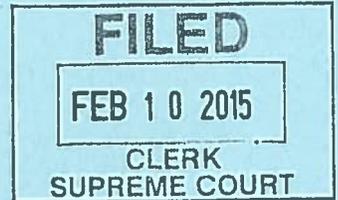


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000820-D



THE BOARD OF REGENTS OF NORTHERN KENTUCKY UNIVERSITY,
APPELLANT

v.

ANDREA WEICKGENANNT, APPELLEE

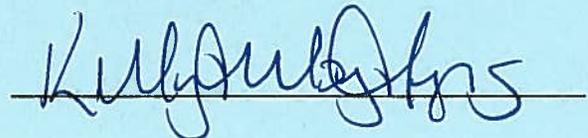
On Discretionary Review from Kentucky Court of Appeals
Case No. 2011-CA-00211
and
Appeal from Campbell Circuit Court
Action No. 09-CI-00432

BRIEF OF APPELLEE ANDREA WEICKGENANNT

Kelly Mulloy Myers (86727)
Randolph H. Freking (23509)
Trial Attorneys for Plaintiff
FREKING & BETZ, LLC
525 Vine Street, Sixth Floor
Cincinnati, OH 45202
Phone: (513) 721-1975/Fax: (513) 651-2570
kmyers@frekingandbetz.com
randy@frekingandbetz.com

CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of the foregoing were served via UPS this 9th day of February, 2015 on: Hon. Susan Stokely Clary, Clerk of the Supreme Court, Room 209, 700 Capital Avenue, Frankfort, KY 40601 and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and one copy of the foregoing was served via hand delivery on the 10th day of February, 2015 on: Hon. Fred A. Stine, Chief Circuit Judge, Campbell County Circuit Court, 330 York Street, Newport, KY 41071; Michael W. Hawkins and Kathleen A. Carnes, Esq., Dinsmore & Shohl LLP, 1900 First Financial Center, 255 East Fifth Street, Cincinnati, OH 45202.



STATEMENT CONCERNING ORAL ARGUMENT

Appellee Andrea Weickgenannt respectfully joins Appellant's request for oral argument. This case has broad implications regarding the application of KRS Chapter 344 and specifically the elements necessary to establish a *prima facie* discrimination case, the determination of who is considered "similarly situated" to a plaintiff, and the quantum of pretext evidence required to raise genuine issues of material fact and thereby survive summary judgment. Moreover, Appellant and Amici Curiae urge this Court to adopt a rule of law which would sharply depart from long-standing and well-established precedent interpreting Title VII and the Kentucky Civil Rights Statute and would significantly diminish the protections of the Kentucky's civil rights law as it is applied to university and college professors throughout the state.

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I. COUNTERSTATEMENT OF THE CASE

While Appellant has adequately set forth the procedural background of the present case, Weickgenannt presents the following counterstatement of facts which is essential to a fair and adequate understanding of the issues presented for appeal to this Court.

A. Weickgenannt's Employment History with NKU.

Weickgenannt is a professionally qualified Certified Public Accountant who was employed by NKU as a faculty member in the College of Business ("COB") from August 2000 until May 2009. (TR 197-198, Att. B--Weickgenannt Depo. Ex. 1.) Weickgenannt began her employment with NKU as an Instructor teaching several accounting classes. (Id., TR 197-198, Att. B--Weickgenannt Depo. at 33, 47-48.) In the fall of 2002, because of the excellence of her teaching, NKU offered Weickgenannt a tenure track position as an Assistant Professor in the COB's Accountancy Department. (Id. at 44.)

Throughout the six years Weickgenannt worked toward tenure, NKU reviewed her progress annually through the University's Reappointment process. (Id., TR 197-198, Att. G--Weickgenannt Depo. at 52.) This review primarily consisted of evaluating Weickgenannt's teaching effectiveness, scholarly and creative activity, and institutional and public service, with a major emphasis on classroom teaching effectiveness. (Id., TR 197-198, Att. B--Weickgenannt Depo. Ex. 2 at 472.) Throughout the review process, NKU issued recommendations regarding Weickgenannt's teaching, scholarship, and service. (Id.; TR 202-203, Att. G--Weickgenannt Depo. Exs. 4-8.) NKU renewed Weickgenannt's annual employment contract each of the six years through the Reappointment process. (Id.)

NKU is first and foremost a teaching university. (TR 202-203, Att. G--Beehler Depo. at 167.) In recognition of this mission, quality of teaching is the most important criterion when evaluating whether to grant tenure. (TR 202-203, Att. G--Frank Depo. Ex. 1 at 3; TR

197-198, Att. B--Weickgenannt Depo. Ex. 2 at 00472; and TR 202-203, Att. G--Weickgenannt Depo. Ex. 15.) Weickgenannt demonstrated superior teaching ability throughout her employment, and was generally regarded as one of the best teachers in the College of Business. (TR 202-203, Att. G--Frank Depo. Ex. 1 at 3; TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 112.) She was also selected by accounting students as the 2007 and 2009 Outstanding Accounting Professor. (TR 202-203, Att. G--Weickgenannt Depo. Ex. 9 at 13.)

B. NKU's Tenure Decision With Respect To Weickgenannt.

In September, 2007, at the end of the six-year Reappointment process, Weickgenannt applied for promotion and tenure. (*Id.*, TR 197-198, Att. B--Weickgenannt Depo. at 99.) She was the only female accountancy professor to be considered for tenure in approximately fifteen years and the only candidate who applied for tenure from her department in the Fall of 2007. (TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 94.)

NKU's Faculty Policies and Procedures Handbook sets forth the criteria for granting tenure as well as the evaluation process to be followed in reviewing tenure applications. (*Id.*, TR 197-198, Att. B--Weickgenannt Depo. Ex. 2 at 472-486.) The Faculty Handbook specifically allows each college in the University to add criteria for tenure applicable to tenure review for that college. (*Id.* at 472.) Under the governing University criteria, each candidate for tenure must demonstrate effectiveness in three categories: teaching, scholarship, and service to the community, with major emphasis on teaching. (*Id.* at 472, 477.) In accordance with this policy, the COB published its criteria for effective teaching, scholarship, and service in its Guidelines for Reappointment, Promotion and Tenure. (*Id.*, TR 202-203, Att. G--Weickgenannt Depo. Ex. 15.) With respect to scholarship, the COB Guidelines provide that a tenure candidate's portfolio should include at least ten total works

published in publicly available academic or professional outlets, which must include at least three peer-reviewed journal articles, and an indication of continuing scholarship. (Id.) However, the Guidelines do not define what constitutes “an indication of continuing scholarship.” (Id.)

At the time she applied for tenure, Weickgenannt’s scholarly activity met and exceeded the University and COB requirements pursuant to the criteria discussed above. Weickgenannt’s portfolio included three refereed journal articles, a textbook, and nine other periodical articles and conference presentations, for a total of thirteen published scholarly works. (Id. Ex. 10 at 1.; TR 197-198, Att. B--Weickgenannt Depo. Ex. 1.) She also had eight more scholarly projects in progress, three of which were already submitted to peer-reviewed journals, clearly satisfying the requirement to demonstrate a commitment to continuing scholarship. (Id.) In fact, one of the articles was accepted for publication only three weeks after her application for tenure was first submitted. (TR 202-203, Att. G--Weickgenannt Depo. Ex. 10 at 3; TR 197-198, Att. B--Weickgenannt Depo. at 38). Another of the submitted journal articles was under “revised review” at the time of the tenure application, which meant that it had at least a ninety percent chance of being accepted for publication. (Id., TR 197-198, Att. B--Weickgenannt Depo. Ex. 1 at 3; TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 148.)

Neither the NKU Faculty Handbook nor the written COB Guidelines for RPT specifically address the situation of a tenure candidate who receives publication acceptance for a scholarly work after her tenure portfolio has been submitted for tenure review. However, the Faculty Handbook specifically states that the RPT Committee’s consideration must include, “*but may not be limited to*, the faculty member’s submissions.” (Weickgenannt Depo. Ex. 2 at 481-482 (emphasis added).) More importantly, in the COB

the longstanding practice has been that if an article is listed on an applicant's vitae at the time she submits her tenure binder for review, and that article is subsequently accepted for publication during the tenure review process, then that publication is counted toward the applicant's total number of published scholarly works. (TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 177-178, 250-251.) At the time of Weickgenannt's tenure application, there were at least two applicants who had recently benefitted from this longstanding practice in the COB--Richard Gilson and Rebecca White. (Id.) However, Weickgenannt was denied the benefit of this longstanding practice even though it had been routinely applied to Gilson's tenure application. (TR 202-203, Att. G--Beehler Depo. at 80-81.)

The initial review of Weickgenannt's tenure application was conducted by the Accountancy Department RPT Committee, which consisted of five faculty members from the COB Department of Accountancy, and was chaired by Professor Linda Marquis. (Id., Weickgenannt Depo. Ex. 9 at 15.) Upon review of her application, and in accordance with the University's Faculty Handbook provisions governing tenure applications, both the RPT Committee and the Chair of the Accountancy Department, Professor Leslie Turner, made separate and independent recommendations that Weickgenannt's application for tenure and promotion be approved. (Id.) Notably, the RPT Committee found that Weickgenannt demonstrated excellence in teaching, a more than sufficient performance in scholarship, outstanding service, a strong commitment to continuing scholarship, and excellence in organizational citizenship. (Id. at 13-14.)

Notwithstanding the provisions of the Faculty Handbook which govern the tenure review process for all faculty at NKU, the newly hired Dean of the COB, Dr. John Beehler, initiated a conversation with Professor Turner prior to Weickgenannt's submission of her portfolio to the RPT Committee. Dean Beehler specifically inquired if any upcoming tenure

applications might be “difficult or troublesome.” (Id., Beehler Depo. at 37.) According to Dean Beehler, Professor Turner responded that Weickgenannt’s application could pose a potential issue concerning the quantity of her research publications. (Id. at 38-40.) Professor Turner forwarded a copy of Weickgenannt’s vitae to Beehler on September 10, 2007. (Id., Beehler Depo. Ex. 1.) Dean Beehler initiated this inquiry prior to Weickgenannt’s submission of her tenure portfolio to the RPT for consideration, and prior to the issuance of the positive recommendations in favor of granting her tenure made by the RPT Committee and Department Chair Turner. (Id., Beehler Depo. at 37.)

Following his inquiry to Professor Turner, Dean Beehler met with Weickgenannt and told her that her application for tenure had a “very low probability” of success, that she was “up against some very strong candidates,” (even though the tenure decision is not competitive) and that he was “afraid that it would not be successful.” (Id., Weickgenannt Depo. Ex. 17.) In contravention of the process for review of tenure applications as set forth in the Faculty Handbook, Dean Beehler made these statements reflecting his forthcoming decision to deny her recommendation for tenure before he ever reviewed Weickgenannt’s complete tenure portfolio, or received the recommendations on her application from either the RPT Committee or the Department Chair. Furthermore, Dean Beehler indicated to Weickgenannt that his statements regarding her poor prospects for tenure reflected the message he had received from the Provost. (Id., Weickgenannt Depo. Ex. 9.)

