Case No. 10-22-00282-CV

IN THE
COURT OF APPEALS
Tenth Judicial District
Waco, Texas

DR. LEONARD BRIGHT,
Appellant,

v.

TEXAS A&M UNIVERSITY,
Appellee.

On Appeal from the 272nd Judicial District Court
Brazos County, Texas
Cause No. 20-000811-cv-272

APPELLANT'S BRIEF

Gregg M. Rosenberg
Attorney-in-charge
Texas Bar No. 17268750
Rosenberg & Associates
3518 Travis, Suite 200
Houston, Texas 77002
(713) 960-8300
(713) 621-6670 (Facsimile)
gregg@rosenberglaw.com

ATTORNEY FOR APPELLANT
DR. LEONARD BRIGHT

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IDENTITY OF PARTIES & COUNSEL

Dr. Leonard Bright, Appellant

Gregg M. Rosenberg
Attorney-in-charge
Texas Bar No. 17268750
Rosenberg & Associates
3518 Travis, Suite 200
Houston, Texas 77002
(713) 960-8300
(713) 621-6670 (Facsimile)
gregg@rosenberglaw.com

Texas A&M University, Appellee

Lisa Mitchell
Attorney-in-Charge
State Bar No. 90001724
Office of the Attorney General
of Texas
Transportation Division
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1175
(512) 936-0888 (Facsimile)
lisa.mitchell@oag.texas.gov

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STATEMENT OF THE CASE

Nature of the Case:

Dr. Leonard Bright ("Bright" or "Appellant") filed his Original Petition on March 18, 2020, after Texas A&M University ("TAMU" or "Appellee") engaged in unlawful employment practices by discriminating against Bright based on his race in violation of the Texas Commission on Human Rights Act ("TCHRA") and retaliating against him after he filed a complaint with the EEOC. (C.R.1) On December 20, 2021, TAMU filed its Plea to the Jurisdiction, asserting governmental immunity because it claimed that Bright could not establish the prima facie elements of his claims. (C.R. 18) On August 5, 2022, the court granted TAMU's plea and dismissed Bright's claims with prejudice. (C.R.19) Bright then timely appealed this dismissal. (C.R.31)

Trial Court:

Cause No. 20-000811-cv-272; *Dr. Leonard Bright v. A&M University*; in the 272nd Judicial District Court Brazos County, Texas, the Honorable John Brick presiding.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that an oral argument is necessary to assist the Court in its determination of this case, particularly to address the multiple and conflicting stances on the issues at hand.

ISSUES PRESENTED

1. Whether Bright administratively exhausted all of his claims? **Yes.**
2. Whether Bright satisfied his prima facie cases for discrimination, retaliation, and hostile work environment? **Yes.**
3. Whether the evaluation of Bright's claims requires the Court to undermine an academic determination? **No.**

I. STATEMENT OF FACTS

Bright's hiring and initial conflict with William West

TAMU hired Bright in 2011 as a tenured associate professor in the Bush School of Government and Public Service ("the Bush School"). In 2013, Dean Ryan Crocker offered him the position of Assistant Dean. Bright soon learned that the interim department head William West ("West"), disagreed with his administrative appointment. West and Bright's working relationship deteriorated and, consequently, West reassigned teaching assignments that had previously been assigned to Bright's wife to the spouse of a new incoming white faculty member. Bright's wife filed a formal complaint against West,[1] and he was not renewed as Department Head. TAMU also corrected an approximate $20,000 disparity in Bright's salary, which had been initiated by West.[2]

While Bright served in TAMU's college and university level administrative roles, he maintained high productivity in research, teaching and service. Bright's research and performance always met expectations, as was reflected in his 2012-2018 annual evaluations.[3]

Bright's promotion application and subsequent denial

[1] Appendix A: Christina Bright's complaint against West.
[2] Appendix B: Bright's salary equity adjustment.
[3] Appendix C: Bright's 2012-2018 annual evaluations.

In May of 2018, Bright applied for promotion to Full Professor in the Bush School. The Bush School had never had an African American full professor, and until very recently, there were no other African American professors working at the Bush School.[4]

Despite West's documented hostility toward Bright, he was appointed to serve as the Chair of Bright's promotion process. Bright complained to the outgoing Interim Department Head about West's appointment, but nothing was done.

During the course of the promotion process, TAMU committed multiple serious violations of its written promotion guidelines, including the use of non-independent external reviewers, the majority of which were West's and other faculty members' co-authors and past coworkers in the Bush School, the failure to obtain at least four external letters from individuals in peer programs/universities, the use of double stacking of reviewers from the same institution,[5] and the failure to use an equal number of reviewers from TAMU's and Bright's lists, among other violations.[6]

[4] Appendix D: Bush School demographics chart.

