

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DR. RICHARD A.S. HALL, : Civil Action
 :
 Plaintiff :
 :
 v. : No. 96-4516
 :
 KUTZTOWN UNIVERSITY OF THE :
 PENNSYLVANIA STATE SYSTEM OF :
 HIGHER EDUCATION, et al., :
 :
 Defendants :

DECISION AND ORDER

Van Antwerpen, J.

January 12, 1998

I. INTRODUCTION

The parties have agreed to submit this matter for our non-jury decision without a formal trial. The parties stipulated that we shall only adjudicate liability at this stage. We have read the Jointly-Prepared Statement of Facts submitted by the parties, and we feel that it is sufficient to enable us to render a decision on the issues the parties have identified.

The Plaintiff has brought two separate claims. The first claim alleges that Defendants Brunner, Collings, and McFarland violated his right to free speech as guaranteed by the First and Fourteenth Amendments of the United States Constitution and by 42 U.S.C. § 1983. The Plaintiff alleges that these Defendants refused to hire him as a tenure-track faculty member because of controversial remarks he had made at a faculty meeting. The second claim alleges that Defendant Kutztown University is guilty of race and gender discrimination in

violation of Title VII because he was not hired as a tenure-track faculty member. The Plaintiff is a white, Anglo-Saxon male.

II. BACKGROUND

We will adopt as our findings of fact, under Fed. R. Civ. Pro. 52(a), each of the following numbered paragraphs, taken directly from the Jointly-Prepared Statement of Facts submitted by the parties.

A. Parties

1. Plaintiff Richard A.S. Hall is a British-born career academic who holds a Ph.D. from the University of Toronto and has been teaching philosophy at various colleges and universities for over 12 years. He became a United States citizen in 1985. As discussed more fully below, he held temporary appointments to teach in the Philosophy Department at Kutztown University during the 1993-94 academic year and during the Fall 1994 semester. He is a white Anglo-Saxon male.

2. Defendant Kutztown University is one of the 14 universities which comprise the Pennsylvania State System of Higher Education. There are over 7,000 full and part time students at Kutztown University, almost all from Pennsylvania and the surrounding region.

3. Defendant David McFarland is the President of Kutztown University. He has held this position since 1988. He is a white male.

4. Defendant Richard Collings was the Dean of the College of Liberal Arts and Sciences at Kutztown University from 1989-1991 and the Provost of Kutztown University from 1991-1996. He is a white male.

5. Defendant Carl Brunner is the current Dean of Liberal Arts and Sciences at Kutztown University, a position he has held on either an "acting" basis or a permanent basis since 1991. He is a white male.

B. The College of Liberal Arts and Sciences

6. Kutztown University is divided into five colleges: The College of Business, the College of Visual and Performing Arts, the College of Liberal Arts and Sciences, the College of Education, and the College of Graduate Studies.

7. There are 14 departments within the College of Liberal Arts and Sciences.

8. At any given time, there are over 200 permanent and temporary faculty members in the College of Liberal Arts and Sciences. Permanent faculty members are either tenured or on a tenure track (working toward tenure). Temporary faculty members may be employed full time or part time, and may be appointed for one or two semesters at a time.

9. Joint Exhibit A shows the total number of faculty in each department within the College of Liberal Arts and Sciences during the 1993-94, 1994-95, 1995-96, and 1996-97 academic years, broken down by sex and by minority status.

C. Past and Present Philosophy Department Faculty

10. Dr. Allan Back is a tenured member of the Philosophy Department. He has served as the Chair of the Department since 1990. He is a white male.

11. Dr. James Hall is a tenured member of the Philosophy Department. He has been teaching in that Department since 1978 or 1979. He is a white male. He is not related to the Plaintiff.

12. Dr. Phillip Ferreira was appointed to a tenure-track position in the Philosophy Department in 1992. His application for tenure was granted in May 1997. He is a white male.

13. Dr. John Lizza held temporary appointments in the Philosophy Department during the 1993-94 academic year and during the Spring 1995 semester. He was then appointed to a tenure-track position, effective at the start of the 1995-96 academic year. He is a white male.

14. Dr. Leemon McHenry held a one-year temporary appointment in the Philosophy Department during the 1995-96 academic year. He is a white male.