Not surprisingly, notwithstanding the positive recommendations from both the RPT Committee and the Accountancy Department Chair, on November 26, 2007 Dean Beehler recommended that Weickgenannt’s application for promotion and tenure be denied. (Id.) The two reasons Dean Beehler gave for this decision were that Weickgenannt had a “minimal number of articles in refereed journals of good quality,” and she “lack[ed] evidence of a

continuing commitment to scholarly activity in the future.” (Id.) Specifically, he claimed that her first journal article, published in the *National Accounting Journal* in 2003, was not published in a journal of good quality. (TR 202-203, Att. G--Beehler Depo. at 82.)

At no time after the *National Accounting Journal* article was published in 2003 did anyone ever advise Weickgenannt that her article had been published in a journal of “poor quality.” (TR 197-198, Att. B--Weickgenannt Depo. at 94; TR 202-203, Att. G--Weickgenannt Depo. Ex. 10 at 946.) In fact, during every annual evaluation for Reappointment following the article’s publication, the quality of that publication was ratified and approved through the University and COB RPT process. (Id., TR 202-203, Att. G--Weickgenannt Depo. Exs. 4-8, 10 at 946.) While Weickgenannt did receive recommendations for Reappointment with a “condition to be removed” in 2004 and 2006, the condition specifically referred to an insufficient *number* of refereed journal publications. (Id., TR 202-203, Att. G--Weickgenannt Depo. Ex. 6 at 38, Ex. 8 at 20; TR 197-198, Att. B--Weickgenannt Depo. at 94-95, 98.) Neither the RPT Committee, nor the Department Chair, nor any other member of the RPT review process ever mentioned or questioned the quality of the journals in which Weickgenannt was already published. (Id.) After the 2004 Reappointment with “condition to be removed,” Weickgenannt published another refereed article, and the condition was removed. (Id., TR 202-203, Att. G--Weickgenannt Depo. Ex. 7 at 33, 32, Ex. 9 at 13-14, 11; TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 112-113.) With respect to the 2006 Reappointment recommendation with condition, Department Chair Turner told Weickgenannt that she needed to publish one more peer-reviewed article before submitting her tenure application, or she would likely not make tenure. (TR 202-203, Att. G--Turner Depo. at 50-51.) By the time of her tenure application a year later, Weickgenannt did indeed have a third peer-reviewed journal article approved for publication, satisfying the

2006 “condition to be removed” and Turner’s admonition to publish one more article. (Id., Turner Depo. at 53-54; TR 202-203, Att. G--Turner Depo. Ex. 11; TR 197-198, Att. B--Weickgenannt Depo. at 99.)

Following Dean Beehler’s recommendation, Gail Wells, Vice President for Academic Affairs and Provost, also recommended denial of Weickgenannt’s application for promotion and tenure. (TR 202-203, Att. G--Weickgenannt Depo. Ex. 9 at 941.) Provost Wells provided no explanation for her decision in her initial letter. (Id.) In accordance with University policy, Weickgenannt appealed this decision. (Id., TR 202-203, Att. G--Weickgenannt Depo. Ex. 12.) Pursuant to University procedures, the appeal of the Provost’s negative tenure recommendation was heard by the Peer Review Hearing Committee (“PRHC”), which consisted of five faculty members from five separate Colleges within NKU. (Id., TR 197-198, Att. B--Weickgenannt Depo. Ex. 2 at 536.) Following a lengthy and detailed hearing, the PRHC unanimously concluded that the decision to deny Weickgenannt’s promotion and tenure “was not made in a fair and reasonable manner and lacks a rational basis.” (TR 202-203, Att. G--Frank Depo. Ex. 1.)

The PRHC determined that Dean Beehler had “prejudged” Weickgenannt’s tenure application based on limited portions of her portfolio, and without any consideration of the positive recommendations in favor of tenure by the RPT Committee and her Department Chair, in violation of the University’s policies and procedures set forth in the NKU Faculty Handbook. (Id.) Specifically, the Committee found that the COB had no definition of “good quality” journals other than journals listed in Cabell’s publication directory. (Id. at 703.) It also found no evidence that any article published in a peer-reviewed journal had ever been determined to have failed to meet the “good quality” standard. (Id.) The PRHC also noted that the quality of the journal in which Weickgenannt published her 2003 article was

never raised by any reviewer at any point during her probationary/reappointment period, including Dean Beehler who reviewed and approved her application for Reappointment in Weickgenannt's sixth year based on her portfolio which included the article published in the journal of alleged "poor quality." (Id. at 704.) The PRHC thus concluded that Dean Beehler's decision to discount Weickgenannt's article based on allegations of publication in a "poor quality" journal was not rationally based. (Id.)

Despite the PRHC's decision, on May 20, 2008, NKU President Jim Votruba recommended to the Board of Regents that Weickgenannt's application for promotion and tenure be denied. (TR 202-203, Att. G--Votruba Depo. at 18.) As a result of this decision, NKU did not renew Weickgenannt's annual contract, and instead issued her a terminal one-year contract. (TR 195--Def. MSJ at Def. Ex. 23.) Weickgenannt continued working under this terminal contract until her termination in May 2009. (TR 202-203, Att. B--Weickgenannt Depo. at 29.)

C. Weickgenannt's Application for Tenure Is Met with Procedural Irregularities and Misapplication of the University and COB's Tenure Criteria.

During Weickgenannt's six years working toward tenure, the only measure of the quality of peer-reviewed journals ever communicated to her was that if the journal was listed in "Cabell's Directory of Publishing Opportunities in Accounting," it was of sufficient quality. (Id., TR 197-198, Att. B--Weickgenannt Depo. at 103-104.) Linda Marquis, former Chair of the Department and a member of the RPT committee, concurred that a listing in Cabell's was the only measure of the quality of a journal in accounting recognized by the COB. (TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 107, 136.) The PRHC likewise found that "no standard has ever been established in the college for 'of good quality' other than publication in a peer-reviewed journal listed in Cabell's publication directory." (TR 202-

203, Att. G--Frank Depo. Ex. 1 at 703.) In fact, the COB made a conscious decision **not** to identify a tier of journals that would be acceptable or unacceptable, and instead urged reviewers to judge the quality of the work instead. (TR 202-203, Att. G--Beasley Depo. at 48-49; TR 200-201, Att. E2--Marquis Depo. at 20.) The COB recognized that the quality of a journal was only a crude proxy for the quality of an article. (Id. at 48.)

However, Dean Beehler disregarded COB standards and imposed an arbitrary and very subjective standard of journal quality. He rejected Weickgenannt's 2003 article published in the *National Accounting Journal*, despite the fact that it was a journal listed in Cabell's, and declared the article as inadequate to satisfy the requirements for tenure. Dean Beehler claimed that the fees to publish, the short time to review (1 to 2 months), and the fact that the journal did not provide the reviewers' comments directly to authors indicated it was a journal of poor quality. (TR 202-203, Att. G--Beehler Depo. at 94, 120-121.) Dean Beehler also boldly asserted that if he had never heard of the journal, its quality was automatically "suspect." (Id. at 121.) The RPT Committee, on the other hand, looked at the Cabell's listing itself as a positive indication of quality, and also considered a low acceptance rate as a further indication of quality. (TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 136-139.) *The National Accounting Journal's* acceptance rate is a relatively low 21-30%. (Id., Marquis Depo. Ex. 10.) Furthermore, other faculty in the COB disagree with the Dean's purported assessment that a journal requiring authors to pay a fee renders the journal's quality suspect. (TR 202-203, Att. G--Beasley Depo. at 61-62.)

Provost Wells made her decision about Weickgenannt's tenure application after meeting with Dean Beehler. (TR 202-203, Att. G--Wells Depo. at 34-35.) Dean Beehler told Provost Wells that he believed *The National Accounting Journal* was not a high quality journal, and that the third article Weickgenannt wrote with Professor Owhoso was primarily

Owhoso's work. (Id. at 36.) Dean Beehler also expressed concern to Wells that all of Weickgenannt's articles were jointly written, indicating a lack of her own research stream. (Id. at 36-37.) Wells allegedly decided to recommend denial of tenure because she believed that the three refereed articles on Weickgenannt's vitae were all primarily the work of her co-authors, and because, according to Dean Beehler, one article was published in a journal of "poor quality." (Id. at 61-62.) However, Wells made this assessment without ever talking to Professors Turner, Theuri or Owhoso, Weickgenannt's co-authors on those three articles. Thus, Wells made her negative recommendation on tenure without actually knowing who did how much work on the articles in question. (Id. at 29, 116-120.) Professors Theuri and Owhoso were both members of the RPT Committee which recommended granting tenure to Weickgenannt based on these same articles they co-authored with her, and they both agreed with the Committee's decision to recommend a grant of tenure. (TR 202-203, Att. G--Weickgenannt Depo. Ex. 9 at 13.) Professor Turner was Chair of the Accountancy Department, and he likewise recommended Weickgenannt for tenure, based on a review of her tenure portfolio which obviously included the article that she co-authored with him. (Id. at 11.) If Weickgenannt did not qualify as a major contributing author¹ on any of the articles she co-authored with Turner, Theuri and Owhoso, these Professors, including the Department Chair, were in the best position to raise this issue early in the tenure evaluation process. (Id.; TR 200-201, Att. E2--Marquis Depo. at 91-92.) They did not, and in fact, they all recommended her for tenure based on review of her portfolio and the University and COB tenure criteria. (Id.)

¹ "Major contributing author" is defined in the COB Guidelines "for journal articles, textbooks, or professional books with one, two, or three authors, all authors may qualify as major contributing authors." (TR 202-203, Att. G--Weickgenannt Depo. Ex. 15 at 3.)

In Short, Provost Wells’s decision to recommend a denial of tenure was based on Dean Beehler’s assessment and because Wells allegedly concluded that Weickgenannt had not demonstrated a “stream of scholarship where she would be the lead author in the future.” (TR 202-203, Att. G--Wells Depo. at 62.) The scholarship standards imposed by Wells are higher standards than what is required by the COB Guidelines. The COB Guidelines require a tenure candidate to have an “[i]ndication of continuing scholarship and active scholar status beyond the awarding of tenure and promotion.” (TR 202-203, Att. G--Weickgenannt Depo. Ex. 15 at 2.) The Guidelines do not provide further definition, nor do they require sole authorship of future scholarly works. (Id.)

D. NKU Treated Similarly Situated Male Professors More Favorably Than Weickgenannt.

Male professors in the College of Business were treated more favorably than Weickgenannt in the application of these standards to their bids for tenure and promotion. The Court of Appeals found that Richard Gilson was similarly situated to Weickgenannt for purposes of evaluating whether Weickgenannt was treated less favorably than comparable male tenure candidates. (Ct. App. Opinion at pp. 13-15.) Gilson applied for tenure in the Fall of 2006, and his application for tenure was granted in March, 2007. (TR 200-201, Att. F--Pl. Memo. in Opp. to MSJ Pl. Ex. 9 at 3476.) As a faculty member in the COB, Gilson was evaluated for tenure under the very same University and COB tenure policies and criteria as Weickgenannt, even though he was a member of a different department. (TR 197-198, Att. B--Weickgenannt Depo. at 80.) In addition, like Weickgenannt, Gilson’s tenure application was ultimately reviewed by Provost Wells. (TR 200-201, Att. F--Pl. Memo. in Opp. to MSJ Pl. Ex. 9 at 3478; TR 202-203, Att. G--Weickgenannt Depo. Ex. 9 at 941.) When Gilson applied for tenure, he had the minimum number (three) of peer-reviewed journal articles published. (TR 202-203, Att. G--Gilson Depo. Ex. 2.) Further, of the seven

Conference Proceedings he listed on his vitae, three were dated in 1997 and 1998, several years before NKU hired him into a tenure-track position, and thus should have been accorded little weight, if any, in the tenure review process. (Id. at 464.) In addition, the three papers Gilson listed under Conference Presentations should not have counted at all toward his requisite total of ten scholarly works. They were the same papers he later published in peer-reviewed journals and should not have been counted twice. (Id. at 463, 465.) Moreover, Gilson was not the sole author of *any* work listed on his vitae. (Id. at 463-465.)

