**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| ***LOUBNA SKALLI HANNA*,**<br>***Plaintiff*,**<br>**v.**<br>***AMERICAN UNIVERSITY*,**<br>***Defendant.*** | **Case No. 2015 CA 007118 B**<br><br>**Judge Michael L. Rankin** |

# ORDER

Loubna Skalli Hanna ("Dr. Hanna") sued American University ("American" or "AU") for breach of contract and unlawful discrimination after the University denied her application for tenure. Dr. Hanna alleges that AU Provost Scott Bass conducted a biased, cursory review of her application and substantially deviated from official, contractually-binding procedures. She alleges further that the Provost judged her application more harshly than he did those of other younger faculty because he holds negative stereotypes about older workers.

Before the court are American's motion for summary judgment, Dr. Hanna's opposition, and American's reply. Dr. Hanna has also filed a motion for partial summary judgment arguing that the court should declare that her employment contract incorporated tenure criteria and guidelines devised by Dr. Hanna's academic unit. American filed an opposition to Dr. Hanna's motion, to which Dr. Hanna replied. As explained in greater detail below, Dr. Hanna's motion is denied because the record evidence permits, but does not compel, a reasonable conclusion that the school-specific guidelines were incorporated into her employment contract.

American raises two arguments for summary judgment: that academic deference precludes this court from reviewing the Provost's decision, and that no reasonable juror could find that the Provost discriminated. Dr. Hanna counters that American's argument about

academic deference lacks merit because it mischaracterizes her claim, which asks the court to review the University's compliance with its procedures, not the decision reached.

The instant dispute is a disagreement about the appropriate role of the judicial branch in enforcing the contractual and civil rights of a professor who was denied tenure. American failed to persuade the court that this matter cannot be litigated without requiring the court to second guess the University's assessment of Dr. Hanna's qualifications. The record evidence creates issues of fact as to both of the plaintiff's claims.

## BACKGROUND

Dr. Hanna was hired by AU as an Assistant Professor in the School of International Studies ("SIS") in 2003. In 2008, she was offered, and accepted, a standard, tenure-line appointment. The plaintiff's Appointment Letter referenced the American University Faculty Manual, which the parties agree is a binding contract governing their employment relationship. The Faculty Manual describes in detail AU's procedures for faculty governance, particularly, the manner in which the University evaluates applications for tenure and promotion. The Manual lists broadly the three "General Criteria for Evaluation of Faculty" for tenure: teaching, scholarship, and service. It instructs each "academic unit" within the University to develop supplemental guidelines and criteria for that school. Pursuant to that directive, SIS developed a set of guidelines in 2010 ("SIS Guidelines"), which the parties agree were in effect when Dr. Hanna applied for tenure.

### The Tenure Review Process Outlined by the Faculty Manual

Tenure-line appointments at American University typically involve a six-year probationary period in which senior faculty mentor junior faculty on their satisfaction of the criteria for tenure, culminating in the University's formal assessment of the faculty member's

application for tenure, known as their "File for Action." The six year period typically is comprised of successive two-year terms. AU reviews a tenure candidate's performance at the end of each term in what it calls a "probationary review." American asserts that the probationary review process serves two objectives: to help the University determine whether to reappoint a professor to another term, and to provide junior faculty members guidance on their progress toward tenure.

After a sixth year of service, a tenure candidate may submit her application for tenure, which jumpstarts the official review process. The Faculty Manual establishes the following process for conducting an official tenure review: First, the applicant's File is reviewed by five to six "qualified" external reviewers. Next, a three-person committee of faculty within the candidate's unit – the "3PC" – considers and reports on the candidate's suitability for tenure. After the 3PC renders a decision, the File is forwarded to a committee of all tenured faculty members within the candidate's academic unit conduct, known as a Faculty Action Committee or "FAC". The FAC conducts votes overall on whether to grant or deny tenure to the applicant, and separately, on whether the applicant satisfies each of the three criteria for tenure: teaching, scholarship, and service. The next phase of review is conducted by the dean of the candidate's constituent school who, like all other reviewers, reports his conclusions in writing. After the dean's review is complete, the File is forwarded to AU's Committee on Faculty Actions ("CFA"), an eight-person committee of faculty from American's constituent schools. The CFA votes on the application, reports the result of its vote and forwards the File for Action to the Dean of Academic Affairs, who ensures that the File is complete, in order and ready for the Provost's review. Finally, the application is forwarded to the Provost, who makes the ultimate decision to grant or deny tenure. Unsuccessful tenure applicants may appeal the Provost's

