tenure. If the vote favored tenure, the School of Social Work's Dean would weigh in with a recommendation. At the next level, the university wide P & T committee reviewed the tenure applicant's file, including the recommendations submitted by the dean and the School of Social Work's P & T Committee. The university provost then considered the recommendations of the dean and both P & T committees and rendered a final decision. The WSU-AAUP "Tenure and Employment Security Status Procedures" applicable to plaintiff did not permit an appeal from the provost's decision.[4]

Plaintiff compiled a tenure dossier, which included external review letters from academicians at other colleges and universities. Two of nine review letters were negative and a third was neutral. The School of Social Work's P & T committee endorsed tenure. However, in a January 1995 letter, Dean Chestang recommended against tenure. WSU's P & T committee then undertook the next level of tenure review and voted against tenure. In a letter dated April 27, 1995, Provost Marilyn Williamson informed plaintiff that WSU had decided to deny him tenure. The letter reads in relevant part, "After careful consideration, I regret to inform you that I cannot concur in the recommendation that you be granted tenure. The University Faculty Promotion and Tenure Committee is in agreement with this decision."[5]

In July 1995, plaintiff filed an "AAUP Grievance" that asserted the following contract violations:

> Violation of right to fair consideration for tenure (XXII.A); failure to abide by the statement of qualifications for tenure (XXII.C.para 2); failure to consider both performance to date and prospects for continued excellence (XXII.C.para 3); failure to adhere to dept/coll/Univ factors (XXII.C.para 2); discrimination on national origin (VIII).

WSU consolidated plaintiff's grievance with those of three other professors who also alleged "various violations of the WSU/AAUP Agreement regarding the processing of tenure cases during the last year of eligibility." The AAUP and WSU resolved the grievances by agreeing that each professor's file would receive "a *de novo* hearing" by the Vice-President for Academic Affairs and the University's P & T Committee. (Emphasis in original).

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[4] Although the WSU-AAUP agreement permitted an appeal of a negative recommendation by the School of Social Work's P & T Committee, the agreement appears to offer no appellate recourse for a negative vote of WSU's P & T committee. The agreement states concerning "Grievance of Tenure Decisions" that "[i]f in the opinion of the candidate and the Association, the failure to recommend the award of tenure was, at any level, based substantially on the candidate's exercise of his/her constitutional rights or was due to a violation of this Agreement, the candidate may file a grievance at Step One of the Grievance Procedure."

[5] Plaintiff's employment contract with WSU expired on May 21, 1995, and WSU did not offer him a "terminal" year of employment. In September 1995, plaintiff commenced academic employment at Southwest Missouri State University.

On April 30, 1996, approximately 11 months after plaintiff's WSU contract expired, Provost Tilden Edelstein advised plaintiff in a letter, "After careful consideration, I regret to inform you that I cannot concur in the recommendation that you be granted tenure. The University Faculty Promotion and Tenure Committee is in agreement with this decision." In a June 12, 1996 letter of explanation authored by Provost Edelstein, he summarized, in pertinent part:

> After a careful examination of your record the University Committee and I have concluded that neither the quantity or [sic] the quality of your scholarship reach the level of excellence required for tenure at Wayne State University. You have published only the two papers with one in press since coming to Wayne State University and previous to that time, six papers. The quality of several of these papers has been questioned by external evaluators. Your service record is adequate, but teaching performance is only average.

II. UNDERLYING LEGAL PROCEEDINGS

With respect to the genesis of plaintiff's lawsuit in this case, we borrow the following summary from this Court's opinion in *Ramanathan I*:

> Plaintiff filed the instant suit in April 1998, alleging race discrimination in violation of the [Civil Rights Act] CRA [MCL 37.2101 *et seq*.], retaliation in violation of the CRA, and tortious interference with a contractual relationship. Defendant Chestang moved for partial summary disposition [in December 1999] pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10) on plaintiff's claim of contract interference, asserting that the claim must fail because no contract of employment existed between plaintiff and [Southwest Missouri State University, his subsequent employer]. At the hearing on Chestang's motion, plaintiff's counsel admitted that she had made a mistake in the complaint by alleging tortious interference with a *contractual* relationship, where the body of the allegation clearly indicated that the claim was for interference with an *expectancy* or a *business relationship*. The trial court granted the motion.
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> Defendants [in February 2000] moved for summary disposition on the remaining counts, asserting that those claims were barred by the statute of limitations and that no evidence supported either claim. Defendants argued that all of the incidents that plaintiff claimed were racial harassment occurred more than three years before plaintiff filed the instant suit. Defendants then asserted that the evidence did not support plaintiff's claim of discriminatory animus based on plaintiff's race or national origin. The trial court granted that motion as well. [*Id*., slip op at 3 (emphasis in original).]