15. Dr. Yong Huang holds a tenure-track position in the Philosophy Department. His appointment was effective at the beginning of the 1996-97 academic year. He is a native of China.

16. Professor Charles Watkins taught philosophy at Kutztown University for 25 years. He was on sabbatical leave during the 1993-94 academic year. At the time of his retirement

at the end of the 1994-95 academic year he was a tenured full professor. He is now engaged in the private practice of law. He is a white male.

17. Dr. Raymond Lucas was a tenured professor in the Philosophy Department. He retired at the end of the 1992-93 academic year. He is a white male.

D. Faculty Evaluation

18. The procedures set forth in Article XII of the Collective Bargaining Agreement between the Association of Pennsylvania State College and University Faculties ("APSCUF") and the State System of Higher Education ("SSHE") (Joint Exhibit B) are utilized to evaluate faculty at Kutztown University.

19. Each university within the SSHE, and each department within each university, has its own evaluation procedure, which must comply with the overriding requirements of the Collective Bargaining Agreement.

20. Tenure-track faculty members are considered to be on probationary status for five years. Their performance is evaluated annually.

21. The performance of faculty members who have already been granted tenure is evaluated every five years.

22. Temporary faculty members are evaluated utilizing basically the same procedures as are utilized for tenure-track faculty members.

23. At the departmental level at Kutztown, the evaluation process has three components: a Promotion, Evaluation

and Tenure ("PET") Committee evaluation, a separate evaluation by the chair of the department, and student evaluations in all classes taught.

24. According to the Collective Bargaining Agreement (Joint Exhibit B), departmental evaluation committees shall consist of three members, selected by the members of the department, and shall not include the chair of the department. If necessary or desirable, individuals from outside a given department may serve on that department's evaluation committee.

25. In the Philosophy Department at Kutztown, PET Committees have typically included two Philosophy Department faculty members. Because the Department is small, the third member of a faculty member's PET Committee at times must come from outside the Department.

26. Under the Collective Bargaining Agreement and in practice in the Philosophy Department at Kutztown, two members of the PET Committee must each observe one class per semester taught by the faculty member being evaluated. As a practical matter, these are the only occasions when faculty members see peers teach a class.

27. The faculty member whose performance is being evaluated receives advance notice of when a PET Committee member will be observing the faculty member teach.

28. University administrators, such as deans, the provost, and the president, are not permitted to observe faculty members' teaching.

29. For each class a Philosophy Department PET Committee member attends, he or she completes a "Faculty Observation Form," the substance of which is subsequently shared with the evaluatee.

30. After the observation of a faculty member's classes has taken place, and after reviewing student evaluations of the faculty member (See Facts 32-42, infra), the Philosophy Department PET Committee, through its chair, prepares a narrative evaluation of the faculty member. This PET Committee evaluation is submitted to the Dean, Defendant Brunner. It is also shared with the evaluatee.

31. The chair of the appropriate department also evaluates each Kutztown faculty member. The chair completes a "Department Chairperson-Non-Tenured Performance Rating Report" form, which is shared with the evaluatee and submitted to the dean. The chair's evaluation is separate and independent from the PET Committee's evaluation, although the chair may see the PET Committee's evaluation before completing and submitting the chair's own evaluation of the faculty member.

32. Before the end of every semester, Kutztown students in every course are asked to complete a two-part evaluation form called the "Student Rating of Instruction" ("SRI") (Joint Exhibit C). Part A of the SRI consists of 21 multiple choice questions (each with three, four, or five possible responses); Part B of the SRI consists of two open-ended questions inviting narrative responses by the student.

33. The SRI is administered during a scheduled class period, by a faculty member other than the one being evaluated and outside that faculty member's presence. All students who are present for that particular class are invited to complete the SRI. There is no procedure for absentees to complete the SRI.

34. The faculty member administering the SRI collects the students' responses to Part A and Part B.

35. Student responses to Part A of the SRI are machine readable and tabulated by computer.

36. Until 1996, when Kutztown University acquired its own optical scanner, student responses to Part A of the SRI were tabulated at East Stroudsburg University. The process is now done at Kutztown.

37. When completed, the computer generated reports for each course taught by each faculty member are sent to the respective departments.