[5] The rules covering external reviewers specifically state that external reviewers should have no conflict of interest, that there should be at least four letters from individuals in peer programs/universities, that they should not be from a committee member, and that more than one letter from the same institution should not be included. C.R. 28, 243-244.

[6] C.R. 18, 115.

On or about December 20, 2018, Dr. Lori Taylor ("Taylor") informed Bright that a three-member Public Service and Administration (PSAA) faculty committee voted unanimously against promotion. When Bright asked for the reasons for the decision, Taylor stated that it was Bright's low research performance. This did not make sense to Bright, as all of his annual evaluations up to that point had praised his research, and TAMU had promoted other Associate Professors to Full Professors who had much lower research performances than Bright, including Dr. William Brown.[7] Taylor then insisted twice that Bright withdraw his promotion application. When Bright refused, Taylor stated that Bright's decision was "a mistake," which Bright interpreted as a threat.

Bright's complaints to TAMU and the EEOC

On or about December 23, 2018, Bright filed a written formal complaint about the recommendation to deny promotion with Dean Mark Welsh ("Welsh"). In his complaint, Bright described the cheating and discrimination he believed occurred including evidence of his and West's contentious history.[8] On or about January 7, 2019, Bright contacted the EEOC to report these unlawful practices. On January 17, 2019, in a recorded meeting, Welsh told Bright that he would be completing his

[7] C.R. 28, 226.
[8] Appendix E: Bright's complaint to Welsh.

promotion review.[9] On January 17, 2019, Bright notified Welsh that he had contacted the EEOC.[10]

On February 1, 2019, Bright filed his formal Charge of Discrimination with the EEOC.[11] In his Charge, Bright stated that he had been discriminated against based on his race and retaliated against for complaining to the EEOC. Additionally, Bright checked the "continuing action" box, indicating that the adverse employment actions were ongoing.

On or about April 1, 2019, Bright notified the provost of his complaints in a good faith effort to resolve these issues.[12] At the provost's suggestion, Bright submitted a grievance to the University Grievance Committee (UGC).

TAMU's retaliation against Bright

The day after Bright informed Welsh that he had contacted the EEOC, Welsh told him that TAMU was allowing West to remain chair of Bright's promotion review, despite West's admission of multiple conflicts with Bright. That same day, in response to Bright's email informing TAMU of his contact with the EEOC, Welsh stated: "Since you are now alleging that both DOF and the Bush School are working against you, I will speak with Dean August to determine who should communicate

[9] C.R. 28, 230.
[10] Appendix F: Bright notifying Welsh of preliminary EEOC charge
[11] C.R. 18, 87-88.
[12] Appendix G: Bright notifying provost of EEOC Charge.

with you from this point forward,"[13] clearly indicating that he did not intend to participate in Bright's promotion review, despite the fact that he had agreed to do so the day before.

On or about August 8, 2019, Bright received Taylor's 2018-19 annual evaluation.[14] In sharp contrast to his previous evaluations, Bright's current and past research was now criticized, using evaluation ratings that were not defined in the PSAA bylaws.[15] Bright filed a grievance regarding the evaluation and, as a result, Dean Welsh rescinded the evaluation, requiring Taylor to increase her assessment to "satisfactory."[16] However, Taylor's evaluation continued to assert standards that are not defined in the PSAA Bylaws.

On or about August 23, 2019, Dean Welsh notified Bright that TAMU was restarting his promotion process, that Welsh had recused himself, and that a dean from another college had been assigned to complete the process. This put Bright at a disadvantage,[17] as the replacement dean would not have any personal experience working with Bright. On or about October 28, 2019, Bright met with Dean Welsh to determine the reasons he recused himself. Welsh indicated that he did so because he

[13] Appendix H: Welsh responding to Bright's EEOC notification.
[14] C.R. 18, 138-139.
[15] C.R. 28, 324-325.
[16] C.R. 18, 140-142.
[17] TAMU standards require a Dean level review in the promotion process. Upon information and belief, Bright is the only faculty in the history of the Bush School seeking promotion who did not have a Dean's level recommendation. C.R. 28, 229.

was angry with the actions Bright took to address the discrimination he was experiencing and stated that he would consider recusing himself from any future promotion attempts by Bright.[18] [19]

On or about October 29, 2019, Bright submitted a formal grievance to the UGC regarding the promotion process used, and the treatment he experienced.[20] On or about November 21, 2019, the UGC agreed to conduct a detailed investigation into Bright's promotion process, annual review, and merit adjustment grievances. On February 6, 2020, Bright participated in the UGC's investigation hearing.