decision to AU's Committee on Faculty Grievances ("CFG"), the internal faculty grievance committee. The CFG investigates the matter to determine whether the appellant has demonstrated any one of three bases for an appeal: (1) the decision was discriminatory, (2) the process materially deviated from the requirements of the Faculty Manual and supplemental criteria and procedures approved by the Provost, or (3) evidence that should have been discovered through due diligence and could have changed the outcome was not. Importantly, the CFG does not review the Provost's decision substantively but determines whether the evidence supports the ground for appeal and, where appropriate, recommends corrective action. At the conclusion of its investigation, the Committee forwards its recommendation to the President of AU for decision. The President's role is to ensure that there were no material deviations from the Faculty Manual which resulted in a negative personnel decision.

**Dr. Hanna's Tenure Review**

Dr. Hanna became eligible for tenure review and submitted her application in September of 2013. By letter dated April 28, 2014, Provost Bass informed Dr. Hanna that he would not award her tenure. He explained that while her teaching and service met the standards for tenure, her scholarship did not. The Provost elaborated that Dr. Hanna's failure to complete a book and the low scholarly impact of articles published during her service at AU demonstrated a low likelihood that she would be a productive scholar in the future. In contrast, at the probationary review level and at every other stage of review, individual faculty members, external reviewers, and faculty committees commented positively on the plaintiff's scholarship and recommended granting tenure. The SIS FAC voted to grant tenure to Dr. Hanna by 20 to 3 vote (with four abstentions); the CFA voted unanimously (8 to 0) in favor of granting Dr. Hanna tenure.

Appeal

After receiving the Provost's letter, Dr. Hanna appealed. The CFG investigated the matter and reported its conclusions. It stated that the Committee had serious concerns about the overall fairness of the process, and noted specific instances in which it found that Provost Bass departed from the University's procedures. In an addendum to its report, the Committee stated that it had found statistical evidence of possible age discrimination in the tenure review process at AU. Notwithstanding those findings, President Kerwin upheld Provost Bass' decision to deny Dr. Hanna tenure. The President found that while the CFG noted its disagreement with the Provost's assessment of Professor Hanna's qualifications, it did not locate any violation of the process itself. He explained that the CFG's disagreement about the overall fairness of the process was not a valid basis for reversing the Provost. The letter stated further that President Kerwin did not find compelling evidence of age discrimination at AU. For those reasons, he sustained the Provost's decision. Dr. Hanna's full-time employment with AU ended in May 2015. She brings the instant lawsuit for breach of her employment contract, as expressed by the Faculty Manual and SIS Guidelines, and age discrimination in violation of the District of Columbia Human Rights Act, D.C. Code § 2-1402.11 (a)(1)("DCHRA").

## LEGAL STANDARD

"Summary judgment is appropriate when there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Brown v. George Washington Univ.*, 802 A.2d 382, 384-85 (D.C. 2002)(*citing* Super. Ct. Civ. R. 56(c))(quotation marks omitted). A party moving for summary judgment must demonstrate "the absence of material issues." *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C. 2000). Specifically, the proponent of a motion for summary judgment "must inform the trial court of the basis for the

motion and identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (citation omitted). "Once that burden is met, the adverse party must present evidence, via affidavit or otherwise, to demonstrate the existence of a genuine issue for trial." *Hollins v. Fed. Nat'L Mortg. Ass'n*, 760 A.2d 563, 570 (D.C. 2000)(quotation omitted). In ruling on summary judgment, the court "must view the evidence in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in that party's favor." *Propp v. Counterpart Int'l*, 39 A.3d 856, 871 (D.C. 2012)(quoting *Woodland v. Dist. Council 20*, 777 A.2d 795, 798 (D.C. 2001) (internal citation omitted). Doubts about the existence of a material factual dispute must be resolved against the moving party. See *Hollins*, 760 A.2d at 570.