On plaintiff's first appeal to this Court, the Court reversed the circuit court in part, holding that plaintiff had established genuine issues of material fact with respect to his claims of a hostile work environment, race discrimination, and retaliation, arising from the decisions not to renew plaintiff's teaching contract and to deny him tenure. *Ramanathan I*, slip op at 4-8. In *Ramanathan I*, this Court also addressed WSU's argument that the statute of limitations barred plaintiff's CRA claims; the Court found that the "continuing violations" doctrine tolled the

statute of limitations. *Id.*, slip op at 8-9. Concerning the date plaintiff's CRA action accrued, this Court held:

> Analysis of this issue involves the determination of which event in plaintiff's WSU career comprised the accrual of his action. Plaintiff alleges that his action accrued when he learned that WSU denied tenure to him, which was in April 1995. In a discriminatory termination case, the time of accrual commences on the date that the employer terminated the plaintiff. See [*Womack-Scott v Dep't of Corrections*, 246 Mich App 70, 74-75; 630 NW2d 650 (2001)]. Correspondingly, the time of accrual here commenced on the date that defendants refused to give tenure to plaintiff. *WSU first denied plaintiff's request for tenure via a letter dated April 27, 1995; plaintiff filed suit in early April 1998, which is within the three-year statutory period.* [*Ramanathan I*, slip op at 8-9 (emphasis added).]

The case returned to the circuit court, where it remained pending without trial for more than three years. On May 20, 2005, WSU again moved for summary disposition, this time on the basis of the Michigan Supreme Court's May 11, 2005 decision in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646, amended 473 Mich 1205 (2005), which abrogated the "continuing violations" doctrine. WSU's second motion for summary disposition did not challenge the accrual date of plaintiff's CRA claims. Instead, WSU insisted that on the basis of a footnote in *Garg*, plaintiff no longer had any evidence to support WSU's purported discriminatory animus.[6]

The circuit court granted WSU summary disposition, but after the Michigan Supreme Court in July 2005 amended *Garg*, 472 Mich 263, to eliminate footnote 14, 473 Mich 1205, the circuit court reversed its summary disposition ruling and reinstated plaintiff's cause of action. This Court granted WSU's application for leave to appeal and affirmed the circuit court's reinstatement of the case, holding that "plaintiff established a genuine issue of material fact for trial with respect to his CRA claim based on the denial of tenure." *Ramanathan v Wayne State Univ Bd of Governors (Ramanathan II)*, unpublished per curiam opinion of the Court of Appeals, issued January 4, 2007 (Docket No. 266238), slip op at 5. Notably, this Court mentioned in a footnote that WSU had raised in a reply brief an argument about the accrual date for plaintiff's claims:

> We decline to address defendant's argument in its reply brief that the accrual date for plaintiff's denial-of-tenure claims is the date when Chestang made a negative recommendation, pursuant to *Joliet v Pitoniak*, 475 Mich 30; 715

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[6] In footnote 14 of the Michigan Supreme Court's initial opinion in *Garg*, the Court rejected "the proposition (advanced by the dissent) that 'acts falling outside the period of limitations' were admissible 'as background evidence in support of a timely claim.'" *Ramanathan II*, slip op at 3. WSU's second summary disposition motion asserted that this footnote signified that plaintiff could not utilize evidence of Chestang's sitar and curried lamb remarks, and that plaintiff otherwise lacked any evidence that Chestang harbored a discriminatory animus.

> NW2d 60 (2006). Aside from the fact that this Court previously addressed this point in the original appeal, *Ramanathan I*, *supra*, slip op, p 3, "[r]eply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). [*Ramanathan II*, slip op at 5 n 2].

WSU sought leave to appeal to the Michigan Supreme Court. In a June 2007 order, the Supreme Court decided it would entertain argument on the application, and directed the parties to brief the following questions:

> (1) [W]hether there is any direct evidence, apart from the comments about a sitar and curried lamb, to indicate that the defendant Leon Chestang had a discriminatory animus toward the plaintiff; (2) whether the sitar and curried lamb comments by the defendant were more than mere stray remarks; (3) whether defendant Chestang's comments and actions are subject to the same actor inference; (4) whether there is any evidence that the provost of defendant university had any knowledge of, or relied in any manner on, any discriminatory animus by defendant Chestang; and (5) whether there is any evidence that the provost harbored any national origin or racial animus toward the plaintiff or had any retaliatory motivation in reaching *her* tenure decision. [*Ramanathan v Wayne State Univ Bd of Governors*, 478 Mich 910 (2007) (emphasis added).]