On or about December 12, 2019, the Dean of Faculties informed Plaintiff that President Young had denied his promotion application. However, the Defendant failed to inform the Plaintiff of prior recommendations from the dean or provost levels in contradiction to TAMU's written promotion guidelines.[21]

Bright's lawsuit against TAMU

[18] Appendix I: Bright's email to the provost explaining why Welsh recused himself. Bright recalled Welsh's explanation, stating "[a]ccording to Dean Welsh, he recused himself because of the actions I took by notifying him and the university of the cheating, discrimination, and retaliation that were present in my full promotion process," which "angered him."

[19] Welsh admits in his affidavit that the reason he recused himself is that he "was extremely disappointed by what [he] considered to be unnecessarily disrespectful communications Dr. Bright sent to university staff and administrators about his allegations and the processes to consider them." C.R. 18, 158.

[20] Appendix J: Bright's 10/29/19 complaint to the UGC

[21] "Candidates should be advised, by the department head, of the recommendation for or against promotion and/or tenure ***at each level of review***." C.R. 28, 253 (emphasis in original).

On March 18, 2020, Bright filed suit against TAMU, alleging claims of discrimination, retaliation, and hostile work environment in violation of the Texas Commission of Human Rights Act (TCHRA) as amended.[22] On December 20, 2021, TAMU filed its Plea to the Jurisdiction, claiming that its sovereign immunity had not been waived because Bright could not satisfy the prima facie case for any of his claims, and because he was improperly seeking to have the Court review and overrule TAMU's academic determinations.[23]

Bright responded, arguing that he was not asking the Court to undermine an academic determination because the underlying dispute was about inconsistently applied policies, not differences in academic or scholarly opinion.[24] Bright further argued that TAMU's sovereign immunity had been waived because he had properly pled claims falling under the TCHRA, discrimination, retaliation, and hostile work environment, and satisfied the prima facie case for each of these claims.[25]

The trial court disagreed and granted TAMU's plea to the jurisdiction, dismissing all of Bright's claims with prejudice.[26]

II. SUMMARY OF THE ARGUMENT

[22] C.R. 1.
[23] C.R. 18.
[24] C.R. 28.
[25] *Id*.
[26] C.R. 19.

Bright, the only tenured Black professor in the Bush School of Government and Public Service at Texas A&M University at the time, was denied a promotion after being held to significantly higher standards than his white counterparts. When he complained, both to the University and the EEOC, TAMU took retaliatory action against him by further subjecting him to an unfair promotion review process, giving him baseless negative performance reviews, and ultimately denying his promotion application. All of these factors combined to create a hostile work environment.

Bright filed his Charge of Discrimination with the EEOC within 180 days of the discriminatory action, stated in the Charge that he was complaining of both racial discrimination and ongoing retaliation, and filed suit within 60 days of receiving his right-to-sue letter. Because Bright presented a prima facie case of discrimination, retaliation, and hostile work environment under the TCHRA, and has adhered to the requirements of the Texas Labor Code, TAMU's sovereign immunity has been waived, and the trial Court has subject matter jurisdiction.

Finally, Bright is not asking the Court to undermine any academic determinations made by TAMU. The validity of Bright's claims does not rest on the strength of his research. Rather, Bright has brought forth evidence that TAMU violated its own written rules when evaluating him for a promotion to subject him to substantially higher standards than his white colleagues.

For these reasons, and others detailed below, this Court should reverse the trial Court's dismissal of his claims and allow this case to go forward.

III. ARGUMENT & AUTHORITIES

A. Plea to the Jurisdiction

When a Defendant asks a Court to dismiss, the Court must overrule the motion unless it is clear from the pleadings and the parties' evidence that the Court lacks jurisdiction. *Texas Nat. Res. & Conserv. Comm'n v. White,* 46 S.W.3d 864, 870 (Tex. 2001). In ruling on the motion, the Court is required to construe the pleadings in the nonmovant's favor. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

As a dilatory plea, a plea to the jurisdiction is not intended to force the Plaintiff to preview his case on the merits but must establish a reason why the merits of the case should not be reached. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Additionally, "a trial court's review of a plea to the jurisdiction challenging the existence of jurisdictional facts mirrors that of a traditional motion for summary judgment. Therefore, if the evidence creates a question of fact regarding jurisdiction, the trial court must deny the plea to the jurisdiction and leave its resolution to the fact finder." *El Paso Community College Dist. v. Chase*, 255 S.W.3d 164, 167 (Tex. App.—El Paso 2011, pet. denied); *City of Celina v. Blair*, 171 S.W.3d 608, 611 (Tex. App.—Dallas 2005, no pet.) ("if the relevant evidence

is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law").