Thus, before assessing the quality of Gilson's work or the journals which published it, Gilson had the *bare minimum* number of scholarly works (ten) required for tenure. When evaluated for quality under Dean Beehler's criteria, at least one of the journals which published his work, the *Review of Business Information Systems*, was of low quality because it required a \$40 per page fee. (TR 200-201, Att. F--Pl. Mem. Opp. MSJ Pl. Ex. 9 at Clute Inst. Listing for *Review of Business Information Systems*.) Further, one of Gilson's submitted articles, "NASCAR fans' responses to current and former NASCAR sponsors" was counted toward his total for peer-reviewed journal articles despite the fact that the journal had not issued a final acceptance of the piece at any time during Gilson's tenure application process. (TR 202-203, Att. G--Gilson Depo. Ex. 1, Ex. 2 at 463; TR 200-201, Att. E2--Marquis Depo. at 177-178; TR 197-198, Att. B--Weickgenannt Depo. at 82.) In fact, the article was not actually published until 2008, a full year after NKU granted tenure to Gilson. (Id.) Thus, the COB's long-standing practice of permitting scholarly works to count towards total published articles if the article was accepted for publication after the tenure candidate had submitted his dossier for review was applied to Gilson but refused to Weickgenannt. (Id.)

Gilson's record of scholarly activity is remarkably similar to Weickgenannt's. Weickgenannt had a textbook to her credit, which Gilson did not have, and she had ten other scholarly works *in addition to* her peer-reviewed journal articles and textbook. (TR 197-198, Att. B--Weickgenannt Depo. Ex. 1.) Gilson had only seven other works, three of which predated his acceptance into NKU's tenure-track. (TR 202-203, Att. G--Gilson Depo. Ex. 2.) Both Weickgenannt and Gilson had three articles submitted to peer-reviewed journals and a similar number of works in progress, although Weickgenannt, unlike Gilson, had at least one completed work as sole author. (TR 197-198, Att. B--Weickgenannt Depo. Ex. 1 ("Aligning Business Disciplines and the Study of Financial Accounting Principles," submitted to *The Accounting Educator's Journal*, and presented at the Academy of Business Disciplines annual conference); TR 202-203, Att. G--Gilson Depo. Ex. 2.) Their applications for tenure were one year apart, and both were considered by Provost, Wells. Wells recommended Gilson for tenure but not Weickgenannt. (TR 200-201, Att. F--Pl. Mem. Opp. MSJ Pl. Ex. 9 at 3478; TR 202-203, Att. G--Weickgenannt Depo. Ex. 9 at 941.)

In addition to Gilson, there are several other male professors in the College of Business who were treated more favorably than Weickgenannt with respect to consideration and approval of their applications for promotion and/or tenure.²

² While the Court of Appeals declined to consider any proposed comparators other than Gilson, as set forth in Weickgenannt's Memorandum In Opposition to Summary Judgment filed in the Circuit Court, and referred to in her Appellant's Brief before the Court of Appeals, the male COB professors identified here are similarly situated to Weickgenannt and were treated more favorably with respect to their applications for promotion and tenure. (TR 200-201, Att. F--Pl. Memo in Opp. to MSJ, pp. 28-34). The Court of Appeals noted that Weickgenannt was not preclude "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." (Ct. App. Opinion at 14 n.5). Therefore, consideration of this evidence is appropriate under the applicable *de novo* review standard to determine whether genuine issues of fact exist. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Peter Theuri: Theuri successfully applied for promotion to associate professor in September 2004 and full professor in September 2006. (Docs. 329, 446, 445, attached to TR 200-201, Att. F--Pl. Memo in Opp. to MSJ Pl. Ex. 3.) When Theuri applied for tenure as a full professor, Defendant's guidelines called for 20 works of scholarly and creative activity. (Id., Pl. Ex. 2.) Defendant required at least 9 of the 20 works to be articles in peer-reviewed journals. (Id.) Theuri listed a total of 11 refereed journal articles on his CV. (Id., Pl. Ex. 3.) Included in this list is an article in *The National Accounting Journal* which Defendant refused to count toward Weickgenannt's scholarly works. (Id.) *The Journal of Accountancy*, in which Theuri published one of his works had a maximum article length of 6-8 pages and its readers are CPAs, not academics. (Id.) *The National Public Accountant Journal* had similar page lengths and readerships. (Id.) *The Journal of Business and Economics* and the *Journal of Internet Commerce* had less impressive acceptance rates than *The National Accounting Journal*. (Id.) *The Review of Accounting Information Systems* in which Theuri published an article seven years before he applied for tenure as a full professor had a less impressive acceptance rate than the *National Accounting Journal* and required payment to publish. (Id.) Two of the articles upon which Theuri relied to secure tenure as full professor were case studies and one of those was the case study he coauthored with Weickgenannt. (Id.) It is clear that according to Beehler's criteria that Theuri did not meet the requirements for tenure as full professor but was granted tenure anyway.

Stephen Mueller: Mueller successfully applied for a tenured associate professor position in 2007, and a full professor position in September 2009. (TR 200-201, Att. F--Pl. Memo in Opp. to MSJ Pl. Ex. 4 at 2913, 2919-21, 2929.) In the years Mueller sought tenure as an associate professor, Defendant warned him twice about poor scholarship and noted that in 2005, he had reported only one proceeding in the Southern Management Association

where he was the third author. (Id. at 2975.) Mueller did not appear to be any more productive in 2006, the year immediately preceding his successful bid for tenure. (Id. at 2973.) When Mueller applied for tenure as full professor in 2009, pursuant to Beehler's criteria, he had published only two articles in good-quality journals since 2004. (Id. at 2914.) He did not satisfy the minimum requirements for tenure as a full professor but was granted it anyway.

Kenneth S. Rhee: Rhee successfully applied for tenure position in 2004. (Id., Pl. Ex. 5 at 454-57.) Several of the publications upon which Rhee relied would not count as a quality journal pursuant to the guidelines Beehler enumerated in his deposition testimony. (TR 202-203, Att. G--Beehler Depo. at 94-95, 119, 120.) For instance, the *Kentucky Journal of Excellence in College Teaching and Learning* had a 50% acceptance rate, much higher than the 21-30% acceptance for the *National Accounting Journal*. (Id.) It had a similar time to review as the *National Accounting Journal*, and was only e-published. (Id.) It was supposedly essential to Beehler that a journal be refereed before it could count as a peer-reviewed journal article. (TR 202-203, Att. G--Beehler Depo. at 76-77, 82, 162.) Rhee served as editor of the periodical *Annual Advances in Business Cases*, in which Rhee published an article 2003. (Id.) Thus, this article was clearly not peer-reviewed. (Id.) Moreover, the article Rhee published in this journal was a case study. According to Beehler, case studies were allegedly disfavored and so were discounted in the review of Weickgenannt's tenure portfolio. (Id.) Rhee had a second peer-reviewed article "What's Wrong With Bob?" in the same journal. That journal had an acceptance rate of 30-40%. The journal *International Journal of Organization Theory and Behavior* had a similar acceptance rate to the *National Accounting Journal*: 20%, and the same time to review. (Id.) Without

these articles in what Beehler classified as “poor quality” journals, Rhee did not meet the requisite three peer-reviewed journal articles for tenure.

Vassilis Dalakas: Dalakas successfully applied for tenure in September 2006. Nine of the 11 articles listed on the Dalakas CV are poor quality journals according to the standards Beehler articulated. (TR 200-201, Att. F-- Pl. Memo. in Opp., Pl. Ex. 6 at 3572-75, 3588, 3619.) Thus, by Beehler’s standards for quality journals, Dalakas should not have been promoted to associate professor. The journal *Services Marketing Quarterly*, which included two of Dalakas’s journal articles, had an acceptance rate of 45% higher than the *National Accounting Journal*, and a one to two month review time similar to the *National Accounting Journal*. (Id.) Dalakas had three of his journal articles published in the *Journal of Consumer Marketing*. (Id.) This journal had an acceptance rate similar to the *National Accounting Journal* at 23%, and a one to two month time to review, again, similar to the *National Accounting Journal*. (Id.) The *International Journal of Sports Marketing and Sponsorship*, in which Dalakas published, had a 40% acceptance rate, higher than the *National Accounting Journal*, and a review time of six weeks to three months. The *Journal of Euro Marketing* had an acceptance rate of 25-28%. Finally, the *Sports Marketing Quarterly*, in which Dalakas published two of his articles, had a 20% acceptance rate, and a one to two month time to review. Again, *The National Accounting Journal* compares favorably to these, yet it was discounted as “poor quality” while these articles were favorably considered. (Id.)

Matthew W. Ford: Ford successfully applied for a tenured position in September 2006. (Id., Pl. Ex. 7 at 3495.) Ford had only published one article in a “quality journal” since 2001. (Id. at 3487-3493.) Specifically, in seeking tenure, Ford relied on a work published in *The Handbook of Entrepreneurial Dynamics: The Process of Business Creation*.

(Id.) This publication was not a journal at all. His article in the *Journal of Business and Leadership: Research Practice and Teaching*, was conditionally accepted, and the journal had a 30% acceptance rate, had one to two month time to review, and was new in 2005. (Id.) The *Journal of Applied Behavioral Science* had a 21-30% acceptance rate, and a one to two month review time. (Id.) The *Journal of Education for Business*, had a 25% acceptance rate, and a maximum page length of 10 pages. (Id.) The *Mid-American Journal of Business* did not have an entry in Cabell's. (Id.) The *Journal of Change Management* had an acceptance rate of 30%, and was only four or five years old at the time of Ford's publication. (Id.) The *International Journal of Operations and Production Management* had a 21-30% acceptance rate. (Id.) The *Periodical Business Horizons* appeared to be a magazine with a bi-monthly distribution, a 20-25% acceptance rate, no external reviewers and only one internal reviewer and a one to two month acceptance rate. (Id.) Thus, according to Beehler's standards, *The National Accounting Journal* was as high quality or more so than the journals in which Ford's articles were published. (Id.) Again, despite the "poor quality" of the journals in which Ford published, he was found to have met the requirements for tenure while Weickgenannt's application for tenure was denied. (Id.)