In March 2008, the Supreme Court reversed in part this Court's opinion in *Ramanathan II* and remanded the case to the circuit court "for further proceedings consistent with this order." *Ramanathan v Wayne State Univ Bd of Governors*, 480 Mich 1090-1091 (2008). The Supreme Court's order further explains as follows:

> *As the Court of Appeals correctly ruled, the plaintiff's sole actionable claim, by operation of the applicable statute of limitations, is the decision of the Provost of Wayne State University to deny the plaintiff's request for tenure.* MCL 600.5805(1); *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263 (2005), amended 473 Mich 1205 (2005). The plaintiff presented no evidence that the Provost harbored any national origin or racial animus toward the plaintiff in reaching her tenure decision. *Dep't of Civil Rights ex rel Burnside v Fashion Bug of Detroit*, 473 Mich 863 (2005). The plaintiff cannot show any relevant connection between the identified comments of the Dean of the School of Social Work in 1993 and the Provost's tenure decision in 1995. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124[; 666 NW2d 186] (2003). The plaintiff has not presented a genuine issue of material fact to sustain his claim of racial or national origin discrimination in violation of the Civil Rights Act . . . . *On remand, the circuit court shall only proceed on the plaintiff's claim that the Provost, by denying tenure to the plaintiff, unlawfully retaliated against the plaintiff for the exercise of his rights under the Civil Rights Act.* [*Id.* at 1091 (emphasis added).]

In July 2008, WSU filed a third motion for summary disposition, averring that "there is no admissible evidence by which plaintiff can make a prima facie retaliation case." WSU

asserted that plaintiff's retaliation claim "is necessarily limited only to the decision of Tilden Edelstein, Ph.D., the university Provost who denied tenure last," and who had no knowledge of plaintiff's EEO claim. The motion further contended that "[t]here was a substantial lack of support for plaintiff's tenure application at *every* level of review." (Emphasis in original). The circuit court granted WSU summary disposition in a bench opinion on the basis that "[t]he record supports the conclusion that Tilden G. Edelstein, … Vice President for Academic Affairs, was the Provost and final decision maker regarding tenure." The circuit court additionally expressed that plaintiff "has failed to demonstrate *any* causal relationship between the decision denying tenure and the plaintiff's protected activity," and that Edelstein's "careful and detailed" explanation for denying tenure "manifestly demonstrates" that the decision "was not caused in whole or in part by plaintiff's protected activity." (Emphasis in original). The circuit court continued,

> Indeed, the record in its entirety leads to the obvious conclusion that plaintiff was a poor candidate for tenure.
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> Furthermore, there is insufficient evidence to conclude Mr. Edelstein even knew of plaintiff's protected activity.
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> Finally, based upon the voluminous record made in this case, it is clear to this court that there was and is no justification, under the facts and law, for a court to set aside and thus interfere with the obligation of an academic institution, such as Wayne State University, to exercise its important and necessary function of determining the quality of its faculty. Academic freedom demands no less.

III. LAW OF THE CASE

We initially address plaintiff's averment that the law of the case doctrine precluded the circuit court from reconsidering the event marking the accrual date of plaintiff's retaliation claim. The application of the law of the case doctrine presents a question of law subject to de novo review. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 522; 730 NW2d 481 (2007).

The law of the case doctrine posits that an appellate court's decision concerning a particular issue binds courts of equal or subordinate jurisdiction during subsequent proceedings in the same case. *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 221-222; 555 NW2d 481 (1996). The doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The doctrine applies when the prior appeal involved the same set of facts, the same parties, and the same question of law. *Manistee v Manistee Fire Fighters Ass'n, Local 645, IAFF*, 174 Mich App 118, 125; 435 NW2d 778 (1989). "[L]aw of the case offers the same parties a measure of certainty by according finality to the litigated issues until the cause of action is fully litigated, including retrials or appeals, and the superseding doctrines of res judicata

and collateral estoppel become effective." *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 729; 209 NW2d 843 (1973).

The present appeal involves the same set of facts and the same parties as the prior appeals in *Ramanathan I* and *Ramanathan II*. Because this appeal also focuses on a question of law at least implicitly decided by both this Court and the Michigan Supreme Court, the law of the case doctrine applies. *Grievance Administrator*, 462 Mich at 260. In *Ramanathan I*, this Court considered whether the statute of limitations had expired for any of plaintiff's CRA claims. In making this determination, the *Ramanathan I* Court reached a legal conclusion about the date that the claims accrued for the purpose of the three-year statute of limitations governing CRA actions. The Court held that plaintiff's CRA claims accrued in April 1995, when Provost Williamson denied plaintiff's tenure application. *Id*., slip op at 8-9. The Supreme Court held that plaintiff's "sole actionable claim, by operation of the applicable statute of limitations, is the decision of the provost of Wayne State University to deny the plaintiff's request for tenure." *Ramanathan*, 480 Mich at 1091. As discussed further, *infra*, the "provost" referred to by the Supreme Court is Provost Williamson.