B. TAMU's Sovereign Immunity has been waived because Bright's claims properly fall under the TCHRA

Appellee argued that the trial Court did not have subject matter jurisdiction because it is entitled to governmental immunity. However, "[t]he legislature has waived immunity for claims properly brought under the TCHRA." *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 135 (Tex. 2015). For this waiver to apply, a plaintiff must "establish a trial court's jurisdiction over her TCHRA claim… [by pleading] the elements of her statutory cause of action—here the basic facts that make up the prima facie case." *Id*. In Bright's petition, he made claims of discrimination, retaliation, and hostile work environment, all of which fall under the TCHRA.

"When a plea to the jurisdiction challenges the pleadings" the Court will look to the pleadings to "determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause…constru[ing] the pleadings liberally in favor of the plaintiff[] and look to the pleader['s] intent." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Here, Bright has met his jurisdictional burden by pleading facts that establish prima facie cases for each of his claims and has shown that TAMU's proffered reasons for the adverse employment actions were pretextual. Therefore, the trial Court has subject matter jurisdiction over Bright's claims and Appellee's sovereign immunity has been waived.

i. Bright administratively exhausted each of his claims

To comply with the exhaustion requirement under the Act, an aggrieved employee is required to: (1) file with the Texas Commission on Human Rights a sworn, written complaint within 180 days of the alleged discriminatory act; (2) allow the Commission 180 days to dismiss or resolve the complaint before filing suit; and (3) file suit in district court no later than two years after the complaint is filed with the Commission. TEX. LAB. CODE ANN. §§ 21.201–.202, .208, .256 (Vernon 1996). Bright has abided by all three of these requirements.[27] [28] [29]

TAMU argued in its Plea that Bright only administratively exhausted the claim that TAMU wrongly failed to promote him in violation of the TCHRA because that is the only claim he brought in his Charge of Discrimination.[30] This is false.

As to Bright's Retaliation claim, he clearly stated in his Charge that after notifying Welsh that he "had contacted the EEOC to report an unlawful practice" he was then "told that they were stopping the decision for [his] promotion" and that he "believe[s he is] being **retaliated against** for engaging in a protected activity."[31] Clearly, Bright was complaining of more than a single instance of discrimination.

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[27] EEOC Charge filed on February 1, 2019; the first complained-of discriminatory action occurred on December 1, 2018, only 60 days earlier. C.R. 18, 87.

[28] Suit filed on March 18, 2020, well over 180 days after filing EEOC Charge, and less than two years after the first adverse employment action. C.R. 1.

[29] Bright also filed suit within 60 days of receiving his right-to-sue letter, in accordance with Texas Labor Code § 21.254. *See* Appendix K: Bright's right-to-sue letter.

[30] C.R. 18, 71.

[31] C.R. 18, 87-88 (emphasis added).

Furthermore, "it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge." *Gupta v. E. Texas State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981). "[U]nder both state and federal law, courts have held that a claim of retaliation for filing a charge of discrimination is sufficiently related to the charge of discrimination to exhaust remedies for the retaliation claim, even though the charge contains no reference to any alleged retaliation." *Texas Dep't of Transp. v. Esters*, 343 S.W.3d 226, 230–31 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Thus, Bright administratively exhausted his retaliation claim, even for instances of retaliation not specifically enumerated in his Charge of Discrimination.[32]

Second, as to Bright's Hostile Work Environment claim, in addition to stating that TAMU continued to take retaliatory action against him, he also checked the "Continuing Action" box, indicating that the unlawful practices were ongoing.[33] "[T]he 'Continuing Action' box on the EEOC charge form is for unlawful discrimination that manifests itself over time, rather than [as] a series of discrete acts." *Univ. of Texas v. Poindexter*, 306 S.W.3d 798, 808 (Tex. App.—Austin 2009, no pet.). "[A] claim of a hostile work environment is a continuing violation, while

[32] Bright has not advanced claims of discrimination for any of the conduct occurring after the February 1, 2019 filing of his EEOC Charge. Bright has asserted that the adverse employment actions occurring after that date were retaliatory, not discriminatory, in nature.
[33] C.R. 18, 87.

termination, failure to promote, denial of transfer, or refusal to hire are discrete acts." *Santi v. Univ. of Texas Health Sci. Ctr. at Houston*, 312 S.W.3d 800, 805 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Although some "specific acts by [the employer] are not mentioned in [the employee's] discrimination charge," the charge is still adequate to support a hostile work environment claim if "the charge includes an adequate factual basis to put [the employer] on notice that [the employee] was complaining of discrimination based upon his race…resulting in a hostile work environment." *Alief Indep. Sch. Dist. v. Brantley*, 558 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). In complaining of discrimination and ongoing retaliation, and checking the Continuing Action box, Bright included sufficient facts to put TAMU on notice that he was complaining of retaliation and discrimination resulting in a hostile work environment. Thus, Bright has administratively exhausted his Hostile Work Environment claim as well.