38. Kutztown students' responses to Part B of the SRI are held initially in the evaluatee's department.

39. Faculty members must submit their final grades for the semester before they are allowed to see either the computer-generated reports of student responses to Part A of the SRI or the narrative responses to Part B.

40. Once student responses to Part B of the SRI are released to the faculty member in question, they are considered the property of the faculty member.

41. In most departments at Kutztown, including the Philosophy Department, it is expected that faculty members will share the responses to Part B of the SRI with their PET Committees and department chairs. Philosophy Department PET Committees expect to review and consider responses to both Part A and Part B of the SRI.

42. Administrators at Kutztown University do not see student responses to Part B of the SRI unless and until a faculty member submits copies of them in support of an application for promotion or tenure.

43. After the dean receives the PET Committee and department chair evaluations concerning a faculty member, along with the student responses to Part A of the SRI, the dean reviews them.

44. Due to the sheer number of evaluations Dean Brunner must review, it is impossible for him to review each one in depth.

45. Defendant Brunner gives somewhat greater attention to the evaluations of tenure-track faculty members than he gives to the evaluations of temporary faculty members. He believes this is justified because the University necessarily makes a bigger investment in, and is more committed to, the professional development of its tenure-track faculty, as distinguished from its temporary faculty. In most cases, a tenure-track faculty member can be expected to teach at Kutztown for many years. The tenure rate is very high. In contrast, temporary faculty members

are hired for limited periods, with no assurance of ongoing employment. There are, however, faculty members who have received multiple temporary appointments, in increments of one semester or one year at a time.

46. In reviewing the evaluations of a tenure-track faculty member, Dean Brunner may zero in on and comment upon any weaknesses which have been identified by the person's PET Committee or chair or which he himself has detected. Formulating strategies for constructive change is less of a concern for temporary faculty with limited duration appointments.

47. In addition, Dean Brunner takes note of tenure track faculty members' scholarly growth and service. There is no expectation that temporary faculty members will engage in scholarly activity or community or college service, although some do.

48. In reviewing responses to Part A of the SRI, Dean Brunner focuses on what he considers the most important questions: 1, 2, 3, 9, 10, 11, 12, 17, and 20.

49. On question 1, regarding the instructor's preparation, Dean Brunner expects at least half the class to answer "always" (A) and most of the rest to answer "most of the time" (B).

50. On question 2, regarding whether course material is effectively organized, Dean Brunner expects almost all students to answer "yes, generally."

51. On question 3, regarding clarity of presentation, Dean Brunner said that he would question teaching effectiveness if 15% or more of the students answered "less than half the time" (C) or "hardly ever, if at all" (D).

52. On question 9, regarding whether the instructor treats the students with respect and without prejudice, Dean Brunner expects at least 90% of the students to answer "always" (A) or "most of the time" (B).

53. On question 10, regarding whether the instructor maintains good interpersonal relations with the class, Dean Brunner expects a majority of the students to answer "yes" (A).

54. On question 11, regarding whether the objectives and student responsibilities of the course were made clear at the beginning of the term, Dean Brunner expects a majority of the students to answer "yes" (A).

55. On question 12, regarding the extent to which instruction (including teaching methods) was consistent with course objectives, Dean Brunner expects the majority of students to answer "always" (A) or "most of the time" (B).

56. On question 17, which asks "Were graded materials returned soon enough and with sufficient review or evaluation to be useful in the learning process?" Dean Brunner expects a majority of the students to answer "always" (A) or "most of the time" (B).

57. On question 20, which asks for an overall rating, Dean Brunner finds it troubling if 10% or more of the students

(in a class of at least average size) consider the faculty member to be "poor" (D) or "very poor" (E).

58. Dean Brunner gives student evaluations "substantial credibility" and considers them very important. He gives less weight to evaluations by department chairs and PET Committees, noting that observations of peers' classes are scheduled, and that it can be difficult to evaluate one's colleagues.

59. There are many possible explanations for seemingly "high" or seemingly "low" numbers on a faculty members' student evaluations (Part A). For example, high numbers may mean that a faculty member is an excellent teacher, or they may mean that the professor is not especially good but is well-liked for giving lots of high grades. Similarly, low numbers may reflect objectively poor teaching or student resentment for a professor's being demanding.