In deciding when plaintiff's retaliation claim accrued and that it amounted to an "actionable" claim, the Supreme Court also implicitly decided that plaintiff had established a cause of action arising from Provost Williamson's denial of tenure. The prior appellate holdings that plaintiff's claim accrued when Provost Williamson rendered her tenure decision implicitly signify that at that point, plaintiff possessed an actionable claim.[7] Had this Court determined that plaintiff's claim arose when Provost Edelstein affirmed Provost Williamson's decision, it would have employed an entirely different analysis.

WSU asserts that the law of the case doctrine lacks applicability "[w]hen an appellate court reverses a case and remands it for a trial because a material question of fact exists." In *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 667; 324 NW2d 123 (1982), this Court refused to apply the law of the case doctrine because a prior appellate "[d]ecision did not determine the merits of plaintiff's or defendant's claim but only determined that factual questions existed." The Court concluded that "[s]ince our first decision did not reach the merits

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[7] The Michigan Supreme Court has recognized the following definitions of the term "accrue":

> "to increase, grow," "*to come into existence as an enforceable claim*; vest as a right," "to come by way of increase or addition: arise as a growth or result," "to be periodically accumulated in the process of time whether as an increase or a decrease," "gather, collect, accumulate," Webster's Third New Int'l Dictionary (1961), p 13, or "to happen or result as a natural growth; arise in due course; come or fall as an addition or increment," "*to become a present and enforceable right or demand*," Random House American College Dictionary (1964), p 9. [*Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 653; 698 NW2d 350 (2005) (emphasis added).]

of defendant's claimed defenses, the law of the case doctrine does not bar this appeal." *Id*. In contrast, this Court's prior decision in *Ramanathan I* and the Supreme Court's 2008 order reached the merits of WSU's statute of limitations defense. Consequently, WSU incorrectly suggests that only the existence of material questions of fact occasioned the Supreme Court's remand order.

We also reject WSU's position that the law of the case doctrine does not apply because "the facts do not remain materially the same." The facts of this case have not changed during the last 11 years. Provost Edelstein's role in the tenure process is neither newly discovered nor newly considered. And WSU inaccurately asserts that its third summary disposition motion "focused on facts not considered or addressed in the prior appeals." In *Ramanathan I*, this Court specifically acknowledged that WSU had afforded plaintiff a second tenure review:

> In July 1995, plaintiff filed a grievance with his teaching union based on the denial of tenure to him. WSU agreed that plaintiff's file could be resubmitted for a de novo hearing. In a follow-up letter, defendants explained to plaintiff that WSU again denied tenure to him because his teaching performance was only average and several external auditors had questioned the quality of his scholarship. [*Ramanathan I*, slip op at 2.]

The second tenure review did not alter this Court's conclusion that plaintiff's CRA claim accrued in 1995, when "WSU first denied plaintiff's request for tenure[.]" *Ramanathan I*, slip op at 8-9. Furthermore, the case on which WSU relies, *Driver v Hanley (After Remand)*, 226 Mich App 558; 575 NW2d 31 (1997), is readily distinguishable. This Court observed in *Driver* that its earlier decision had "incorrectly stated that plaintiff had 'filed a complaint with the Michigan Department of Labor, Wage and Hour Division.'" *Id*. at 565. When the case returned to this Court, the parties agreed that the plaintiff had reported "to the federal agency rather than a state agency." *Id*. This Court concluded that "because the key fact upon which the circuit court relied to dismiss plaintiff's 'exclusive remedy' was not among the facts apparently relied on by this Court, the law of the case doctrine was not applicable on remand and does not now bind this Court on the issue." *Id*. at 565-566. Here, by contrast, WSU has neglected to identify any factual errors underpinning the opinions of this Court or the Supreme Court.

The law of the case doctrine demands that we and the circuit court abide by the prior holdings of both this Court and the Supreme Court: that plaintiff's cause of action accrued when Provost Williamson denied tenure, and not when Provost Edelstein affirmed Provost Williamson's decision. Although the circuit court may correctly have noted in ruling on WSU's third motion for summary disposition that plaintiff did not have proof that his protected activity comprised a factor in Provost Edelstein's decision, the law of the case doctrine mandated the circuit court to proceed with plaintiff's cause of action premised on *Provost Williamson's* tenure decision. Stated differently, given that this Court and the Supreme Court have determined that Provost Williamson's decision to deny tenure forms the basis for plaintiff's retaliation action, not Provost Edelstein's, the circuit court's focus on Provost Edelstein's decision contradicted the law of the case doctrine.

IV. MERITS OF RETALIATION CLAIM

Even were we to opt against applying the law of the case doctrine, we would still reverse the circuit court's incorrect grant of summary disposition regarding plaintiff's retaliation claim under MCR 2.116(C)(10). We review de novo the circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). In granting summary disposition of plaintiff's retaliation claim, the circuit court invoked MCR 2.116(C)(10), which tests a claim's factual support. "In reviewing a motion under . . . (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id*.