Finally, TAMU claimed in its Plea that Bright had not exhausted most of his claims because he did not raise those claims in his pleading.[34] In support of this contention, it cites to certain interrogatory responses Bright provided regarding treatment he received during his employment, *but those claims were never part of this lawsuit*.[35] It is illogical for a court to dismiss a claim that was never advanced.

[34] C.R. 18, 72.
[35] *Id.*

ii. TCHRA Racial Discrimination

To establish a prima facie case of race discrimination under the TCHRA, a plaintiff must show that he (1) was a member of the protected class, (2) was qualified for the position at issue, (3) suffered a final, adverse employment action, and (4) was either (a) replaced by someone outside the protected class or (b) otherwise, as is the case here, treated less favorably than others who were similarly situated but outside the protected class. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 632 (Tex. 2012); *AutoZone v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008). TAMU has contested the fourth element as to all of Bright's claims and the third element as to some of his claims.

As to the third element, TAMU claimed that most of Bright's claims fail to constitute an adverse employment action under the TCHRA, which only include "ultimate employment decisions" such as "hiring, granting leave, discharging, **promoting**, and compensation." *Navy v. College of the Mainland*, 407 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (emphasis added). However, TAMU's argument that "general complaints about the promotion process and Dean Welsh's recusal, by themselves, do not constitute an adverse employment action"[36] is nonsensical because Bright never claimed that these things constitute adverse employment actions "*by themselves*." Rather, Bright claimed that TAMU's

[36] C.R. 18, 76.

subjecting him to a different standard than his white comparators serves as evidence of discriminatory animus, which led to TAMU's refusal to promote him. Furthermore, none of the other "claims" TAMU mentioned (slander, incivility, misleading comments about Bright's prior charge of discrimination at Louisville, complaints about his performance reviews)[37] actually form the basis of Bright's discrimination claim. Again, TAMU has asked the Court to dismiss a claim that Bright never advanced.

As to the fourth element, TAMU claimed that the comparators Bright offered, Brown and Taylor, are not similarly situated because they work in different academic disciplines and because Brown and Taylor had supervisory responsibilities while Bright did not.[38] It is true that Courts "require that an employee who proffers a fellow employee as a comparator demonstrate that the employment actions at issue were taken under nearly identical circumstances." *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009). However, "nearly identical" does not mean *actually* "identical" because "it would only be in the rarest of circumstances that the situations of two employees would be totally identical." *Id*.

Here, neither Brown nor Taylor were supervisors of the department at the time of their promotional review, though all three did have some supervisory

[37] *Id*.
[38] C.R. 18, 74-75.

responsibilities within the university.[39] As to working in different disciplines, TAMU claims that Bright is a political scientist while Taylor is an economist and Brown has a background in organizational psychology with a focus on nonprofit governance.[40] However, Bright is not a political scientist;[41] he does not work in the political science department, his degrees are not in political science, and neither the department nor the university has ever described him as such.[42] TAMU has focused on and elevated minute differences between the three individuals in an attempt to make it seem as though they were not similarly situated at the time of their promotional reviews. All three individuals work in the same department, Brown and Bright research extremely similar topics, and, critically, all three were—or should have been—subjected to the same standards during their promotion reviews.[43]

Furthermore, the issue of similarity between Bright and his proffered comparators should not form the basis of a dismissal because "whether two

[39] C.R. 28, 229.
[40] C.R. 18, 74-75.
[41] An independent investigation conducted by a TAMU faculty committee concluded, among other things that "Dr. Bright is not a political scientist." C.R. 28, 322
[42] Bright's research into public management and motivation is a central focus of organizational psychology (the study of human behavior as it pertains to work). All three individuals work and research in the same academic discipline of Public Service Administration and Policy. *See* C.R. 28, 229.
[43] "**[T]he actual process of evaluating and discussing candidates must be systematic and uniform across candidates**." C.R. 28, 236-237 (emphasis in original).

employees are 'similarly situated' generally presents a question of fact for the jury." *Wallace v. Seton Fam. of Hosps.*, 777 F. App'x 83, 89 (5th Cir. 2019).

iii. TCHRA Retaliation

To establish a prima facie case of retaliation under the TCHRA, "[a] plaintiff must prove '(1) [he] engaged in an activity protected by the [Texas Commission on Human Rights Act][;] (2) an adverse employment action occurred[;] and (3) there exists a causal link between the protected activity and the adverse action.'" *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 585 (Tex. 2017) (*quoting Nicholas*, 461 S.W.3d, 137). "Opposing a discriminatory practice includes making an internal grievance." *Id*. TAMU has contested the second and third elements.