60. Unlike individual faculty members or even department chairs, administrators such as Dean Brunner and Provost Collings routinely see hundreds of evaluations. Administrators therefore have a basis for informally comparing a given faculty member's evaluations to what appears to them to be "typical" or "average" college-wide or university-wide. However, the University does not compile comprehensive statistical analyses of faculty evaluations.

60a. During their depositions, some members of the Philosophy Department testified that they had the impression that

the administration evaluated the teaching of women and/or minorities more leniently than the teaching of white males. Although certain individuals in other departments were mentioned by name, no Philosophy Department faculty member had ever seen those individuals' actual evaluations, nor did any of them have any first hand knowledge of how anyone in the administration in fact viewed the teaching of the individuals in question.

61. After reviewing a faculty member's PET Committee, department chair, and student evaluations (Part A), Dean Brunner transmits them to the Provost, with a cover memo. For temporary faculty members, the Dean's cover memorandum has always tended to be brief. In recent years, Dean Brunner has adopted a form for this purpose.

62. The provost, in turn, reviews the faculty member's evaluations and the dean's cover memo and transmits the entire package to the president of the university with a second cover memo.

63. Because the provost is required to review all faculty evaluations for the entire university, the provost is constrained to pay even less attention than the deans to each individual evaluation. While at Kutztown, Provost Collings relied heavily upon the deans of the colleges, including Dean Brunner, to alert him to problems with any faculty member's performance. In the absence of any indication of trouble, Provost Collings routinely transmitted evaluations to the President (for placement in the faculty member's official

personnel file) with the simple comment that he was "in substantial agreement" with the faculty member's dean.

64. To the extent that Provost Collings scrutinized responses to Part A of the SRI during his tenure at Kutztown, he paid most attention to whether the instructor was organized (question 2), whether the instructor returned assignments in a timely manner (question 17), whether the instructor respected students (question 9), and whether there were good relations between the faculty member and students (question 10). More generally, he looked for any responses at the far end of the scale for any given question.

65. Provost Collings was also interested in whether the PET Committee and department chair evaluations were generally consistent with each other and with the faculty member's student evaluations.

66. With regard to the Philosophy Department, Provost Collings feels that Dr. Back, Dr. J. Hall, and Professor Watkins had moderate credibility. He would not disregard what any of them said, but he was not sure any of them was prepared to make "really tough decisions" about colleagues. This is not unusual in academia, where evaluatees see what evaluators write, and faculty members have to live with their peers as office mates and colleagues.

67. Joint Exhibit D consists of the PET Committee, Department Chair, and student evaluations (Part A) of the Plaintiff's performance during the three semesters he taught at

Kutztown as a temporary faculty member, along with 1994 and 1995 cover memos by Dean Brunner and Provost Collings.

68. Available evaluations of Philosophy Department faculty members John Lizza, Leemon McHenry, and Yong Huang are attached as Joint Exhibits E, F, and G.

69. Student evaluations (Part A) of five individuals in addition to Dr. Lizza, who had full-time temporary positions in the College of Liberal Arts and Sciences at Kutztown, and who subsequently received tenure-track appointments in their respective departments during the time period in question, are attached as Joint Exhibits H, I, J, K, and L. (It has not been possible to determine whether there were other temporary faculty members who applied for but did not get tenure-track appointments during the same period.)

E. Faculty Hiring at Kutztown

70. Article XI of the Collective Bargaining Agreement between AFSCUF and SSHE (Joint Exhibit M) sets forth general requirements for faculty hiring by SSHE universities, including Kutztown University.

70a. Each university also has its own local procedures for hiring faculty members. Joint Exhibit N is a copy of Kutztown's local procedure.

71. In general, the process of hiring both temporary and permanent faculty members at Kutztown begins when a department chair submits a completed Request to Hire form to the

dean of his or her college. If the dean approves the request and signs the form, he or she transmits the form to the Provost.

72. After the Provost approves a Request to Hire, a search committee is formed.

73. In the Philosophy Department, search committees are comprised of all tenured or tenure-track faculty, except the Chair of the Department. The position of chair of the search committee is rotated.