Bob Russ: Russ successfully applied for tenure in September of 2010, listing five peer-reviewed journal articles on his CV. (TR 197-198, Att. B--Weickgenannt Depo. at 20; TR 200-201 Att. F--Pl. Memo. in Opp., Pl. Ex. 8 at 2444-48, 2535.) However, the RPT Committee did not have Cabell's entries for Russ's tenure binder. (TR 200-201, Att. E2--Marquis Depo. Vol. 2. at 142-143.) The journal article Russ listed in a *Tennessee CPA Journal*, was not in an academic journal at all. Rather, that periodical is a professional publication for CPAs and had a manuscript length requirement of one to ten pages, much shorter than the manuscript length listed in Cabell's for the *National Accounting Journal*.

(Id.) One of the journals Russ listed on his CV was new in 2004, just two years before he published his article in it. (Id.) Two of Russ's peer-reviewed journal articles appeared in journals which listed an acceptance rate of 21-30%, the same acceptance rate which Beehler rejected as indicating a journal of poor quality in Weickgenannt's case. (Id.) Yet another of Russ's articles appeared in *The Journal of International Finance & Economics* which had a one to two month time to review, again the exact time listed in Cabell's for Weickgenannt's *National Accounting Journal* article. (Id.)

Russ's tenure binder was also treated more favorably in other ways. Russ submitted his binder before the deadline so he could review recommendations for improvement. (TR 197-198, Att. B--Weickgenannt Depo. at 19-20.) It included multiple notes with these recommendations. (Id., TR 200-201 Att. E2--Marquis Depo. Vol. 2 at 127-129.) Even with this unfair opportunity given to Russ for improvement, Marquis was concerned about his binder because the documentation required by the tenure standards was incomplete. (Marquis Depo. Vol. 2 at 79-80, 130.) Marquis and the RPT Committee were also concerned about the quality of Russ's scholarship. (Id. at 80-81.) Russ had two articles published in the *Accounting Historian's Journal*. (Id.) Marquis reviewed the Journal article and found typographical errors and poor grammar which meant that these errors existed in the original manuscript. (Id.) The RPT Committee was further concerned with the repetitive nature of Russ's research. (Id.) The RPT Committee had these concerns for several years. (Id.) In its evaluation of Russ's application for reappointment in 2009, the RPT Committee included a strongly worded statement expressing their concerns regarding the poor organization of the binder. (Id.) The Committee noted that these problems made it difficult to determine whether Russ was making progress toward meeting the guidelines for promotion and tenure. (Id.)

Owhoso: Beehler participated in the decision to promote Owhoso to Full Professor. (TR 202-203, Att. G--Beehler Depo. at 100.) Beehler admitted that Owhoso had an opportunity to add things to his portfolio during his application process for promotion to Full Professor. (Id.) Weickgenannt was denied the same opportunity notwithstanding the common COB practice of allowing recently published articles to be submitted while an application for tenure or promotion was still under consideration.

Ken Ryack: Ryack did not publish any work in a refereed journal during his two years as an Assistant Professor at NKU. (TR 200-201. Att. F--Pl. Ex. 10 at 1252.) Moreover, the journals in which Ryack published before coming to Defendant, *Journal of Behavioral Finance and Advances in Accounting Education, Teaching and Curriculum Innovations*, each had acceptance rates and review times similar to those for the *National Accounting Journal*. (Id.) Then-chair, Carol Lawrence recommended denial of Ryack's application for reappointment, but in an unusual move, the Dean overturned the Lawrence's decision. (TR 200-201, Att. E2--Marquis Depo. Vol. 2 at 234.)

II. ARGUMENT

A. Standard of Review

“Summary judgment is only to be granted ‘to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant’.” *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 604 (Ky. 2014) (quoting *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991)); *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985) (same). The Kentucky Supreme Court has repeatedly held that summary judgment is not intended as a substitute for trial and is therefore to be cautiously applied. *Steelvest*, 807 S.W.2d at 480. The trial court's role is not to decide an issue of fact;

rather, “the trial court reviews the evidence to determine whether a real issue of fact exists.” *Kirby*, 426 S.W.3d at 604 (citing *Steelvest*, 807 S.W.2d at 480). When performing its review, the trial court must always “view the evidence through a lens colored in favor of the party opposing summary judgment.” *Id.* Accordingly, appellate review of summary judgment involves only legal questions and the determination of whether disputed questions of material facts exist. In conducting its review, the appellate court applies a *de novo* standard of review. *Id.*

B. The Court of Appeals’ Articulation of the Elements of a *Prima Facie* Case under *McDonnell Douglas* Does Not Amount to Reversible Error.

Appellant argues that the Court of Appeals committed reversible error in its statement of the of the fourth element of a *prima facie* discrimination case under the familiar *McDonnell Douglas/Burdine* burden shifting framework.³ In reviewing the trial court’s decision concerning whether Weickgenannt had established a *prima facie* discrimination case, the Court of Appeals stated:

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. 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.

(TR 37, Ct. App. Opinion at pp. 10-11). While the Court of Appeals’ articulation of the elements necessary to set forth a *prima facie* discrimination case may appear inconsistent

³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). Kentucky courts interpret the civil rights provisions of KRS 344 consistent with applicable federal anti-discrimination laws. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005); *Kirkwood v. Courier- Journal*, 858 S.W.2d 194 (Ky. 1993).

with the elements traditionally considered under the *McDonnell Douglas/Burdine* framework, the Court of Appeals' formulation does not amount to reversible error.

1. The Elements of a Prima Facie Case Are Context-Dependent Not Rigid, Mechanistic Requirements.

The Kentucky Civil Rights Act prohibits employers from making adverse employment decisions because of an employee's gender. KRS 344.040. To establish a gender discrimination claim based on circumstantial evidence, courts typically require a plaintiff to demonstrate that (1) she is female; (2) she was qualified for her job; (3) she suffered an adverse employment action; and (4) she was replaced by someone outside her protected class or treated less favorably than similarly situated male employees. *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1247 (6th Cir. 1995) (rev'd on other grounds?); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998); *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003) (Kentucky courts look to federal law to interpret the Kentucky Civil Rights Act). This was the *prima facie* analysis articulated by both the parties and the Circuit Court in the proceedings below. (TR 195--Def. MSJ at p. 25; TR 200-201, Att. F--Pl. Memo in Opp. to MSJ at pp. 39-40; TR 37, Circuit Court Opinion at p. 10.)

In cases alleging gender discrimination based more specifically on a failure to promote claim, the *prima facie* analysis has been slightly modified to require evidence that (1) Plaintiff is a member of a protected class; (2) she applied for and was qualified for a promotion; (3) she was considered for and was denied the promotion; and (4) an individual of similar qualifications who was not a member of the protected class received the job at the time plaintiff's request for the promotion was denied. *Hicks v. SSP Am., Inc.*, 490 Fed. Appx. 781, 783-784 (6th Cir. 2012); *Nguyen v. City of Cleveland*, 229 F.3d 559, 562-63 (6th Cir. 2000). This articulation of *prima facie* elements is used by the courts to review the facts

particular to cases in which an employee has been denied a sought after promotion such that the question of whether the employee was replaced is inapplicable. *Id.* See also *Brown v. Tenn. Dep't of Human Servs.*, 693 F.2d 600, 603 (6th Cir. 1982) (“Adjusting the *McDonnell* formula in cases of discriminatory refusal to promote is relatively simple. Thus to make out a *prima facie* case the plaintiff must show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied.”). This was the *prima facie* standard articulated by the Court of Appeals. (Ct. App. Opinion at pp. 10-11.)

The case law makes clear that the articulation of a *prima facie* case is not a one size fits all proposition. Rather, the *prima facie* elements applicable to a particular claim of discrimination are based on the specific facts of the case:

We must keep in mind, however, that these are merely various context-dependent ways by which plaintiffs *may* establish a *prima facie* case, and not rigid requirements that all plaintiffs with similar claims must meet regardless of context. See *McDonnell-Douglas*, 411 U.S. at 802 n.13 (“The facts necessarily will vary in [employment discrimination] cases, and the specification above of the *prima facie* proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.”). The key question is always whether, under the particular facts and context of the case at hand, the plaintiff has presented sufficient evidence to permit a reasonable jury to conclude that he or she suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. *Burdine*, 450 U.S. at 253.

Blair v. Henry Filters, Inc., 505 F.3d 517, 529 (6th Cir. 2007).

As the case law following *McDonnell Douglas/Burdine* has emphasized, “the *prima facie* method ‘was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.’” *Shah v. General Electric Co.*, 816 F.2d 264, 268

(1987) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Thus, the Supreme Court has made clear that “[t]he essence of a disparate treatment case is that ‘the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.’” *Id.* (quoting *Int’l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977)). The courts have long recognized that:

The significance of the prima facie case is that it permits an inference of discrimination . . . because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Thus, the central inquiry in evaluating whether the plaintiff has met [her] initial burden is whether the circumstantial evidence presented is sufficient to create an inference of discrimination.

Id. (internal quotations and citations omitted). Consequently, individual disparate treatment cases generally require indirect evidence from which an inference of discriminatory motive may be drawn. *Id.* at 268-770.

A plaintiff in a discrimination case supplies this indispensable comparative evidence at the *prima facie* stage through the last prong of the *McDonnell Douglas* test. *Id.* The last prong of the *prima facie* analysis may be satisfied by identifying those individuals who are allegedly treated differently, be it an individual who replaced plaintiff after her termination, a non-protected employee who was treated more favorably under similar circumstances, or a non-protected employee with similar credentials who received the promotion plaintiff sought and was denied. *Id.* However, a plaintiff may also satisfy the fourth prong by presenting “additional evidence” that indicates discriminatory intent “in light of common experience.” *Lindsay v. Yates*, 578 F.3d 407, 418 (6th Cir. 2009).

2. The Court of Appeals Properly Found That Weickgenannt Has Raised an Inference of Discrimination at the *Prima Facie* Stage.

Indeed, in cases involving the denial of tenure or failure to promote in the University setting, courts have articulated the elements of a prima facie case as requiring evidence that

(1) plaintiff is a member of a protected class; (2) she was qualified for tenure and or promotion; (3) she suffered an adverse employment action in that she was denied tenure and or promotion; and (4) **circumstances giving rise to an inference of discrimination.** *Rajaravivarma v. Bd. of Trustees of Conn. State Univ. Sys.*, 862 F. Supp. 2d 127, 146 (D. Conn. 2012) (citing *Weinstock v. Columbia Univ.*, 224 F.3d 33, 43 (2d Cir. 2000)) (emphasis added). *See also Zahorik v. Cornell Univ.*, 729 F.2d 85, 93-94 (2d Cir. 1984) *Doucet v. Univ. of Cincinnati*, 2006 U.S. Dist. LEXIS 49022, * 51-53 (S. D. Ohio July 19, 2006) (“*Doucet’s prima facie* burden is not onerous; to prevail she must simply produce enough circumstantial evidence ‘to create an inference of discrimination’.”) (quoting *Burdine*, 450 U.S. at 263).