To establish a prima facie case of retaliation under the CRA,[8] a plaintiff must show "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Garg*, 472 Mich at 273 (internal quotation omitted). The identity of the decision maker in a retaliation case is pertinent to element (2), the defendant's knowledge, and element (4), causation. A plaintiff who has engaged in a protected activity must demonstrate the decision maker's awareness of the plaintiff's participation in a protected activity and that the plaintiff "suffered an adverse employment action *as a result of* her engaging in the protected activity, i.e., that there was some nexus or causal connection between the adverse employment action and the protected activity." *Id*. at 276 n 5 (emphasis in original).

A. RETALIATION: DECISION MAKER

Plaintiff insists that Provost Williamson's tenure decision comprised the adverse employment action giving rise to his retaliation claim, and that Chestang's discriminatory, retaliatory state of mind infected Provost Williamson's decision. Our review of the record reveals that during the first decade of this litigation, WSU agreed that Provost Williamson was the pertinent decision maker. In WSU's 2005 brief in reply to plaintiff's response to summary disposition, WSU asserted that "there is no dispute that Provost Williamson was the actual decision-maker with respect to plaintiff's tenure application." In a 2006 brief in this Court, WSU similarly observed that "as has been established in the deposition of Provost Williamson taken since *Ramanathan I*, Dean Chestang was *not* even the ultimate decision maker—it was provost Williamson who made the decision to deny tenure after a de novo review." (Emphasis in original). Furthermore, Provost Williamson testified in her deposition that she made the "ultimate[] . . . decision to deny [plaintiff's] tenure application[.]"

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[8] The antiretaliation portion of the CRA prohibits discrimination or retaliation "against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. MCL 37.2701.

Provost Williamson's decision to deny tenure, which occasioned the termination of plaintiff's employment at WSU, constitutes an adverse employment action giving rise to plaintiff's retaliation claim. See *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999) (explaining that a CRA violation occurs only when a plaintiff suffers "an adverse employment action under circumstances giving rise to an inference of discrimination"). An adverse employment action is "materially adverse in that it is more than mere inconvenience or an alteration of job responsibilities," and it must exhibit "some objective basis for demonstrating that the change is adverse" that goes beyond "a plaintiff's subjective impressions." *Id*. at 364 (internal quotation omitted). Examples of adverse employment actions include "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id*. at 363 (internal quotation omitted). In this case, WSU does not challenge that the denial of tenure and resultant termination of plaintiff's employment amount to adverse employment actions.

Indisputably, *Provost Williamson's* decision denying tenure, which forced plaintiff to find other employment, constitutes an adverse employment action. Provost Edelstein later reviewed plaintiff's tenure application and reaffirmed Provost Williamson's tenure decision only after plaintiff had initiated a grievance procedure. The grievance challenged "the standards and procedures" utilized in the course of the tenure evaluation, rather than the merits of the tenure decision. "But entertaining a grievance complaining of [a] tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Delaware State College v Ricks*, 449 US 250, 261; 101 S Ct 498; 66 L Ed 2d 431 (1980) (emphasis in original).[9]

When determining the date a retaliation cause of action accrues, a court necessarily must consider "the wrong upon which the claim is based." MCL 600.5827 (instructing that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results"). In *Garg*, 472 Mich at 282, our Supreme Court emphasized that an employment discrimination plaintiff must "commence an action within three years of each adverse employment act by a defendant." Here, the adverse employment action about which

[9] In *Ricks*, an employment discrimination case brought by a professor denied tenure, the United States Supreme Court held that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." 449 US at 258. Although *Ricks* involved computation of the accrual date in case brought under Title VII and 42 USC 1981, the accrual analysis it employed analogously applies here. We recognize that federal decisions in civil rights cases often supply guidance, but are not binding on Michigan courts. *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997).

plaintiff complains, the "wrong upon which the claim is based," arose from Provost Williamson's decision, not Provost Edelstein's.[10]

Provost Williamson's April 27, 1995 letter offers no suggestion that her decision lacked finality or qualified as conditional or tentative in any respect, and the letter does not mention an applicable appeal process. The governing WSU-AAUP guidelines also envisioned no appeal of Provost Williamson's tenure denial. Provost Edelstein became involved not as a part of the regular and predictable continuation of the tenure evaluation procedure, but only because the AAUP had filed a grievance on behalf of plaintiff and three other professors. The resolution of the grievance, including Provost Edelstein's reaffirmation of Provost Williamson's decision, occurred entirely outside the boundaries of the tenure review process. Consequently, Provost Williamson was the only pertinent decision maker in this case because Provost Williamson, rather than Provost Edelstein, made the challenged employment decision. Although WSU makes much of the fact that Provost Edelstein conducted a "de novo" review of plaintiff's academic file, the adverse employment action for which plaintiff seeks damages is *Provost Williamson's* decision to deny tenure, which occasioned plaintiff's loss of employment, and not Provost Edelstein's "de novo" grievance disposition affirming Provost Williamson.[11]