74. In the Philosophy Department, the chair of the search committee prepares an advertisement, and solicits the input and approval of other members of the search committee. Although there are specialties within the discipline of Philosophy, the Philosophy Department at Kutztown has sought to attract the widest possible pool of applicants, and therefore has worded its advertisements broadly.

75. A department's proposed advertisement for a faculty position must also be approved by the appropriate dean and the Affirmative Action Office.

75a. In general, in recent years, Kutztown University has wanted to add more qualified women and minorities to its faculty (and to diversify its staff and student body).

75b. Kutztown's goals are consistent with the "Equity Plan" of the SSHE. The Equity Plan touches upon many areas of university operations and policies. One of them is faculty hiring. Under the Equity Plan, it is recommended that the

faculty and administration at each SSHE institution support diversification of the institution's faculty.

76. After the text of an advertisement is approved, the Affirmative Action Office determines where the advertisement will be placed. Kutztown Philosophy Department search committees routinely ask that their advertisements be placed in The Journal of Philosophy. In addition, the University routinely places advertisements for faculty positions in The Chronicle of Higher Education, Hispanic Outlook, Women in Higher Education, and Black Issues in Higher Education.

77. Precisely when advertisements for faculty positions are run depends on factors such as when the position was authorized, how long it takes the department to propose a job description and advertisement, the expense of placing advertisements where proposed by the department, and the belief that advertisements run in The Chronicle of Higher Education just before Christmas break will not be widely read.

78. Advertisements for philosophy positions direct candidates to send their applications to the search committee chair. The Philosophy Department secretary creates a file for each application, puts the files in alphabetical order, and sends the names and addresses of the applicants to the Affirmative Action Office. The Affirmative Action Office, in turn, sends the applicants a questionnaire, asking them to specify their gender and minority status.

79. Based upon applicants' responses to the Affirmative Action Office questionnaire, the Affirmative Action Office may send a memorandum to the chair of a department's search committee, listing the names of one or more applicants who have identified themselves as women or minorities; asking that their resumes be reviewed; and strongly encouraging the search committee to interview the applicants "if it is determined that they meet the qualifications of the position." Joint Exhibit O consists of examples of such memoranda.

80. At the beginning of any search, the affirmative action officer is responsible for explaining applicable procedures and guidelines to the chair of the departmental search committee.

81. During the period in question, Kutztown University's affirmative action policy was summarized in a document titled "Hiring the Most Qualified Candidate" (Joint Exhibit P).

82. Dean Brunner's, Provost Collings's, and President McFarland's understanding of the concept of voluntary affirmative action, which they have each expressed publicly on various occasions, is consistent with the policy set forth in Joint Exhibit P.

83. The University's policy is to solicit and consider as diverse a group of applicants as possible, and always to hire the best qualified candidate regardless of race, sex, or any other personal characteristic.

84. Over the years, Philosophy Department search committees have utilized substantially similar search procedures, but there have been variations depending upon who is serving as chair of the committee for a given search.

85. In general, members of the search committee must screen a large volume of applications and, through a process of elimination, arrive at a "short list" of 10-20 candidates who will be given the most serious consideration.

85a. In the Philosophy Department, committee members screening applications consider factors such as candidates' academic preparation; teaching experience; publications and other contributions to the profession; past community and university service; and the extent to which candidates' backgrounds and areas of specialization complement those of others in the department. As a general rule, Philosophy Department search committees have in the past subscribed to the view that the more years of teaching experience a candidate has, the better.

86. Even after the pool is narrowed to a short list, there is additional debate regarding which candidates will be invited to campus for an interview. Normally, due to budgetary and time constraints, no more than 4 or 5 candidates for a single position can be brought to Kutztown for an interview.

87. During the time period at issue in this case, Dean Brunner, the Affirmative Action Officer, and the chair of a departmental search committee would jointly review any

departmental short list before the department would be permitted to invite any candidates to Kutztown for interviews.

88. After the proposed list of interviewees is approved, the search committee chair invites candidates for interviews and (for those candidates who accept the invitation) makes arrangements for them to come to Kutztown.

89. When visiting Kutztown University, candidates for positions in the Philosophy Department teach a class, give a presentation to the Philosophy Club, meet with Department faculty, and have an interview with the Dean. The Department has invited Dean Brunner to attend the Philosophy Club presentations, but--because his schedule does not permit him to attend all of these sessions--he has decided it is fairer for him not to attend any of them.