## DISCUSSION

### Breach of Contract

American argues that Dr. Hanna's breach of contract claim cannot survive summary judgment because the record is clear that the University substantially complied with its procedures. Dr. Hanna counters that the matter at the very least presents a jury question.

To state a claim for breach of contract, a plaintiff must prove: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) breach of that duty; and (3) damages caused by the breach. *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). "In determining whether a university has complied with its own rules or contract, a court must be careful not to substitute its judgment improperly for the academic judgment of the school." *Allworth v. Howard Univ.*, 890 A.2d 194, 202 (D.C. 2006)(alteration and citation omitted). Rather, "the courts will only intervene where there has not been substantial

compliance with those procedures." *Brown v. George Wash. Univ*., 802 A.2d 382, 385 (D.C. 2002)(citation omitted).

The first issue is whether Dr. Hanna's employment contract is reasonably susceptible to the meaning she gives it. American treats the Faculty Manual as the exclusive contract between the parties. Mot. at 19, 32-33. It does not directly address the specific procedural obligations asserted by the plaintiff as arising from her contract. The only provision within the Faculty Manual that AU references in its breach of contract argument is the one giving the Provost final decision-making authority. Mot. at 33. It implies that the only contractual obligation binding the Provost's review was to carefully read over Dr. Hanna's File for Action. Dr. Hanna asserts the Faculty Manual and the SIS Guidelines (which she argues the Manual incorporated either expressly through its plain meaning or implicitly through custom and practice) together comprise her employment contract. She argues that the Manual and Guidelines create specific criteria and procedures that the University was required to follow when evaluating her application and cites to evidence of AU custom and practice as support.

"The objective view of contract interpretation adopted in this jurisdiction requires, in the context of University employment contracts, that the custom and practice of the University be taken into account in determining what were the reasonable expectations of persons in the position of the contracting parties." *Howard Univ. v. Roberts-Williams*, 37 A.3d 896, 906 (quoting *Brown v. George Washington Univ*., 802 A.2d at 386). Consequently, "[t]he University is … entitled to summary judgment if, and only if, the Faculty Code unambiguously supports the University's interpretation" of the employment contract. *Kakaes v. George Washington Univ*., 683 A.2d 128, 132 (D.C. 1996).

Here, American does not contend and *a fortiori* does not demonstrate that Dr. Hanna's employment contract is unambiguous; however, the Faculty Manual does not evince the parties' clear intent to incorporate the SIS Guidelines such that they became part of Dr. Hanna's contract as a matter of law. As such, extrinsic evidence of custom and practice informs the meaning of Dr. Hanna's employment contract, which is a question of fact for the jury.

The next issue is whether Dr. Hanna can establish the element of breach; in this context, defined as "substantial compliance." American's discussion of breach is cursory, apparently resting on the premise that the Faculty Manual is the exclusive contract between the parties. By asserting that the Provost carefully read over Dr. Hanna's File for Action, American contends that a reasonable factfinder must conclude that he fulfilled any contractual requirements. Dr. Hanna alleges that AU breached her employment contract in several ways, citing to the record in support of each alleged instance of breach. The court does not find AU's argument about the Provost's compliance with AU's procedures to be persuasive. American is correct that Dr. Hanna could not sustain a contract action on the basis of Provost Bass's disagreement with other faculty members; lower levels of review are not binding on the provost where the Faculty Manual gives him final discretion to decide tenure. *Johns Hopkins University v. Ritter*, 114 Md. App. 77 (1996). However, that does not mean his actions are unreviewable. Dr. Hanna asserts more than the Provost's disagreement with other faculty as grounds for her claim. For example, Dr. Hanna argues that her employment contract was breached when the Provost conducted off-the-books discussion about her scholarly merit with Associate Vice Provost William LeoGrande, something that is not contemplated by the procedures listed in the Faculty Manual. AU fails to analyze whether the specific instances of procedural deviations alleged by Dr. Hanna could reasonably be viewed as material, which is a classic question of fact for a jury. As such, the court

is not persuaded that these alleged breaches are immaterial. Furthermore, American does not establish the absence of disputes of fact as to breach. In its reply memorandum, American argues that it does not concede, but need not discuss, the materiality of the alleged breaches because they find no factual support in the record. The court disagrees. Upon exhaustively reviewing the evidence, the court finds that Dr. Hanna's allegations are supported by sufficient evidence to create genuine disputes of fact, such as whether Dr. LeoGrande offered his substantive remarks about Dr. Hanna's tenure file to the Provost.