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[10] This Court recently explained, "Subsequent claims of additional harm caused by one act do not restart the claim previously accrued. For the purposes of accrual, there need only be one wrong and one injury to begin the running of the period of limitations. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the 'wrong is done.'" *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009). This Court determined in *Ramanathan I* that the "wrong" occurred in April 1995, one year before Provost Edelstein's affirmation of the previous tenure decision; the Court expressed that "the time of accrual here commenced on the date that defendants refused to give tenure to plaintiff. WSU first denied plaintiff's request for tenure via a letter dated April 27, 1995; plaintiff filed suit in early April 1998, which is within the three-year statutory period." *Ramanathan I*, slip op at 8-9. In *Ramanathan II*, WSU contended that plaintiff's cause of action accrued on the date that Chestang made a negative tenure recommendation, but this Court declined to revisit the accrual issue. *Ramanathan II*, slip op at 5 n 2.

The Supreme Court did not disturb this Court's ruling regarding accrual. It in fact affirmed that this Court had "correctly ruled" that "plaintiff's sole actionable claim, by operation of the applicable statute of limitations, is the decision of the provost of Wayne State University to deny the plaintiff's request for tenure." 480 Mich at 1091. The Supreme Court's reference to this Court's opinion plainly reflects the Supreme Court's determination that Provost Williamson's 1995 decision, not Provost Edelstein's 1996 affirmance of that decision, gave rise to plaintiff's claim. The Supreme Court's reference to "*her* tenure decision" reinforces this conclusion. *Id*. (emphasis added).

[11] Even if Provost Edelstein's 1996 ruling had reversed Provost Williamson's tenure decision and bestowed plaintiff tenure, plaintiff still could have maintained an action against WSU arising
(continued…)

Finally, WSU's assertion that Provost Edelstein's ruling "sterilized" Provost Williamson's prior decision, eliminating any causal connection between Chestang's animus and the decision to deny tenure, lacks legal merit. The cases cited by WSU in support of this argument either compel a contrary conclusion or do not apply to the circumstances of this case. WSU first cites, *Wilson v Stroh Companies, Inc*, 952 F2d 942, 943-944 (CA 6, 1992), in which a corporate industrial relations manager for the defendant recommended the plaintiff's termination. The defendant's general manager concurred, and discharged the plaintiff. *Id*. at 944. The plaintiff "then filed a grievance protesting his discharge," and an arbitrator found in favor of the defendant. *Id*. The Sixth Circuit phrased the "determinative question" as whether the plaintiff had submitted evidence supporting that a subordinate's racial animus constituted a cause of the plaintiff's termination. *Id*. at 946. The court concluded that because the industrial relations manager had "conducted an independent investigation," the plaintiff could not establish a prima facie case. *Id.* The *Wilson* case does not support the notion that the arbitrator's decision qualified as the "final" one or that the arbitrator's decision "sterilized" that of the general manager. The decision in *Wilson* establishes only that because the biased subordinate had no influence in the decision making process, no causal connection linked the alleged bias and the adverse employment action. WSU also relies on *Lacks v Ferguson Reorganized Sch Dist R-2*, 147 F3d 718, 720 (CA 8, 1998), in which a school board fired a teacher pursuant to an established teacher termination process. The teacher neither filed a grievance nor sought other administrative review of the school board's discharge decision, and the Eighth Circuit thus did not consider whether the school board had issued a "final" decision because that issue was not presented. WSU further cites *EEOC v BCI Coca-Cola Bottling Co of Los Angeles*, 450 F3d 476 (CA 10, 2006), which analyzed the theory of "cat's paw" liability, but in that case the Tenth Circuit did not address whether a certain decision maker was the "final" decision maker.[12]

In summary, the circuit court incorrectly determined that plaintiff's retaliation claim derived from Provost Edelstein's decision, instead of Provost Williamson's.

B. RETALIATION: KNOWLEDGE AND CAUSATION

Lastly, we briefly address plaintiff's additional appellate issues to the extent they might arise on remand. Plaintiff challenges the circuit court's ruling that he failed to show causation connecting Chestang's retaliatory animus and WSU's decision to deny tenure. The circuit court found that because plaintiff "was a poor candidate for tenure," the tenure denial "was not caused in whole or in part by plaintiff's protected activity."

(…continued)

from Provost Williamson's 1995 tenure denial. As we already have discussed, the termination of plaintiff's employment amounts to an adverse employment action under *Wilcoxon*.