90. The Collective Bargaining Agreement provides that, after interviews are completed, a majority of the regular full-time department faculty must arrive at a hiring recommendation. The Philosophy Department operates by consensus rather than by strict majority vote.

91. At this point, the chair of the search committee completes a Candidate Approval Form, addressed to the Provost. The signature of the search committee chair reflects the fact that a majority of the regular full-time faculty concur in the recommendation.

92. The Candidate Approval Form must also be signed by the department chair. The department chair may or may not

agree with the departmental recommendation. However, in the Philosophy Department, Dr. Back has consistently taken an active role in the search process, including the committee's deliberations, so the Department's recommendation and the chair's recommendation are effectively one and the same.

93. At Kutztown, the dean of the appropriate college reviews each department's hiring recommendations.

94. In reviewing a department's recommendation to hire a candidate, Dean Brunner--who will already have interviewed the candidate--compares the candidate's qualifications to those called for in the published job description, to verify that the candidate qualifies for the position. He also reviews the candidate's CV, checking his or her past employment, length of service at other institutions, and courses taught. If past student evaluations of the candidate's teaching are forwarded to him, he reviews those as well, but he does not draw any negative inference if student evaluations are not provided, because not every department asks candidates to submit them, and not every candidate has written evaluations to submit in support of an application.

95. After the dean reviews the recommendation, the Candidate Approval Form is forwarded to the affirmative action officer, who is asked to certify that the search complied with the University's affirmative action procedures.

96. Thereafter, the recommendation is sent to the Provost and, from there, to the President, who is the final

decision-maker for faculty hiring. President McFarland, however, delegates most of his responsibility for faculty hiring to the Provost. The President does little but sign contracts. Only in those rare situations when there is a contentious situation between a department and/or a dean and/or the Provost does President McFarland review hiring recommendations in greater detail.

97. Dean Brunner does not recall any occasion between 1993 and 1996 when Provost Collings disagreed with his conclusion regarding whether a person should be hired for a temporary or tenure-track faculty position.

98. Similarly, President McFarland has agreed with all or virtually all of Provost Collings's conclusions regarding faculty hiring during the time period at issue in this case.

99. After a position is filled, the department is supposed to submit "pink sheets," "green sheets," and an Affirmative Action Summary form to the Affirmative Action Office. Green sheets list candidates who were not interviewed, and the reasons for this; pink sheets list candidates who were interviewed and identify the person actually hired for the position.

100. Joint Exhibit Q shows the total number of tenure-track and full time temporary faculty members hired in the College of Liberal Arts and Sciences at Kutztown University for the 1993-94, 1994-95, 1995-96, and 1996-97 academic years, broken down by sex and by minority status.

101. During the time period in question a total of six individuals who had temporary faculty appointments in the College of Liberal Arts and Sciences at Kutztown were subsequently appointed to tenure-track positions. These include Dr. Lizza in the Philosophy Department and five individuals in other departments who were identified during discovery as white male #5, white female #5, white male #3, white male #14, and "the black female biologist."

102. Dean Brunner testified that no pressure to hire women and/or minorities, rather than white males, was exerted upon him or by him.

103. During their depositions, some members of the Philosophy Department testified that they had the impression that the administration preferred that women and/or minorities--rather than white males--be hired for the Kutztown faculty. These Department members acknowledged, however, that no one ever said this explicitly, and they could not identify any documents or other concrete evidence which would support this testimony, except one faculty member did cite the hiring of a black female in the Biology Department.

104. The hiring of the "black female biologist" to a tenure-track position came about in the following manner. During the 1993-94 academic year, when the "black female biologist" was working at Kutztown under a temporary appointment, the Biology Department conducted a search for a tenure-track faculty member. The Department's first choice was an applicant from outside the

Kutztown University community, who was a Filipino woman. The "black female biologist" was the Department's second choice. Knowing this, and knowing that the Biology Department wanted and could actually use another tenure-track faculty member, the administration offered to convert an existing temporary position to a tenure-track position, provided that the Department recommended the "black female biologist" for this second tenure-track position. The Department agreed to this, and the "black female biologist" and the Filipino woman were both appointed to tenure-track positions that year.