The *prima facie* standard articulated by the Court of Appeals reflects the elements of a traditional failure to promote case. The Court of Appeals conducted a *de novo* review of the evidence and properly found that Weickgenannt had presented evidence in support of each of these *prima facie* elements. Appellant does not dispute that Weickgenannt presented evidence sufficient to satisfy the first three prongs of a *prima facie* gender discrimination case.⁴ In its consideration of the fourth *prima facie* element, the Court of Appeals found that Weickgenannt had indeed presented evidence that there were male faculty members who were granted tenure and promotion in the few years surrounding her application. This testimony, coupled with the appellate court’s finding that Weickgenannt was qualified to be considered for tenure and the evidence that she was indeed recommended for tenure by the

⁴ In the proceedings below, Appellant argued that Weickgenannt could not demonstrate the second prong of a *prima facie* analysis, namely that she was qualified for the position she sought- tenure and promotion to Associate Professor. The Court of Appeals found that Weickgenannt was so qualified, (Ct. App. Opinion at pp. 11-12), and Appellant has subsequently abandoned any argument to the contrary in this appeal. (Appellant’s Br. at p. 26.)

RPT Committee and her Department Chair, was sufficient to establish a *prima facie* case. *Zahorik*, 729 F.2d at 94 (evidence of significant support for professor's candidacy coupled with evidence "of the relatively simultaneous promotion of males was sufficient to shift the burden of production."). Moreover, the Court of Appeals also found that Weickgenannt was indeed treated less favorably than a similarly situated male professor, thereby raising an inference of discrimination.

The burden of establishing a *prima facie* case of discrimination is not onerous. *Burdine*, 450 U.S. at 253; *Doucet*, 2006 U.S. Dist. LEXIS 49022 at * 52. Rather, it is "a burden easily met." *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). As the federal courts have repeatedly emphasized in Title VII cases:

The *prima facie* phase "merely serves to raise a rebuttable presumption of discrimination by 'eliminating the most common nondiscriminatory reasons for the [employer's treatment of the plaintiff].'" *Hollins v. Atlantic Co.*, 188 F.3d 652, 659 (6th Cir. 1999)(quoting *Burdine*, 450 U.S. at 253-54). It is "only the first stage of proof in a Title VII case," and its purpose is simply to "force [a] defendant to proceed with its case." *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861-62 (6th Cir. 1997). This division of intermediate evidentiary burdens is not meant to stymie plaintiffs, but simply serves to "bring the litigants and the court expeditiously and fairly to the ultimate question." *Burdine*, 450 U.S. at 253.

Cline v. Catholic Diocese, 206 F.3d 651, 660 (6th Cir. 1999).

The Court of Appeals determined that Weickgenannt satisfied her *prima facie* burden by presenting testimony that raises questions of fact as to whether other comparable male professors were granted tenure and/or promoted to higher positions at or around the time that Weickgenannt's application was denied. Moreover, the Court of Appeals likewise determined that questions of fact exist concerning whether at least one male professor had similar qualifications and was similarly situated to Weickgenannt such that the Appellant's award of tenure to him raises an inference that the decision to deny Weickgenannt's tenure

application was motivated by discriminatory animus. At the *prima facie* stage of the *McDonnell Douglas/Burdine* analysis, the plaintiff need do no more to survive a motion for summary judgment. *Steelvest*, 807 S.W.2d at 480 (trial court reviews the evidence to determine whether a real issue of fact exists); *Griffin v. Finkbeiner*, 689 F.3d 584, 593 (6th Cir. Ohio 2012) (citing *Blair*, 505 F.3d at 528 n.10) (Where court does not expressly determine that plaintiff made out a *prima facie* case, but instead determines that issues of fact exist as to the fourth element, the result is the same: summary judgment is inappropriate at the first stage of the *McDonnell Douglas* analysis. The lower court's role in evaluating a motion for summary judgment on a discrimination claim is to determine if plaintiff has put forth sufficient evidence for a reasonable jury to find her to have met the *prima facie* requirements.)

C. Evidence That Weickgenannt Was Treated Less Favorably than Similarly Situated Male Professors Raises an Inference of Discrimination and Precludes Summary Judgment at the *Prima Facie* Stage.

Weickgenannt presented substantial evidence that she was treated differently than male professors in the COB who were similarly situated in all relevant aspects of employment. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998); *McBrearty v. Kentucky Cmty. & Tech. Coll. Sys.*, 262 S.W.3d 205, 214 (Ky. 2008). Tenure candidates may be considered similarly situated even if they were considered for tenure by different committees and deans in different years. *Amini v. Case Western Reserve Univ.*, 5 F. Supp. 2d 563, 567-68 (N.D. Ohio 1998) (noting that university's argument that individuals could not be considered similarly situated because they were reviewed for tenure by different committees, deans, and presidential advisory committees was "not persuasive"). See also *Waggaman v. Villanova Univ.*, 2008 U.S. Dist. LEXIS 67254, * 48-49 (E.D. Penn.

Sept. 3, 2008) (comparison to other tenure candidates proper even if the comparator was not from same academic department or same academic year where the comparator and the plaintiff were subject to the same promotion criteria, and the presence of members of the college and university committees reviewing the decision was relatively constant, notwithstanding fact that some individual decision makers may have changed); *Murray v. Eastern Kentucky Univ.*, 328 S.W.3d 679, 681 (Ct. App. Ky. 2009) (appellate court agreed with circuit court that proper comparators had to be from same college, with same full-time status and subject to the same employment contract requirements). Accordingly, courts should make an independent, case-by-case determination of the relevance of a particular aspect of the plaintiff's employment status and that of the employee outside the protected class. *Jackson v. Fedex Corp. Svcs.*, 518 F.3d 388, 394 (6th Cir. 2008). As Appellant acknowledges in its brief, in the tenure context, "proper comparators are those that have been judged by the same criteria as plaintiff." (Appellant's Brief at p. 27 (citing with approval *Lim v. Bd. Trustees of Ind. Univ.*, 297 F.3d 575, 581 (7th Cir. 2002); *Demuren v. Old Dominion Univ.*, 33 F. Supp. 2d 469, 481 (E.D. Va. 1999)).

In this case, the trial court erroneously concluded that Weickgenannt could only compare herself to males who were candidates for tenure from the Accountancy Department, judged by the same criteria, in the same time period, and by the same individuals, specifically Turner, Beehler, Wells and Votruba. (Circuit Court Order at p. 12.) Under these narrow criteria, Weickgenannt would not have any potential comparators, because she was the only candidate for tenure from her department in the Fall of 2007. Such a narrow definition of what constitutes a similarly-situated employee, and which precludes comparison with anyone, is exactly what *Ercegovich* and *Jackson* sought to avoid, because it would remove the plaintiff "from the protective reach of the anti-discrimination laws" and leave NKU free

to discriminate against any tenure candidate who has no departmental colleagues up for tenure in the same year. *Jackson*, 518 F.3d at 397; *Ercegovich*, 154 F.3d at 353.

Appellant argues for an even more narrow framing of the similarly situated standard, suggesting that Gilson is not an appropriate comparator based on alleged differences between the quality of his journal articles, whether his Reappointments were ever granted with conditions, the extent to which he was a “major contributing author” on the articles he co-authored, and his trajectory of scholarship. (Appellant Br. at pp. 29-30, 34.) Imposition of such a standard, however, would require the Court to make impermissible factual findings and accept the University’s version of the facts and then incorporate those facts into its similarly situated standard. *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008). This exercise contravenes both the standards for consideration of a summary judgment motion and the case law which makes clear that “the plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered ‘similarly-situated’.” *Id.* (citing *Ercegovich*, 154 F.3d 352).

The Court of Appeals rejected the Circuit Court’s cramped and restrictive formulation of “similarly situated” and properly determined that “[t]his definition was far too narrow because not all of the requirements identified by the Circuit Court were truly relevant.” (Ct. App. Opinion at p. 13.) Reviewing the entire record in the context of this case, the appellate court concluded that:

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 tenure guidelines promulgated by the College and the [U]niversity.

(Ct App. Opinion at pp. 13-14.)

Weickgenannt presented evidence demonstrating that there are several male COB professors who received more favorable treatment in consideration of their tenure and/or promotion applications. As discussed above, Peter Theuri's tenure portfolio submitted in 2006 included an article in the *National Accounting Journal* which was counted towards his requirement for refereed journal articles while Weickgenannt's publication in the same journal was discounted because the journal was deemed to be of "poor quality." There is additional evidence that Theuri was treated more favorably with respect to the quality and quantity of his submissions. Stephen Mueller was repeatedly warned about both the quality and quantity of his scholarship and based on the standards applied to Weickgenannt, he failed to meet the minimum requirements for journal articles in good quality journals but was nevertheless granted tenure and promotion to associate professor in 2007, the same year Weickgenannt applied for tenure and was denied. Kenneth Rhee published several articles in what Beehler deemed "low quality" journals, yet these works were not discounted in the assessment of his tenure portfolio. Vassilis Dalakas applied for tenure in 2006, the year before Weickgenannt. Based on the publication standards Beehler applied to Weickgenannt, 9 of the 11 scholarly works Dalakas published were in "poor quality" journals, yet they counted towards his publications requirements and he was granted tenure. Matthew Ford was granted tenure in 2006, a year before Weickgenannt, based on a tenure portfolio that included publication of scholarly works in outlets other than peer-reviewed journals and in journals that, according to Beehler's standards, are "poor quality." Bob Russ submitted his application for tenure in 2010 with a portfolio that included publications in journals that were

not even listed in Cabell's and another publication that was not even an academic journal. Nevertheless, these articles were counted toward the requirements for publication and he was granted tenure.

In addition, Russ was granted an opportunity to receive recommendations for improving his portfolio before it was officially considered and was granted tenure despite written reservations by the RPT Committee concerning his successful fulfillment of the tenure guidelines. Beehler also permitted Professor Owhoso to add items to his binder during his application for promotion to full professor, while he denied Weickgenannt the opportunity to add the article she had accepted for publication shortly after her portfolio was submitted for review. Ken Ryack was reappointed when the Dean overturned a contrary recommendation by his Department Chair who recommended against reappointment, based in part on Ryack's failure to publish anything in a refereed journal in his two years as an Assistant Professor at NKU. This evidence demonstrates that male COB faculty who applied for tenure and/or promotion at or around the same time as Weickgenannt were treated more favorably with respect to the criteria that were applied to their portfolios and the standards to which they were held, especially concerning the quality and quantity of their scholarly works. In addition, the University permitted some of these male comparators to add items to their portfolios after they were submitted for review but did not afford the same opportunity to Weickgenannt. The COB's practice of permitting a tenure applicant to include a published article when the work was listed in the portfolio and subsequently accepted for publication was applied to male comparators, but not Weickgenannt. This evidence clearly supports an inference of disparate treatment.

As the Court of Appeals found, Gilson is also clearly a proper comparator. His application for tenure was submitted and reviewed one year before Weickgenannt's, he was

a colleague in the same College of Business, and they were subject to identical standards for tenure and promotion from both the COB and the University. Moreover, as the Court of Appeals noted, they presented similar portfolios of scholarly works with respect to both quantity and quality of publication. (Ct. App. Opinion at pp. 14-15.) In addition, as Weickgenannt has shown, when her fourth refereed article was accepted for publication three weeks after she submitted her tenure application, it was not counted towards meeting the tenure criteria. Gilson, however, did have a fourth article counted, even though he had not received a final acceptance for publication. (TR 200-201, Att. E2--Marquis Depo. at 177-178.) In addition, both candidates were evaluated by Provost Wells.⁵ Yet Gilson's tenure application was approved while Weickgenannt's was denied. This evidence demonstrates that, "[Gilson] was similarly situated and was treated differently than was Weickgenannt. . . . Gilson was given tenure and a promotion while Weickgenannt was not." (Ct. App. Opinion at p. 15.)