Overall, having failed to establish that the record forecloses any reasonable dispute as to the meaning of Dr. Hanna's employment contract or the University's compliance with it, AU is not entitled to summary judgment on Dr. Hanna's breach of contract claim.

AGE DISCRIMINATION

American argues that Dr. Hanna cannot establish a *prima facie* case of discrimination or pretext. Dr. Hanna counters that her discrimination claim is supported by ample evidence in the record.

The DCHRA makes it unlawful for an employer to discriminate against an employee for because of her age. D.C. Code § 2-1402.11 (a)(1). In considering employment discrimination claims under the DCHRA, the court employs the same burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *McFarland v. George Washington University*, 935 A.2d 337, 346 (D.C. 2007). When the defendant has produced evidence that it denied the plaintiff tenure based on a legitimate, nondiscriminatory reason, the court need not analyze whether the plaintiff made out a *prima facie* case of age discrimination.[1]

[1] Nonetheless, the plaintiff has established a prima facie case of age discrimination. To establish a prima facie age discrimination case in the context of tenure denial, the plaintiff "must show that she is within the protected age group, that she was qualified for tenure, that she was denied tenure and that a substantially younger employer was

See *Hamilton v. Howard Univ.*, 960 A.2d 308, 314 (D.C. 2008). Rather, the court may proceed to the ultimate issue: whether the plaintiff's evidence can prove that the defendant's actual motivation was discriminatory. See *id.*

Here, American has produced sufficient evidence of a legitimate, non-discriminatory reason for denying Dr. Hanna's tenure application: the Provost's determination that Dr. Hanna would not likely be a productive scholar at AU. *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1344 (9th Cir. 1981)("Without doubt, deficient scholarship is a legitimate, nondiscriminatory reason to deny salary increases or tenure.") As such, the court proceeds to the issue of pretext.

AU argues that Dr. Hanna cannot establish that its reason for denying her tenure was pretext because courts may not second guess a university's assessment of its faculty's qualifications. It argues further that even if academic deference did not prevent this case from moving forward, the record lacks evidence tending to show that Provost Bass discriminates against older people whereas it is replete with evidence that he does not. Dr. Hanna counters that academic deference does not give universities a license to discriminate and that the record contains more than enough evidence to show that the Provost denied Dr. Hanna's application because of her age.

The court first addresses the import of academic deference. American argues that Dr. Hanna cannot establish pretext because the record "merely shows a dispute about the quality of [Dr. Hanna's] scholarship." Dr. Hanna counters that American "does not, because it cannot, cite any authority for the proposition that denial of tenure cannot be challenged as discriminatory." The court understands American's argument to have more nuance than the plaintiff gives it. AU's argument for deference hinges on its characterization of Dr. Hanna's evidentiary showing;

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granted tenure." *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 965 (7th Cir. 1998). The evidence sustains each element of the prima facie showing.

its cases stand for the proposition that a plaintiff cannot prevail on an employment discrimination claim on the basis of a disagreement about the plaintiff's scholarship alone.

To establish pretext, the plaintiff "must present evidence to suggest not that the University was mistaken in denying her tenure but that it was lying in order to cover up the true reason, her age." *Vanasco v. National-Louis Univ.*, 137 F.3d at 966. Pretext can be demonstrated in a number of ways, including:

> citing the employer's better treatment of similarly situated employees outside the plaintiff's protected group, its inconsistent or dishonest explanations, its deviation from established procedures or criteria, or the employer's pattern of poor treatment of other employees in the same protected group as the plaintiff, or other relevant evidence that a jury could reasonably conclude evinces an illicit motive.