Regarding the second element, "the scope of the antiretaliation provision is not limited to conduct that constitutes 'ultimate employment decisions'; rather, the provision 'extends beyond workplace-related or employment-related retaliatory acts and harm.'" *Navy*, 407 S.W.3d at 901 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67, 126 S. Ct. 2405, 2414, 165 L. Ed. 2d 345 (2006)). More specifically, the retaliation provision protects employees "from actions that a reasonable employee would have found materially adverse… 'Material' employer actions are those that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers." *Donaldson v. Texas Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 442 (Tex. App.—Houston [1st Dist.] 2016,

pet. denied) (internal quotation marks and citations omitted). This is a fact-specific inquiry "because the significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington*, 548 U.S. at 69. However, 'adverse employment action' does also necessarily include ultimate employment actions, which "involve hiring, granting leave, discharging, promoting, and compensation." *Navy*, 407 S.W.3d at 899.

Here, TAMU has taken several employment actions against Bright that a reasonable employee would have found materially adverse. The day after Bright informed Welsh that he had contacted the EEOC, two retaliatory actions were taken against him: TAMU allowed West to remain chair of Bright's promotion review despite his documented animus toward Bright, and Dean Welsh indicated that he did not intend to participate in Bright's promotion review. Previously, Taylor had warned Bright that refusing to withdraw his promotion application would be "a mistake," and then, at the first annual performance review following his EEOC charge, she followed through on this threat by giving him a baseless negative review which did not align with either PSAA bylaws or earlier reviews. Only a few days later, Welsh informed Bright that he was recusing himself from Bright's promotion review, and when Bright asked why, Welsh *specifically stated* that he was angry about the way Bright had addressed the discrimination he was facing. Welsh also informed Bright that he intended to recuse himself from any of Bright's future promotion

reviews, meaning that he would continue to be at a marked disadvantage if he ever sought promotion again. Finally, TAMU denied Bright's promotion application.

TAMU addressed each of these actions independently, arguing that almost none of them, on their own, constitute materially adverse actions.[44] Courts, however, are not supposed to address each action independently, but in the larger context of the plaintiff's employment as a whole. It is true that on their own, negative performance reviews, general complaints about a promotion process, or Welsh's recusal likely would not constitute adverse employment actions. Taken together, however, they *are* materially adverse because they affected conditions and privileges of Bright's employment in that he was denied a promotion and unable to secure future raises. Finally, TAMU argued that slander and incivility do not constitute adverse employment actions.[45] It is unclear why TAMU makes this argument as those claims were never part of this lawsuit.

The third prong, causation, "is not onerous and can be satisfied merely by proving close timing between the protected activity and the adverse action." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 782 (Tex. 2018). However, "if the employer provides evidence of a legitimate reason for the adverse action…the employee must prove the adverse action would not have occurred 'but for' the

[44] C.R. 18, 75-77.
[45] *Id*., at 76.

protected activity." *Id*.

TAMU argued that there is no connection between the denial of Bright's promotion and his protected activities because he made his EEOC complaint after his promotion was recommended to be denied.[46] This is entirely misleading. TAMU uses a multi-level decision making process when conducting promotion reviews, in which each level is tasked with making an independent judgement using the input of the previous level.[47] Bright engaged in his first protected activity on December 23, 2018, when he filed a written complaint to Dean Welsh after the *first* decision making level recommended his promotion be denied. Bright then complained to the EEOC on January 7, 2019. The Department Head, College Committee Chair, Dean, Provost, and President all issued their recommendations after Bright filed his Charge.

TAMU further argued that because there were large gaps of time between the protected activity and retaliatory actions, the causation element was necessarily missing.[48] However, Bright's retaliation claim does not rest on close timing alone, as he has produced evidence linking the adverse actions to his protected activities. Bright informed TAMU that he had complained to the EEOC, and, in response, Welsh indicated that he was not going to participate in Bright's promotion review. Then, when Welsh formally recused himself from the promotion review process, he

[46] *Id*., at 77-78.
[47] C.R. 18, 112; C.R. 28, 253-254.
[48] C.R. 18, 78.