[12] Federal courts permit Title VII plaintiffs to establish a decision maker's retaliatory motive by imputation from a subordinate's mindset, the "cat's paw" theory. *EEOC*, 450 F3d at 484; see also *Arendale v City of Memphis*, 519 F3d 587, 604 n 13 (CA 6, 2008).

1. DECISION MAKER'S KNOWLEDGE

Plaintiff asserts that a causal connection exists between his protected activity and the adverse employment actions taken by Chestang and Provost Williamson, reasoning that (1) by speaking with the EEO and filing a report, he engaged in a protected activity; (2) Chestang and Provost Williamson knew of this activity; (3) Chestang and Provost Williamson took employment actions adverse to plaintiff; and (4) plaintiff's protected activity was a cause of Chestang's retaliation and Provost Williamson's decision to deny tenure. In plaintiff's estimation, Chestang retaliated against plaintiff because of his pursuit of an EEO grievance, and Chestang's negative tenure recommendation foreclosed plaintiff's ability to achieve tenure. Plaintiff contends that Chestang's retaliatory animus may be imputed to Provost Williamson's tenure decision because virtually no professor achieves tenure without the support of his dean, Provost Williamson knew that Chestang opposed plaintiff's tenure, and Provost Williamson "substantially based" her decision on Chestang's negative recommendation.

In light of the fact that WSU likely will challenge Provost Williamson's awareness of Chestang's animus after we remand this case again to the circuit court, we take this opportunity to emphasize that plaintiff has presented evidence giving rise to a reasonable inference that Chestang's animus impacted Provost Williamson's decision. In *Harrison v Olde Financial Corp*, 225 Mich App 601, 608-609 n 7; 572 NW2d 679 (1997), an opinion authored by former Judge (now Justice) Young, this Court recognized that a plaintiff may establish the "predisposition to discriminate" element by imputation:

> With respect to the "predisposition to discriminate" element, because we are obligated to construe the evidence in the light most favorable to plaintiff, we must accept plaintiff's argument that the racially discriminatory comments of the others participating in the interviewing process must be imputed to Campbell, who defendant states was "the" decisionmaker. . . .
>
> In this case, Campbell testified in his deposition that he consulted with and considered Hatmaker's views concerning plaintiff. Consequently, we believe that plaintiff established a question of material fact regarding whether Campbell's decision was influenced by a person that plaintiff alleges operated with racial animus. As a result of these imputed inferences, Campbell cannot be deemed the sole decisionmaker for the purpose of this motion under MCR 2.116(C)(10) . . . .

Plaintiff theorizes that Chestang's negative recommendation and inappropriate involvement in the tenure process should be imputed to Provost Williamson. Provost Williamson testified that Chestang's recommendation against tenure "was an ingredient in my decision." Plaintiff thus has presented evidence that Provost Williamson's decision was influenced, to some extent, by Chestang's negative recommendation. Under *Harrison*, 225 Mich App at 608-609 n 7, this proof suffices to establish the second element of plaintiff's prima facie case, WSU's knowledge that plaintiff participated in a protected activity.

2. CAUSATION

Plaintiff asserts that he has established a prima facie case of retaliation given his engagement in a protected activity, Provost Williamson's possession of imputed knowledge, the

denial of tenure and termination from employment, and the existence of a link between his protected activity and the denial of tenure. In support of the circuit court's lack of causation conclusion, WSU asserts that legitimate, nonretaliatory reasons warranted the denial of tenure and plaintiff's termination, and that plaintiff did not establish that WSU's actions were pretextual under the burden shifting framework established in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Plaintiff replies that the circuit court misapplied *McDonnell Douglas* by requiring him to prove at the summary disposition stage that he was a "good candidate" for tenure.

"To establish causation [when bringing a retaliation claim under the CRA], the plaintiff must show that his participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). In *Ramanathan I*, slip op at 8, this Court observed,

> Plaintiff's EEO complaint was pending when Chestang decided not to renew plaintiff's contract. Also, plaintiff's EEO complaint had been rejected by the EEO within four months of Chestang's negative recommendation regarding tenured employment. One could infer from the evidence that Chestang reached the complained-of decision to retaliate against plaintiff for his EEO complaint. See *DeFlavis v Lord & Taylor, Inc*, 223 Mich App 432, 443; 566 NW2d 661 (1997). *Thus, plaintiff has come forward with sufficient evidence to create a genuine issue of material fact as related to Chestang's decision not to recommend plaintiff for tenure*. [Emphasis added.]

This passage embodies the law of the case with regard to the question whether plaintiff satisfied his initial burden to submit some evidence of a causal link between plaintiff's protected activity and Chestang's decision to recommend against tenure. *Manistee*, 174 Mich App at 125.