⁵ Appellant argues that President Votruba was the ultimate decision maker and therefore only candidates whose tenure applications were reviewed by him are proper comparators with Weickgenannt. The argument is no more than an effort by the University to turn Weickgenannt into a "class of one" such that it is impossible to identify anyone similarly situated to her. Votruba was not normally a decision maker in the tenure process. Normally, the President simply forwards the Provost's recommendation to the Board of Regents without adding his own recommendation. (TR 197-198, Att. B--Weickgenannt Depo. Ex. 2 at 484.) President Votruba was required to make a decision in this case because Weickgenannt appealed the decision to the PRHC. (*Id.* at 539-541.) In the ten years Dr. Frank had been on the PRHC, Weickgenannt's appeal was the only appeal of a tenure denial the Committee ever heard. (TR 202-203, Att. G--Frank Depo. at 10.) The University's efforts to draw such narrow comparisons were rejected by the Court of Appeals and should likewise be rejected by this Court. *See Bobo v. UPS*, 665 F.3d 741, 751 (6th Cir. 2012) (citing *Ercegovich*, 154 F.3d at 352) (The focus of discrimination litigation is not meant to turn on "a comparison of the employment status of the plaintiff and other employees in every single aspect of their employment. Consequently the "same supervisor" criterium has never been read by the courts to be an inflexible requirement.)

It appears Gilson is, in fact, the comparator the Circuit Court was searching for when it asserted that: “Weickgenannt could not point to any individual granted tenure who had engaged in the same conduct she had, *i.e.*, an employee who applied for tenure with the minimum number of peer reviewed articles, who had nominal contributions to one of the three articles, or who had published in a journal that was deemed to have an inferior reputation.” (Circuit Court Order at p. 13.) Yet the Circuit Court erroneously found that Gilson was not an appropriate comparator under these criteria.

While the comparisons between Weickgenannt and Gilson, or Weickgenannt and any of the other comparators, may not be perfectly aligned in every single respect, the law does not require perfection. *Moore v. Univ. of Memphis*, 2013 U.S. Dist. LEXIS 176233 at * 40-41 (Aug. 16, 2013) (citing *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 814 (6th Cir. 2011) (“In a failure to promote claim, a plaintiff is not required to establish that he and his comparator had the exact same qualifications. . . . Strengths and weaknesses of the comparators do not necessarily have to be in the same areas for the plaintiff to satisfy the fourth prong of the *prima facie* case”). As the appellate court properly concluded, there is sufficient similarity between Gilson and Weickgenannt to raise genuine issues of material fact and create an inference as to the ultimate issue of discrimination. Thus, the appellate court recognized that the questions of fact raised by this evidence must be resolved by a jury and preclude summary judgment in favor of the University.

D. The Court of Appeals’ Finding as to Pretext Also Establishes A *Prima Facie* Case of Gender Discrimination.

The Court of Appeals’ finding that Weickgenannt was treated less favorably than Gilson with respect to its pretext analysis likewise establishes a *prima facie* discrimination case based on disparate treatment. To the extent the Court of Appeals’ decision appears to

foreclose consideration of evidence that Weickgenannt was treated less favorably than comparable male tenure candidates at the *prima facie* stage, the Court of Appeals' analysis does not constitute reversible error. *Carter v. Toyota Tsusho America, Inc.*, 529 Fed. Appx. 601, 610 (6th Cir. 2013) (where court misstated law but correctly conducted burden shifting analysis under *McDonnell Douglas/Burdine*, misstatement of law did not constitute reversible error). Assuming *arguendo* that the Court of Appeals' articulation of the *prima facie* elements in the context of this case should have expressly referred to consideration of treatment afforded similarly situated males, the Court of Appeals considered that evidence in the context of its pretext analysis and determined it was sufficient to raise questions of fact requiring submission of this case to a jury. (Ct. App. Opinion at pp. 13-15.)

Reviewing the matter *de novo* and construing the facts "through a lens colored in favor of the party opposing summary judgment," *Kirby*, 426 S.W.3d at 604, the Court of Appeals ultimately concluded that there was evidence that Weickgenannt was treated less favorably than Gilson, a similarly situated male tenure candidate, and that this evidence was sufficient to rebut Appellant's articulated reasons for denying her tenure application. (Ct. App. Opinion at pp. 13-15). The appellate court's finding that Weickgenannt presented sufficient evidence to demonstrate pretext is likewise sufficient to raise a question of fact regarding the fourth *prima facie* element— whether Weickgenannt was treated less favorably than similarly situated male tenure candidates. See *Blair*, 505 F.3d at 533 (evidence in support of a *prima facie* case may be sufficient to raise a genuine issue of fact as to whether employer's stated reasons for adverse employment were a pretext for unlawful discrimination as the proof necessary to establish both a *prima facie* case and a showing of pretext often overlaps); *Pettit v. Steppingstone, Ctr. for the Potentially Gifted*, 429 Fed. Appx. 524, 535-36 (6th Cir. 2011) (in discrimination case alleging retaliation, evidence in support of *prima facie*

elements may overlap with evidence offered to demonstrate pretext). If Weickgenannt's evidence of less favorable treatment compared to Gilson is sufficient to rebut the University's stated reasons for denying her tenure at the pretext stage of the *McDonnell Douglas/Burdine* analysis, clearly that same evidence is more than sufficient to support the much less onerous burden of raising a question of fact as to the fourth *prima facie* element and the circumstances that give rise to an inference of discrimination. *Burdine*, 450 U.S. at 253; *Cline*, 206 F.3d at 660. *See also Lindsay*, 578 F.3d at 416 ("We remain mindful that the burden of establishing, much less creating a genuine issue of material fact over, a *prima facie* case 'is not onerous'.").

E. Weickgenannt Has Presented Additional Evidence Sufficient to Raise an Inference of Discrimination and Establish a *Prima Facie* Discrimination Case.

Courts have long cautioned against applying the "traditional" elements of a *prima facie* case in a formalistic and rigid way so as to discount relevant evidence supporting an inference as to the ultimate issue- whether the employment action was based on unlawful discriminatory animus:

But while a discriminatory inference is *usually*, and perhaps most readily generated through evidence of unfavorable treatment of the minority plaintiff vis-a-vis similarly-situated individuals, *McDonnell Douglas* and its progeny do not require this *always* be the case. . . . Keeping this ultimate inquiry in mind, we find that so long as "additional evidence" exists- beyond showing the first three elements of the *McDonnell Douglas* test- that indicates discriminatory intent in 'light of common experience," the required "inference of discrimination" can be made in satisfaction of the *prima facie* case. This holds true even if the plaintiff is not necessarily able to identify similarly-situated individuals outside of the relevant protected group who were treated more favorably.

Lindsay, 578 F.3d at 417-18 (citing *Shah*, 816 F.2d at 268 and *Furnco*, 438 U.S. at 577) (emphasis in original). Weickgenannt has presented sufficient evidence from which an inference of discrimination arises, thereby establishing a *prima facie* case and shifting the

burden of persuasion to Appellant as required under the governing *McDonnell Douglas/Burdine* framework. In addition to the evidence that Weickgenannt was treated less favorably than Gilson, and other similarly situated male COB professors, Weickgenannt also presented evidence that Dean Beehler prejudged her tenure application in contravention of the policies set forth in the University Handbook and the COB Guidelines which govern the tenure process. He told Weickgenannt her application had a “very low probability of success” and offered her an administrative position in his office so that she could “get off the tenure track” and “feed her family” (TR 202-203, Att. G--Weickgenannt Depo. Ex. 17; 202-203, Att G--Turner Depo. pp. 68-71.)

As the PRHC clearly found, Dean Beehler’s premature assessment did not comport with the applicable policies and procedures governing tenure review. (Id., TR 202-203, Att. G--Frank Depo. Ex. 1). In addition, Weickgenannt presented evidence raising at least a question of fact as to whether the claim that her 2003 publication was in a journal or of “poor quality” was contradicted the COB standards of quality that had been applied routinely to tenure applications in the COB. (Id.) Indeed, Dean Beehler himself reviewed and implicitly approved the alleged “poor quality” journal article as sufficient to support Weickgenannt’s application for reappointment the year prior to her tenure application. Finally, Weickgenannt presented evidence that she was denied the benefit of the longstanding COB policy and practice of granting publication credit for an article that was listed as submitted in a tenure applicant’s portfolio and subsequently accepted for publication. This evidence supports a finding of pretext in this case, and is therefore more than sufficient to establish a *prima facie* case of discrimination. At a minimum, it raises questions of facts which render summary judgment inappropriate at the *prima facie* stage of the *McDonnell Douglas/Burdine* analysis. *Griffin*, 689 F.3d at 593; *Blair*, 505 F.3d at 528 n.10.

In short, the Court of Appeals' determination that Weickgenannt has presented sufficient evidence to establish a *prima facie* discrimination case was proper and should be affirmed by this Court. It is undisputed that Weickgenannt has established the first three prongs of a *prima facie* discrimination case based on the denial of her application for promotion and tenure at NKU— she is a woman, she was qualified for and applied for tenure and promotion to Associate Professor in the Accountancy Department of the College of Business, and her application was denied. As for the fourth prong of her *prima facie* case, the Court of Appeals found that there is at least a question of fact as to whether male COB professors received promotions and tenure during the same period that Weickgenannt's application for promotion and tenure was denied. *Hicks v. SSP Am., Inc.*, 490 Fed. Appx. 781, 783-784 (6th Cir. 2012); *Nguyen v. City of Cleveland*, 229 F.3d 559, 562-63 (6th Cir. 2000). Weickgenannt has also established a *prima facie* discrimination case based on the evidence she has presented concerning the more favorable treatment that similarly situated male COB professors received in review of their tenure portfolios, and the application of the tenure standards and criteria, as well as COB policies and practice, to their candidacies. Finally, as discussed above, Weickgenannt has presented additional evidence which raises an inference of discriminatory motive, including evidence that Dean Beehler prejudged her tenure candidacy and failed to follow University and COB Guidelines for review of her tenure application; that Beehler retroactively determined that she had published in a journal of "poor quality" after the quality of the journal was tacitly approved several times through the Reappointment process; and that she was denied the benefit of the longstanding COB practice of granting publication credit for a listed article that was subsequently accepted for publication.

The *prima facie* elements of a discrimination claim are not meant to be rigid or mechanistic and there are, therefore, various context-dependent ways by which a plaintiff may establish a *prima facie* case. *Blair*, 505 F.3d at 529. Regardless of how a court articulates the applicable *prima facie* elements, the key question is always whether, under the particular facts and context of the case at hand, the plaintiff has presented sufficient evidence to permit a reasonable jury to conclude that she suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. *Id.*; *Burdine*, 450 U.S. at 253. The Court of Appeals found that Weickgenannt has done so in this case and its determination on this point is not reversible error. *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 805 n.3 (Ky. 2010) (citing *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 575-76 (Ky. 2009)) (“An appellate court may affirm a lower court’s decision on other grounds as long as the lower court reached the correct result.”) (internal quotations omitted); *Fischer v. Fischer*, 348 S.W.3d 582, 589-90 (Ky. 2011) (same).