specifically told Bright that he was doing so because he was angry at how Bright chose to address the discrimination he was facing. Regarding the 2018-19 performance review, while it is true that Taylor did not write the review until months after Bright filed his Charge, it was the first opportunity she had to give him a negative evaluation following his Charge. Furthermore, a TAMU faculty committee conducted an independent investigation into Bright's 2019 and 2020 performance evaluations[49] and found that Taylor's assessments were not consistent with how she evaluated other faculty members. Thus, it is of little consequence that some of the retaliatory actions taken against Bright occurred months after his EEOC Charge, because there is evidence linking the two.

iv. TAMU's proffered reasons for its adverse employment actions are pretextual

When bringing a case for employment discrimination or retaliation, a plaintiff-employee can rely on either direct or circumstantial evidence. *Texas Tech Univ. Health Scis. Ctr.-El Paso v. Flores*, 612 S.W.3d 299, 304 (Tex. 2020). When relying on circumstantial evidence, "the employee must make a prima facie case of discrimination under the *McDonnell-Douglas* burden-shifting analysis." *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 643 (Tex. App.—Houston [1st Dist.] 2015, no pet). Under this analysis, once a plaintiff-employee has established his prima facie case for discrimination and retaliation, the burden shifts to the employer

[49] C.R. 28, 322-325.

to give nondiscriminatory reasons for the adverse employment actions. *Turner v. Kan. City S. Ry. Co.*, 675 F.3d 887, 892 (5th Cir. 2012). If the employer meets this requirement, the burden shifts back to the employee to show that the reasons given were pretextual. *Id*. An employer's failure to follow its own policies gives rise to an issue of pretext. *Goudeau v. National Oilwell Varco, L.P.*, 793 F.3d 470 (5th Cir. 2015). Bright has satisfied his prima facie case for both discrimination and retaliation, and TAMU has asserted supposedly legitimate reasons for several of its actions.

Appellee has contended that it chose not to promote Bright based on its academic judgment of his scholarship.[50] However, Bright's claims do not rest on TAMU's refusal to grant his promotion alone, but rather on the fact that the university violated its own written promotion guidelines, including: the use of non-independent external reviewers, failure to obtain at least four external letters from individuals in peer programs/universities, failure to use an equal number of reviewers from TAMU's and Bright's lists, and the use of double stacking of four external reviewers from the same two institutions, among other violations. Appellee has repeatedly attempted to hide behind the shield of "academic judgment," but failed to offer any justification for holding Bright to much higher standards than either Brown or Taylor during his promotion review process.

[50] C.R. 18, 79.

TAMU also has claimed that it gave Bright his annual reviews based on its evaluation of his performance.[51] However, it does not explain why an independent faculty committee found that Taylor's assessments in Bright's 2019 and 2020 performance evaluations were not consistent with how she evaluated other faculty members,[52] in fact that committee found that "Bright is the most cited Associate Professor in the entire Bush School" and that his research was actually cited *more* in the year that he received his poor evaluation than in previous years when his research was praised.[53] Again, Bright is not asking the Court to evaluate the quality of his research, but to note that TAMU did not follow its own rules when evaluating him.

Appellee further claimed that Bright did not receive the same raise as every other associate professor because he was not an economist.[54] However, the same independent investigation found that even when Bright's salary was compared to other Associate Professors in areas other than economics, his salary was still disproportionately low.[55]

Finally, TAMU argued that Welsh recused himself from Bright's promotion review because he felt it was the "fairest thing to do."[56] However, Welsh specifically

[51] *Id*.
[52] C.R. 28, 324-325.
[53] *Id.*
[54] C.R. 18, 79-80.
[55] C.R. 28, 329.
[56] C.R. 18, 80.

stated that he was recusing himself because he was angry that Bright had made complaints about the racial discrimination he was facing.

Bright has met his prima facie burden as to discrimination and retaliation and has provided evidence that TAMU's proffered reasons for its adverse employment actions were pretextual. Therefore, Bright has properly pled a case under the TCHRA, thereby waiving TAMU's governmental immunity.

v. TCHRA Hostile Work Environment

A work "environment is hostile when it is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment." *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 443 (5th Cir. 2012). Whether an environment is hostile "can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993).

Bright has asserted several instances of discriminatory and retaliatory behavior which made the work environment at TAMU hostile. TAMU allowed West, who had a documented history of discriminatory animus against Bright, to control the process of whether he would receive a promotion. Welsh recused himself from Bright's promotion review process, specifically because of the way Bright dealt with this discrimination, contributing to the unfairness of the promotion review. Then, TAMU denied Bright a promotion despite having promoted other Associate

Professors outside of his protected class with similar or lower performances. Bright received baseless negative annual evaluations, which did not reflect PSAA bylaws or his previous reviews and contributed to his inability to get merit-based raises. All of these incidents, taken together, unreasonably interfered with Bright's performance and conditions of his employment.