*Walker v. Johnson*, 798 F.3d 1085, 1092 (D.C. Cir. 2015). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Atlantic Richfield Co. v. District of Columbia Comm'n on Human Rights*, 515 A.2d 1095, 1099 (D.C. 1986). However, summary judgment should be granted sparingly in cases involving motive or intent. *Hollins v. Fannie Mae*, 760 A.2d at 571. Furthermore, the McDonnell-Douglas framework recognizes that "[o]utright admissions of impermissible motivation are infrequent." *Id.* (citing *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)).

A plaintiff who offers nothing more than his own subjective disagreement with the university's appraisal of its scholarship will not survive summary judgment. See *Elam v. Bd. of Trs.*, 530 F.Supp. 2d 4 (D.D.C. 2007)(granting summary judgment in tenure-related discrimination claim where the "plaintiff offer[ed] little more than a bald assertion that his portfolio conclusively establishes that he was qualified for the position and therefore defendant's proffered reason for the promotion denial must be pretext."). Indeed, "courts are not free to

second-guess an employer's business judgment, [and] a plaintiff's mere speculations are insufficient to create a genuine issue of fact regarding an employer's articulated reasons for its decisions." *Furline v. Morrison*, 953 A.2d 344, 354 (D.C. 2008) (internal quotation marks and citations omitted);Generally, in an employment discrimination claim, evidence that the plaintiff was more qualified than a similarly-situated employee who received more favorable treatment is not sufficient, on its own, to establish pretext: "[A] reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone." *Aka* at 1294. Finally, the court observes that possession of minimum qualifications does not entitle an applicant to tenure. See *Kumar v. Board of Trustees*, 774 F.2d 167 (1st Cir. 1985). These principles do not mean, however, that the plaintiff's qualifications' evidence is never relevant:

> If a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate--something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

*Aka* at 1294. Qualifications evidence is admissible in the context of discrimination cases where the adverse action is the University's denial of a tenure application. In such a context, an inference of pretext can arise from evidence tending to show "that a university's given reasons … were 'obviously weak or implausible,' or that the tenure standards … were 'manifestly unequally applied.'" *Brown v. Trustees of Boston Univ*., 891 F.2d 337, 346 (1st Cir. 1989). Comparative evidence of the unsuccessful tenure applicant's qualifications is admissible where it is "so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in judgment." *Id.* at 347.

Here, Dr. Hanna has produced sufficiently compelling "qualifications evidence" to permit an inference of discrimination. She offers more than her subjective opinion that the Provost's assessment of her scholarship was wrong; she offers the views of the vast majority of reviewers, who determined that she merited tenure. Those reviewers include external faculty that the University viewed as qualified to assess Dr. Hanna's scholarship, faculty within Dr. Hanna's academic unit who were familiar with her field of study, and faculty members who were appointed to represent faculty within the entire institution. Evidence that the majority of reviewers were united in support of granting Dr. Hanna tenure distinguishes the authority cited by the defendant and makes it more similar to cases in which tenure denial plaintiffs survived summary judgment. Compare *Brousard-Norcross v. Augustana Coll. Ass'n,* 935 F.2d 974 (8th Cir. 1991)(rejecting pretext argument where none of the three chairpersons in the plaintiff's department formally supported her tenure application) and *Goodship v. Univ. of Richmond*, 860 F. Supp. 1110, 1112 (E.D. Va. 1994)(entering summary judgment for the defendant University where "[a] number of University evaluators found [the plaintiff's] scholarship and research to be deficient, and cited specific deficiencies.") with *Brown* at 347(upholding discrimination claim where the plaintiff enjoyed nearly universal support of faculty, comparators were not held to same publication requirements, and there was evidence of the decisionmaker's discriminatory animus) and *Kunda v. Muhlenberg Coll.*, 621 F.2d 532 (3d Cir. 1980)(affirming jury verdict for unsuccessful tenure applicant on discrimination claim, and distinguishing case from ones which did not survive summary judgment, where plaintiff's achievements, qualifications and prospects were not in dispute and there was evidence that male comparators were treated differently).