However, after presenting a rebuttable prima facie case on the basis of indirect proof of retaliation, the plaintiff must nevertheless "proceed through the familiar steps set forth in *McDonnell Douglas*[, 473 US at] 802-803." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "[O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id*. at 464. If the defendant produces a legitimate, nondiscriminatory reason for its action, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that [retaliation] was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Id*. at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). A plaintiff can establish pretext by demonstrating that the proffered reasons for the adverse employment action (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

In WSU's summary disposition motion, it contended that it had denied plaintiff tenure because he did not possess the requisite scholarship and teaching abilities. WSU's advancement of a legitimate, nondiscriminatory reason for denying tenure shifted to plaintiff the burden to

articulate evidence that, when viewed in the light most favorable to plaintiff, would permit a reasonable fact finder to conclude that WSU's proffered reason for its decision constituted a pretext. *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 253; 101 S Ct 1089; 67 L Ed 2d 207 (1981). Plaintiff presented evidence from which a fact finder could reasonably conclude that WSU's criticisms of his scholarship and teaching ability amounted to pretexts. Before plaintiff filed his EEO complaint, Chestang had ranked plaintiff's scholarship at the highest level. The School of Social Work's P & T Committee recommended tenure and the committee's report noted that plaintiff's teaching evaluations "are at the mean for the School [of Social Work]." Most of the outside reviewers who considered plaintiff's candidacy for tenure rated him well-qualified. After WSU denied plaintiff tenure, his colleagues in the School of Social Work wrote to Provost Williamson "to express our profound disagreement with the University's decision to reject Professor Ramanathan's application for tenure." The letter stated, in relevant part, "Professor Ramanathan was enthusiastically recommended for tenure by his colleagues in our School's Tenure and Promotion Committee," and "[h]e has clearly met and in many cases exceeded all School of Social Work norms for scholarly productivity, service, and instruction in his three years at Wayne State, as well as in his five prior years of service [at other universities]." Plaintiff also presented evidence, namely the affidavit of a long-tenured WSU professor and past "president of the WSU AAUP-AFT [American Federation of Teachers]," supporting his claim that it becomes virtually impossible to achieve tenure at WSU in the face of a negative recommendation from the pertinent dean. See *Zahorik v Cornell University*, 729 F2d 85, 93-94 (CA 2, 1984) ("Given the elusive nature of tenure decisions, we believe that a prima facie case that a member of a protected class is qualified for tenure is made out by showing that some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question.").

In light of this evidence, plaintiff has raised genuine issues of material fact regarding retaliatory pretext adequate to defeat summary disposition. Viewed in the light most favorable to plaintiff, a rational finder of fact could conclude that plaintiff was qualified for tenure and that Chestang's views about plaintiff's scholarship and teaching lacked factual support or were the product of bad faith generated by retaliatory motives. A reasonable fact finder could conclude that Chestang's retaliatory animus spawned or significantly influenced Provost Williamson's tenure decision. The circuit court neglected to properly apply the *McDonnell Douglas* burden shifting analysis and engaged in impermissible fact finding, ultimately failing to recognize that the existence of a "genuine issue" concerning causation precluded summary disposition under MCR 2.116(C)(10). *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

C. CIRCUIT COURT'S INVOCATION OF ACADEMIC FREEDOM

We finally address briefly the circuit court's determination that no "justification" existed "for a court to set aside and thus interfere with the obligation of an academic institution … to exercise its important and necessary function of determining the quality of its faculty." In enacting the CRA without including any exceptions for academic institutions of higher learning, our Legislature established that it deemed workplace discrimination at colleges and universities no more acceptable than discrimination in other contexts. The statutory language plainly does not insulate educational institutions from the reach of the CRA. Because neither the circuit court nor WSU has presented any Michigan authority tending to support the circuit court's view that a

jury trial of plaintiff's CRA claim would infringe on WSU's "academic freedom," we reject the circuit court's reliance on this doctrine.[13]

V. CONCLUSION

The circuit court erred to the extent that it ignored the law of the case doctrine in ruling on WSU's 2008 motion for summary disposition. Furthermore, plaintiff has overcome every evidentiary hurdle associated with proving his retaliation claim, which should proceed to trial.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher

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[13] A cogent rebuttal to the circuit court's unwillingness to "interfere" in tenure decisions appears in *Kunda v Muhlenberg College*, 621 F2d 532, 550 (CA 3, 1980):

> The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy. Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands.

STATE OF MICHIGAN

COURT OF APPEALS

CHATHAPURAM S. RAMANATHAN,

Plaintiff-Appellant,

v

WAYNE STATE UNIVERSITY BOARD OF GOVERNORS and LEON CHESTANG,

Defendants-Appellees.

UNPUBLISHED
April 6, 2010

No. 289147
Wayne Circuit Court
LC No. 98-810999-NO

Before: JANSEN, P.J., and MURRAY and GLEICHER, JJ.

JANSEN, P.J. (*concurring*).

I concur in the result only.

/s/ Kathleen Jansen