F. The Court of Appeals Did Not Err in its Reference to the University’s Stated Reasons for Denying Tenure.

The University argues that the Court of Appeals misstated the University’s reasons for the decision to deny Weickgenannt’s tenure application and that this alleged misstatement somehow constitutes reversible error. (Appellant’s Br. at pp. 35-37.) Appellant’s argument is wholly without merit. The Circuit Court found that the University had articulated a legitimate non-discriminatory reason for its decision to deny Weickgenannt’s tenure application, namely deficient scholarship. (Circuit Court Opinion at p. 14) (“The Court therefore finds that NKU has articulated a legitimate non-discriminatory reason to deny Ms. Weickgenannt tenure—her insufficient scholarship based upon its subjective analysis of the tenure criteria found in the Faculty Handbook and COB Guidelines.”). The Court of Appeals

affirmed the Circuit Court on this point, stating, “[i]nadequate 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.” (Ct. App. Opinion at pp. 12-13.) Thus, both the Circuit Court and the Court of Appeals have concluded that the University articulated deficient scholarship as the alleged non-discriminatory reason for its tenure decision. Defendant insists that “the reasons stated by the University for denying tenure to Weickgenannt were both the number and the quality of the journal articles she published as well as her failure to demonstrate a solid trajectory for future scholarship.” (Appellant’s Br. at pp. 36-37). The courts are clearly not bound to reiterate an employer’s proffered non-discriminatory reason verbatim. Appellant’s argument seeks to make a distinction without a difference. Both lower courts have found that the University satisfied its burden at the second phase of the *McDonnell Douglas/Burdine* burden-shifting analysis and Weickgenannt did not challenge those findings in the proceedings below. Nothing in the Court of Appeals’ reiteration of the University’s proffered reasons for its tenure decision constitutes reversible error. The overriding issue is, and should be, whether Weickgenannt has presented evidence raising genuine issues of material fact with respect to the ultimate issue in this case, to wit: whether she has raised an inference of discrimination. As discussed more fully below, there is substantial evidence which rebuts the University’s stated reasons for its decision and supports the conclusion that NKU’s reasons are merely a pretext for unlawful discrimination. The Court of Appeals so found, and its decision to reverse and remand this case for trial should be affirmed.

G. Weickgenannt Presented Evidence Sufficient to Rebut NKU's Stated Reasons for Denying Tenure and Overcome Summary Judgment.

To prove pretext, Weickgenannt's *prima facie* case combined with evidence challenging NKU's explanation is sufficient to allow a jury to infer unlawful discrimination, and no additional evidence of discrimination is required. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 149 (2000). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence . . . , and it may be quite persuasive." *Id.* at 147. When reviewing the record as a whole, this Court must draw all reasonable inferences in favor of Weickgenannt and must disregard all evidence favorable to NKU that the jury is not required to believe, such as testimony from interested witnesses like Votruba, Wells, Beehler, and Turner. *Id.* at 150-151.

"There are no hard and fast rules as to . . . what evidence is needed in order to establish pretext." *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.*, 690 F.2d 88, 97 (6th Cir. 1982). Evidence that the employer's articulated reason had no basis in fact, did not actually motivate the adverse action, or was insufficient to motivate it, is sufficient to create a factual question concerning pretext. *Chattman v. Toho Tenax Am. Inc.*, 686 F.3d 339, 349 (6th Cir. 2012); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Moreover, courts should avoid formalism in evaluating a plaintiff's evidence of pretext and must analyze it cumulatively based on the totality of the record. *Chen v. Dow Chem Co.*, 580 F.3d 400, n.4 (6th Cir. 2009); *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1166-67 (6th Cir. 1996). Thus, **"to survive summary judgment, a plaintiff need only produce enough evidence to support a *prima facie* case and to rebut, but not to disprove, the defendant's proffered rationale."** *Shazor v. Prof. Transit Mgmt., Ltd.*,

744 F.3d 948, 957 (6th Cir. 2014) (quoting *Griffin v. Finkbeiner*, 689 F.3d 584, 593 (6th Cir. 2012)) (internal quotations omitted; emphasis added).

Finding that Gilson was similarly situated to Weickgenannt in all relevant respects, the Court of Appeals concluded that the evidence of differential and less favorable treatment afforded her compared to the male professor “sufficiently rebuts NKU’s asserted nondiscriminatory reason for not giving tenure to Weickgenannt” and that such evidence “warrant[ed] submitting the matter to a jury.” (Ct. App. Opinion at p. 15). The Court of Appeals’ finding on pretext should be affirmed by this Court. The evidence demonstrates, as the Court of Appeals found, that there is at least a question of fact as to whether the University’s stated reasons for its tenure decision are a pretext to mask unlawful gender discrimination.

1. Evidence That Similarly Situated Males Were Treated More Favorably Demonstrates Pretext.

Weickgenannt has clearly raised a question of fact as to whether NKU treated similarly situated male professors who applied for tenure and promotion more favorably than her. Considering all the evidence and construing all the facts and inferences in her favor, the comparator evidence is sufficient to raise a jury question as to whether the University’s claim of insufficient scholarship is merely a pretext for unlawful gender discrimination. *Provenzano*, 663 F.3d at 812 (when evaluating pretext and the plaintiff’s ultimate burden, the court should consider all the evidence in the light most favorable to plaintiff, including the evidence presented in the *prima facie* stage). There is substantial evidence that male professors from the COB who applied for tenure and promotion, including Gilson, Theuri, Mueller, Rhee, Dalakas, Ford, Russ, and Ryack, were treated more favorably than Weickgenannt with respect to the evaluation of their scholarship’s quantity and quality. In

addition, Gilson and Owhoso were permitted to add items to their portfolios after they had been submitted, while Weickgenannt was denied the opportunity to submit an article accepted for publication shortly after her portfolio was submitted, in contravention of the longstanding practices of the COB. (TR 200-201, Att. E2--Marquis Depo. Vol. 2 pp. 177-78; 250-51.) As the Court of Appeals held, Gilson and Weickgenannt are sufficiently similar to permit a comparison of their scholarly activity and this comparison gives rise to material issues of fact as to whether the decision not to grant tenure to Weickgenannt was a pretext for discrimination. *See Moore*, 2013 U.S. Dist. LEXIS 176233, at * 40-43.

In *Moore*, the plaintiff had been recommended for promotion to full professor and had presented evidence of his record of significant scholarship and achievements in other areas. The *Moore* Court held that a comparison of relative strengths and weaknesses of professors seeking promotion did not have to be in the same areas for the plaintiff to demonstrate disparate treatment. *Id.* The court also held that when the less favorable treatment was coupled with evidence that plaintiff's scholarly activity arguably met the university's written standards, the evidence was sufficient to raise a question of fact as to pretext. *Id.* In this case, Weickgenannt has presented evidence that she was recommended for tenure and promotion by both the RPT Committee and the Department Chair. In addition, she presented undisputed evidence of her strengths in teaching and service, as well as her record of scholarly activity, which satisfied the standards of the Faculty Handbook and the COB Guidelines. Thus, when compared to Gilson, who was granted tenure while Weickgenannt was denied the same, the evidence raises an inference of discrimination and establishes genuine issues of fact which the jury, not the court, must resolve.

2. The Substantial Evidence of Procedural Irregularities Supports a Finding of Pretext.

Contrary to the Circuit Court’s reasoning, neither the courts below nor this Court are required to substitute the court’s own judgment for NKU’s regarding whether Weickgenannt should have been granted tenure in order to conclude that summary judgment should be denied. As noted above, both the RPT Committee and the Chair of the Accountancy Department recommended that Weickgenannt be granted tenure. Before those recommendations could be properly evaluated according to the University’s tenure procedures, indeed before she ever submitted her portfolio for consideration, Dean Beehler advised Weickgenannt that her tenure application was likely to be denied and then proceeded to offer her an administrative position in his office. (TR 202-203, Att. G--Weickgenannt Depo. Ex. 17.) Dean Beehler did not tell her at that time that the *quality* of her research was the issue; instead he simply cited that “[i]t never looks good when your numbers reflect the bare minimum, especially when your pipeline shows a low likelihood of producing publishable research.” (Id.,) He later admitted he was not sure about the details of the criteria required by the RPT policy. (Id., TR 202-203, Att. G--Weickgenannt Depo. Ex. 18.)

At the time Dean Beehler pre-judged Weickgenannt’s portfolio application, he had a copy of her vitae and knew that she had produced more than the “bare minimum” number of scholarly works, and that she had three manuscripts submitted to peer reviewed journals and five more projects in progress, indicating a strong likelihood she would continue producing publishable research. (TR 202-203, Att. G--Beehler Depo. Ex. 1; TR 197-198, Att. B--Weickgenannt Depo. Ex. 1.) It was only later that he alleged “quality” as a concern, specifically with respect to the article published in *The National Accounting Journal*. He deemed this journal to be “poor quality” notwithstanding the fact he had found it to be of sufficient quality to support Weickgenannt’s reappointment on his previous review of her portfolio. On appeal of the denial decision the PRHC, comprised of five more tenured

professors from other colleges, also unanimously concluded, based in part on Beehler's improper pre-judgment of her application, that, "the decision to deny tenure . . . was not made in a fair and reasonable manner and lacks a rational basis." (TR 202-203, Att G--Frank Depo. Ex. 1.) In addition, the PRHC concluded that there were no standards for what constituted a publication "of good quality" other than the COB's longstanding practice of publication in a journal listed in Cabell's, and therefore the standards applied to Weickgenannt's tenure application were not rational. (Id.) Similarly, the PHRC unanimously concluded that Weickgenannt had been granted reappointment several times since the publication of her 2003 article in *The National Accounting Journal* and that at no point was she ever told that the publication was not of sufficient quality to support her reappointment or tenure. (Id.) Courts have uniformly recognized that certain departures from procedural regularity which may affect a tenure decision, can raise a question as to the good faith of the tenure review process and support a finding of pretext. *Canchu Lin v. Bowling Green State Univ.*, 2012 U.S. Dist. LEXIS 75413, 21-22 (N.D. Ohio May 31, 2012) (citing *Zahorik*, 729 F.2d at 93). See also *Weinstock v. Columbia Univ.*, 224 F.3d 33, 45 (2d Cir. 2000) (same). In the context of this case, and in light of the other evidence that Weickgenannt was treated differently than male professors applying for tenure, these procedural irregularities most certainly give rise to an inference of discrimination sufficient to rebut NKU's proffered reasons regarding inadequate scholarship.

3. Evidence that the University's Claims of Insufficient Quality and Quantity of Scholarship Are Pretext Also Rebutts the Contention That Weickgenannt Lacked a Sufficient Research Stream.