Moreover, Dr. Hanna offers evidence that similarly-situated applicants who had published few or no articles or books were granted tenure by the Provost. For example, Dr.

Hanna cites the fact that a successful applicant, who was awarded tenure in 2010 at the age of 38, had published no books and only one refereed article. She points to another, awarded tenure by the Provost at age 41, who had published only one single-authored book and zero refereed articles. In contrast, the Provost attributed his conclusion that Dr. Hanna would not likely be a productive scholar at AU to her failure to complete a third book, which faculty advisors had told her was unnecessary to do. High-level advisors told the plaintiff that completing the book was mere "icing on the cake." In his letter of denial, the Provost does address the fact that events unfolding in the Middle East North Africa region (the "Arab Spring") prompted the plaintiff to expand the focus of her book, which she was praised for doing, from a study of one country to that of four, or that dangerous conditions in the region further encumbered the research process. Between 2010 and the time her tenure file was reviewed, Dr. Hanna had published six scholarly articles and presented her research at six conferences throughout the U.S. Such evidence supports a reasonable finding that tenure criteria were manifestly unequally applied. See *Brown* at 347.

But even if Dr. Hanna's qualifications evidence did not have probative value, she could still establish pretext. "[A]n employment discrimination plaintiff is not limited to arguing that the employer's explanation is wrong on the merits, but he can also attempt to show by other means that the explanation was made up to disguise illegitimate bias." *Aka* at 1299. The plaintiff has presented other evidence, beyond her qualifications, in support of her discrimination claim. For one, evidence of procedural regularities supports a finding of pretext in this context. See *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 314 (2d Cir. 1997). And, as discussed later in this order, the plaintiff has introduced sufficient evidence for a jury to infer that the Provost holds

biases against older workers. As such, allowing Dr. Hanna to present her case to a jury need not invite judicial recalculation of the plaintiff's scholarly merit.

American also supports its motion for summary judgment by emphasizing the probative value of its evidence that the Provost does not discriminate against older workers and attacking the plaintiff's evidence that he does. However, this argument fails as well because it does not establish the lack of a jury question.

American cites the Provost's age and evidence of his positive attitude toward older workers as precluding any reasonable inference that he harbors a discriminatory animus toward them. Mot. at 4. The plaintiff counters that the Provost's age or occupation is wholly irrelevant to whether he discriminated. She offers excerpts from the Provost's scholarship as proof that he undoubtedly holds a discriminatory animus toward older workers.

The truth is somewhere in the middle. The Provost's age permits, but does not compel, a finding of non-discrimination. See *Richter v. SupeRx Inc.*, 142 F.3d 1024 (7th Cir. 1998). As such, the significance of Provost Bass's age is a jury question. The same is true for evidence of the Provost's scholarship; it is admissible, but not conclusive. The ADEA, the federal statute prohibiting age discrimination in employment, was enacted to combat outdated stereotypes about older workers, such as the belief that their productivity levels decline with age. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."). There can be no doubt that the discriminatory animus prohibited by civil rights statutes encompasses unconscious biases and stereotypes. See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999).

Here, while the record lacks evidence of the Provost's outward hostility toward older people, it supports a reasonable conclusion that he harbors stereotypical assumptions or bias about their productivity levels in the workforce. The Provost has attributed his decision to deny Dr. Hanna tenure to his negative assessment of the likelihood of her future scholarly productivity. Dr. Hanna cites excerpts from Provost Bass's scholarship addressing the problems faced by older people in the work force, such as statements that they start to depart from the workforce after reaching age 50, that they likely seek greater flexibility in their jobs, and statements suggesting that the market can be manipulated to respond to these issues. In the overall context of this action, a jury could reasonably see the statements as evidence that the Provost harbors negative stereotypes about older workers and that those stereotypes influenced his decision to deny Dr. Hanna tenure.

Turning to American's challenges to the probative value of Dr. Hanna's evidence, the court finds such argument to be ineffective for two reasons. First, American exposes flaws in each type of evidence as if it were offered on its own. It does not establish the evidence's lack of sufficient probative value to create a jury question when considered in its totality. As well, some of the arguments are based on unsupported assumptions and are thus not persuasive.