C. Bright is not seeking to challenge an academic determination

Finally, Appellee has argued that Bright's claims should be dismissed because they improperly seek to challenge TAMU's academic decisions regarding the quality of Bright's research. However, despite arguing that "*the most fatal flaw* that undermines [Bright's] suit is that he is seeking to challenge an academic determination,"[57] all but one of the cases TAMU cited in support of this contention are not controlling authority.[58]

The only Texas case TAMU cited was *Texas S. Univ. v. Villarreal*, 620 S.W.3d 899 (Tex. 2021), which is not analogous to the instant case. That case dealt with the question of "whether a state university's dismissal of a student for poor academic performance implicates a liberty or property interest." *Villarreal*, 620 S.W.3d, 903. The court mentioned in its opinion that it could not determine whether certain conditions at the university had affected the plaintiff's grade because it was

[57] C.R. 18, 67.
[58] *Id*., at 83-84.

"ill equipped to evaluate the academic judgment of professors and universities. *Id*., at 907. Here, Bright is not asking the Court to evaluate the quality of his research, he is claiming that TAMU failed to follow its own written procedures when conducting his promotion review.

The written research standards listed in the PSAA Bylaws state the research should be published in "leading" journals "in one's substantive field [sub-field]."[59] However, in Bright's promotion review process, TAMU deviated from these rules, and determined that his having published articles in journals in his sub-field was not sufficient, and instead required Bright's research to have been published in "highly ranked *general* field" journals.[60] Conversely, during Brown's promotion review, while TAMU noted that he had not published in any general field journals, it was not held against his research record.[61]

Bright is not asking the Court to determine the difference between "leading journals" and "highly ranked journals," or to compare the quality of Bright's research to that of Brown's. TAMU stated in Bright's promotion review that he did not publish articles in highly ranked general field journals; Bright is not contesting that claim, nor is he asking the Court to determine which journals are more

[59] C.R. 18, 120
[60] C.R. 18, 131-132.
[61] C.R. 28, 262-263.

academically valuable. Rather, what Bright is claiming is that a) the fact that Bright did not publish any articles in highly ranked general field journals was held against him, despite TAMU's written research standards not containing such a requirement; and b) TAMU specifically noted in Brown's promotion review that he did not publish any articles in highly ranked general field journals but promoted him anyway because he had published articles in journals in his substantive field, as was required by the rules. TAMU followed the PSAA Bylaws when determining whether to promote Brown but deviated from the Bylaws when evaluating Bright.

Additionally, TAMU stated in Bright's promotion review that his research was thin because he had not published enough articles.[62] However, Bright published fourteen articles, eight of which he published while employed by TAMU.[63] Brown, on the other hand, only published three joint articles since being employed by TAMU.[64] The University Bylaws do not require any minimum number of publications, but they do state that quality, including number of citations should be valued above sheer number.[65] In Bright's promotion review file it is noted that he has been cited over 1,000 times;[66] Brown, conversely, was cited roughly 717 times.[67]

[62] C.R. 18, 131
[63] C.R. 28, 226. Bright's promotion review mistakenly states that he published seven articles since arriving at Bush School. C.R. 18, 131.
[64] C.R. 28, 262.
[65] C.R. 18, 120.
[66] C.R. 18, 131.
[67] C.R. 28, 264.

Again, Bright is not asking the Court to make an academic determination; he is asking the Court to note that three is less than eight, and 717 is less than 1,000.

TAMU is not insulated from claims of racial discrimination simply because it is an academic institution. Bright has claimed that TAMU did not follow the same procedures during his promotion review that it used when evaluating a similarly situated white comparator. This is in no way an academic determination.

IV. PRAYER

For the foregoing reasons, Appellant Dr. Leonard Bright respectfully requests that this Court Reverse and Remand the trial court's order granting Appellee Texas A&M University's Plea to the Jurisdiction and Dismissal of Bright's claims

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limits of Rule 9.4(i)(2)(B), as it contains 6,981 words, excluding the parts of the brief that are exempted by 9.4(i)(1). This brief also complies with the typeface requirements of Rule 9.4(e), because this document has been prepared in a proportionately spaced typeface using Microsoft Word, 14-point font for the body and 12-point font for all footnotes.

Executed on October 26, 2022.

/s/ Gregg Rosenberg
Gregg Rosenberg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically on this the 26th day of October, 2022 on the following counsel:

Lisa McClain Mitchell
Assistant Attorney General Texas Bar No. 90001724
lisa.mitchell@oag.texas.gov
Office of the Attorney General of Texas
Transportation Division (020)
P.O. Box 12548
Austin, Texas 78711-2548