Appellant argues that Weickgenannt cannot demonstrate pretext because she has not offered any evidence to specifically rebut the University's assertion that she failed to demonstrate a sufficient future research stream. This argument is contradicted by the case

law which does not require a plaintiff to rebut every single argument set forth by a defendant's laundry list of purported nondiscriminatory reasons for its employment decision. A number of federal circuit and district courts have held that when an employer offers "multiple reasons for discharging a plaintiff, the plaintiff need only discredit one of the proffered reasons." *Smith v. Good Samaritan Hospital*, Case No. 1:06cv207, 2007 U.S. Dist. LEXIS 48304, *19 (S.D. Ohio July 3, 2007) (citing *May v. Pilot Travel Centers, LLC*, Case No. 2:05-cv-918, 2007 U.S. Dist. LEXIS 484 (S.D. Ohio 2007)); *Powell v. Rumsfeld*, 42 Fed. Appx. 856 (7th Cir. 2002); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995) ("there may be cases where the multiple reasons offered by the defendant 'are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment' by showing the pretextual nature of just one reason."); *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1127 (10th Cir. 2005) (holding that discrediting one proffered reason, such as the dominant reason, can cast doubt on all remaining reasons, even if they have not been discredited). Plaintiff need not discredit every reason because "the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available." *Fuentes v. Perskie*, 32 F.3d 759, 764-65, n.7 (3d Cir. 1994). As the *Nathan* court explained in a case relied upon by Appellant, "the issue is qualitative, not quantitative: the court must determine whether the plaintiff has presented sufficient evidence from which a factfinder could conclude that the defendant's explanation is false, and that discrimination was the real reason." *Nathan v. Ohio State Univ.*, 984 F. Supp. 2d 789, 801-802 (S.D. Ohio 2013) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 512 n.4 (1993)) ("It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation

of intentional discrimination.”). *See also* *Lowe v. Hamilton County Dep't of Job & Family Servs.*, 2012 U.S. Dist. LEXIS 74018 (S.D. Ohio May 29, 2012); *Ellert v. Chipotle Mexican Grill Inc.*, 2008 U.S. Dist. LEXIS 122125, 17-21 (S.D. Ohio June 27, 2008) (where defendant offered multiple reasons for its employment decision and plaintiff offered evidence rebutting several of the stated reasons, argument that plaintiff could not show pretext as to one enumerated reason did not preclude finding of pretext).

In this case, Weickgenannt has presented evidence which raises genuine issues of material fact as to whether her purported deficient scholarship was the real reason for the University’s tenure decision and whether such a reason was sufficient to deny her tenure, given the evidence presented regarding scholarship of similarly situated male professors in the COB. Weickgenannt’s portfolio of published works and her record of articles subsequently accepted for publication demonstrate in and of themselves the pretextual nature of the University’s position on this point. Moreover, the University imposed quality and quantity standards on Weickgenannt’s tenure application that were clearly not applied to similarly situated male colleagues. The PRHC found violations of Faculty Handbook and COB tenure Guidelines. The misapplication of these standards to Weickgenannt’s tenure application clearly demonstrates that the University’s proffered justifications for its tenure decision are unworthy of belief and raise an inference of discrimination.

H. Because Wells and Votruba Relied on Lower Level Decision Makers Their Roles in the Tenure Decision Do Not Insulate NKU from a Finding of Gender Discrimination.

Ultimate decision makers are not insulated from the gender bias of lower level decision makers just because they conduct an independent investigation. *Staub v. Proctor Hosp.* 131 S.Ct. 1186, 1193 (2011); *Chattman*, 686 F.3d at 351. Only if the ultimate decision is made for reasons **completely unrelated** to the biased supervisor’s original action

is the employer not liable for the supervisor's discrimination. *Staub*, 131 S.Ct. at 1193. Thus, notwithstanding the fact that Votruba and Wells claim they conducted independent reviews, because their decisions were not based on **new grounds**, but relied on lower level decision makers to reach the same conclusion as to denial of tenure, the University cannot escape liability for the discriminatory decision to deny Weickgenannt's tenure application. *Id.*

President Votruba admitted that he asked Provost Wells to explain her rationale prior to making his decision, and she told him that she based her decision on Weickgenannt's failure to meet the standards for scholarship, both quantity and quality. (TR 202-203, Att. G--Votruba Depo. at pp. 9-12.) Wells told him about the alleged lack of quality of journals, the lack of evidence regarding Weickgenannt's contribution to multiple-authored articles, and that there was insufficient evidence of continuing scholarship. (*Id.* at 10.) Votruba also spoke with Dean Beehler, whose position was essentially the same as Wells's in all three respects. (*Id.* at 13-14.) Votruba's decision to deny tenure was based on the same grounds as those articulated to him by Wells and Beehler. (*Id.* at 18-19.) He did not meet with the PRHC, the RPT Committee, or the Accounting Department Chair, even though he found it impossible to determine on his own what contributions Weickgenannt made in the co-authored articles. (*Id.* at 16-17, 22-24, 38.) Thus, it is clear that although he "reviewed" Weickgenannt's portfolio itself, his assessment of the quality, quantity and future research stream demonstrated by the submission was based on the lower level decisions of Wells and Beehler.

Likewise, Wells admitted that she discussed the application with Dean Beehler before she made her decision. (TR 202-203, Att. G--Wells Depo. at 34-35.) At that time, Beehler told Wells that he based his decision to recommend against tenure on his contention that one

article was published in a journal of low quality, one was primarily the research of Owoso, and that all of Weickgenannt's articles were jointly written, indicating a lack of evidence that she would continue scholarly activity in the future. (Id. at 36-37, 61-62.) These were the very same reasons Wells articulated as the basis for her decision to recommend against tenure. (Id. at 61-62.)

I. University Tenure Decisions Are Not Exempt from Gender Discrimination Laws and the Invitation to this Court to Abandon Longstanding Precedent and Restrict the Methods of Proof for Tenure Cases Should Be Soundly Rejected.

While the Appellant and the University Amici Curiae go to great lengths to emphasize the unique nature of tenure decisions and the implication of First Amendment rights and Academic Freedom issues associated therewith, their exhortations fail to recognize the fundamental principle at issue in this case: Even though denial of tenure decisions differ in certain respects from other types of employment decisions, they are not exempt from gender discrimination laws. *Zahorik*, 729 F.2d at, 93-94.

When originally passed, Title VII of the Civil Rights Act exempted all educational institutions with respect to faculty employment practices. 42 U.S.C. § 2000e-1 (1970), as amended. The Equal Employment Opportunity Act of 1972, 86 Stat. 103, sec. 3 (1972), amended Title VII to bring educational institutions within the purview of the Act. At the time of this amendment, the House Report stated, “[t]here is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees - primarily teachers - from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.” H.R. Rep. No. 238, 92d Cong., 2d Sess. (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 2137, 2155. The House at the time

recognized the “pervasive nature of discriminatory university employment practices” and characterized them in the Congressional debates preceding the amendments as “truly appalling,” “gross” and “blatant.” *See* 118 Cong. Rec. 117 (1972) (remarks of Senator Bayh) and 118 Cong. Rec. 1992 (1972) (remarks of Senator Williams).

Consequently, courts have since recognized that “Congress has evidenced particular concern for the problem of employment bias in an academic setting. **Indeed it might be said that far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias.**” *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir. 1978) (emphasis added). In short, academic freedom does not “embrace[] the freedom to discriminate.” *Powell*, 580 F.2d at 1154. While judges are frequently admonished not to second-guess the merits of a university's collective academic judgment as to a tenure candidate's qualifications, any judicial deference afforded to a college or university should not “result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of . . . discrimination in institutions of higher learning as readily as for other Title VII suits.” (Id.) *See also Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 235 (S.D.N.Y. 1998); *University of Pennsylvania v. EEOC*, 493 U.S. 182, 190 (1990) (“The effect of the elimination of this exemption [for educational institutions] was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions.”). Likewise, the Kentucky courts have not, nor should they, abdicate their responsibility to provide a forum for litigation of discrimination claims brought by university professors, any more than the Kentucky courts would abandon their duty to enforce KRS 344 with respect to any other employee.

The University Amici have proposed that the Kentucky Supreme Court adopt a rule of law for denial of tenure cases which would effectively upend and overturn longstanding precedent governing application of the *McDonnell Douglas/Burdine* burden shifting framework in denial of tenure cases brought pursuant to KRS 344. Amici explicitly ask this Court to disallow proof of pretext based on the first and third *Manzer* methods of proof, and to require a plaintiff seeking to show pretext under the second *Manzer* prong to present “pretext-plus” evidence to survive summary judgment. The position advocated by the University Amici is intended to make it virtually impossible for any candidate denied tenure to challenge unlawful discrimination and to ensure that the Universities enjoy essentially unfettered discretion and ability to discriminate under the guise of “Academic Freedom.”

The *Manzer* decision itself makes clear that the Supreme Court has rejected the heightened burden of “pretext-plus” requirement in discrimination cases:

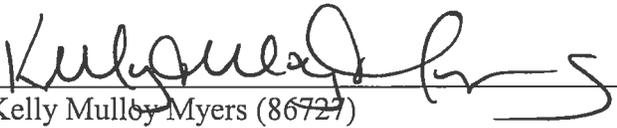
[T]he Supreme Court rejected the "pretext only" position and held that a mere finding that the reasons given by the employer "were not the real reasons" for firing plaintiff did not compel judgment for the plaintiff. *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407, 113 S. Ct. 2742, 2748-49 (1993). **The Court, however, also rejected the "pretext plus" position**, stating: The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals [for the Eighth Circuit] was correct when it noted that, upon such rejection, 'no additional proof of discrimination is required.'

Manzer, 29 F.3d at 1083. Regardless of the “deference” to which the Amici believe they are entitled, neither NKU nor any other employer in Kentucky is excepted from application of the anti-discrimination laws. Contrary to the Amici’s suggestion, there clearly are circumstances, including the case *sub judice*, in which application of all three *Manzer* methods of proof is appropriate to show pretext. See e.g. *Lynch v. ITT Ed. Svs. Inc.*, 571 Fed.

Appx. 440, 452-53 (6th Cir. 2014) (Daughtrey, J. dissenting) (evidence that plaintiff met the requisite accreditation standards showed that ITT's articulated reason had no basis in fact). In this case, there is evidence of procedural irregularities and evidence that the tenure standards set forth in the Faculty Handbook and the COB Guidelines, as well as the COB common practices, were not applied to Weickgenannt in the same manner as her male comparators. This evidence demonstrates pretext without requiring the court to weigh or compare the scholarly works themselves. To establish a rule of law that effectively eliminates the methods of proof by which discrimination plaintiffs show pretext under the *McDonnell Douglas/Burdine* framework would not only contravene the clear U.S. Supreme Court precedent in *Hicks*, but would permit Universities to convert "academic freedom" into "the freedom to discriminate." Such a departure from *McDonnell Douglas/Burdine* and their progeny is both unprecedented and unwarranted and should be flatly rejected by this Court.

VI. CONCLUSION

On *de novo* review, the Court of Appeals found that Weickgenannt established a *prima facie* discrimination case and that she presented sufficient evidence of pretext to raise an inference of discrimination, thereby making summary judgment in favor of NKU improper. For all the reasons stated above, the decision of the Court of Appeals should be affirmed and this case should be remanded to the Circuit Court for trial on the merits.


Kelly Mullby Myers (86727)
Randolph H. Freking (23509)
FREKING & BETZ, LLC
525 Vine Street, Sixth Floor
Cincinnati, OH 45202
Phone: (513) 721-1975/Fax: (513) 651-2570
kmyers@frekingandbetz.com
randy@frekingandbetz.com