American addresses each type of evidence offered by the plaintiff separately to identify its flaws. For example, American notes that the Provost's statements unconnected to the decision to deny Dr. Hanna tenure are "stray remarks" insufficient to survive summary judgment when offered on their own as direct evidence of discrimination. AU also argues that statistics are considered weak evidence of discrimination and viewed with skepticism when offered as proof of disparate treatment of a particular individual. However, the defendant has not demonstrated that so-called "stray remarks" or "statistical evidence" do not have probative value when offered

as one part of the plaintiff's overall showing of disparate treatment based on circumstantial evidence.

Furthermore, such an item-by-item analysis is especially inappropriate in discrimination claims based on indirect evidence. "[T]he McDonnell-Douglas framework is premised on the reality that outright admissions of impermissible [discriminatory] motivation are infrequent." *Ahmed v. Johnson*, 752 F.3d 490, 503 (7th Cir. 2014)(quotation omitted). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Wash. v. Davis*, 426 U.S. 229, 242 (1976). For that reason, "the court should not consider the record solely in piecemeal fashion, giving credence to innocent explanations for individual strands of evidence." *Howley v. Town of Stratford*, 217 F.3d 141, 151 (2d Cir. 2000). Instead, the court must "consider the question [of whether a discrimination case survives summary judgment] in light of the total circumstances of the case." *Hamilton v. Geithner*, 666 F.3d 1344, 1351 (D.C. Cir. 2012)(quotation omitted). AU's motion does not establish the insufficiency of Dr. Hanna's evidence when viewed in its totality, and that is the only inquiry the court must make.

Other challenges to Dr. Hanna's evidence are not persuasive because they rely on an unjustified assumption. Specifically, American attacks the validity of Dr. Hanna's statistics and comparator evidence based on the premise that an older worker is 40 or older. However, age, unlike other protected classes such as race and gender, is a mutable characteristic. For that reason, the Supreme Court has ruled that an age discrimination plaintiff is not limited to drawing comparator evidence from the circumstances of other individuals younger than 40 years old. *O'Connor v. Consolidated Coin Caterers Corp*., 517 U.S. 308, 313 (1996). The court finds persuasive the plaintiff's argument that age 40 is not the appropriate age for drawing a comparison in the context of tenure applications, which occur later in life than other employment

decisions. American offers nothing to counter that argument. Arguments based on such arbitrary line drawing lack sufficient cogency to establish that the evidence may not be considered by a jury.

The court also rejects American's argument that faculty outside of Dr. Hanna's field of specialty or SIS are inappropriate comparators. Whether or not another employee is similarly-situated to the plaintiff "ordinarily presents a question of fact for the jury." *George v. Leavitt*, 407 F.3d 405, 414, (D.C. Cir. 2005). Where the Provost has argued that he is not required to give deference to lower-level reviewers, account for school-specific differences, or apply school specific guidelines when judging tenure applications, and it is undisputed that all tenure applications are governed by the Faculty Manual, a reasonable juror could conclude that faculty outside of SIS are similarly-situated to the plaintiff for the purpose of serving as a comparator.

The court has considered the defendant's other evidentiary challenges to Dr. Hanna's discrimination evidence and finds that they do not warrant its exclusion at summary judgment. "A judge should not exclude evidence which a reasonable jury might find relevant unless its probative value is substantially outweighed by the danger of unfair prejudice. " *Brown* at 350. As such, the significance of Dr. Hanna's evidence must be decided by a jury, absent a more compelling argument for exclusion on motion *in limine.*

## CONCLUSION

Having concluded that academic deference does not preclude this court from reviewing the plaintiff's claims and that the record sustains a verdict for the plaintiff on both of her claims, it is this 18th day of August, 2017, hereby:

**ORDERED**, that the defendant's motion for summary judgment is **DENIED**.; and it is further

**ORDERED**, that the plaintiff's motion for partial summary judgment is **DENIED**.

**SO ORDERED**.

**Michael L. Rankin**, Associate Judge