104a. Provost Collings testified that two factors entered into the decision to authorize two tenure-track appointments in the Biology Department at that time: There was a real need in the Department to fill the position on a permanent basis; and appointing the "black female biologist" to a tenure-track position would help diversify Kutztown's permanent faculty.

F. Initial Hiring of the Plaintiff and Dr. Lizza

105. At the beginning of the 1992-93 academic year, it was known that Professor Watkins would be on sabbatical leave the following year.

106. The Philosophy Department therefore submitted a Request to Hire form, seeking approval to fill Professor Watkins's position on a temporary basis.

107. For budgetary reasons, Dean Brunner held this form without action for a period of time.

108. Toward the end of 1992, the possibility that Dr. Lucas might retire also arose. This would result in another vacancy in the Philosophy Department.

109. In December 1992, the Philosophy Department was given conditional approval to advertise to fill one or two vacancies, contingent upon funding and administrative approval.

110. In February 1993, shortly after Dr. Lucas confirmed that he would indeed retire, Dean Brunner and Provost Collings approved the filling of two temporary positions in the Philosophy Department. (Initially one of the positions was expected to be full-time and the other 3/4-time, but both were ultimately filled on a full-time basis.)

111. A search committee was duly established. It was chaired by Dr. J. Hall and included Professor Watkins and Dr. Ferreira.

112. The Committee reviewed numerous applications, including ones submitted by the Plaintiff and Dr. Lizza.

113. On April 30, 1993, Dr. Back expressed the view that Dr. Lizza and a Dr. Hobbs should be hired for the two available positions. Dr. Hobbs, however, accepted a position elsewhere.

114. On May 5, 1993, Dr. J. Hall, on behalf of a majority of the regular full-time faculty in the Philosophy Department, formally recommended that Dr. Lizza be hired for one of the two available temporary positions. As Department Chair, Dr. Back concurred. Dean Brunner approved this recommendation on

May 19, 1993, and Dr. Lizza was indeed hired at the rank of assistant professor for the first of the two temporary positions.

115. Some time before June 10, 1993, Dr. Back remarked to Dean Brunner something to the effect that the Plaintiff "is really not a philosopher, but is more a student of American Studies." Dr. Back went on to add that plaintiff was nevertheless an acceptable candidate for the available temporary position, with the rank of assistant professor.

116. On June 10, 1993, Dr. Back signed a standard Candidate Approval Form, which had already been signed by the chair of the search committee, Dr. J. Hall, formally recommending that plaintiff be hired for the second available temporary position in the Philosophy Department. Dean Brunner approved this recommendation on June 28, 1993, and plaintiff was in fact hired for the second available temporary position, at the rank of assistant professor.

117. Joint Exhibit R is a copy of the "pink sheet" completed at the end of the 1992-93 search.

G. The General Education Model

118. General Education is one component of a student's baccalaureate degree program (the other component being the student's major area of study).

119. In 1991, Kutztown University established a General Education Task Force to analyze the underlying goals of general education, articulate those goals, make recommendations for

improving general education at the University, and present a new model for general education.

120. On August 30, 1993, the General Education Task Force disseminated a Proposed Model for General Education (Joint Exhibit S) to the Kutztown University community.

121. The Task Force scheduled a series of open meetings for September 7 and 9 and October 21, 1993, during which members of the university community could obtain additional information and suggest revisions to the Proposed Model for General Education.

122. By memorandum dated March 28, 1994 (Joint Exhibit T), Dean Brunner notified all faculty in the College of Liberal Arts and Sciences that he was scheduling a college faculty meeting for April 19, 1994, to discuss the Proposed General Education Model.

123. Dean Brunner did in fact conduct such a faculty meeting.

124. During the April 19, 1994 faculty meeting, Dean Brunner reviewed the various components of the General Education Model, seeking input from his faculty.

125. The Plaintiff recalls Dean Brunner saying something toward the end of the meeting to the effect of, "I don't see how there could be, but is anyone here opposed to multi-cultural education?" Dean Brunner is not sure he used these words, but it is undisputed that the Plaintiff raised his hand and was recognized.

126. It is also undisputed that the Plaintiff's ensuing remarks were expressed in a dramatic and forceful manner.

127. The Plaintiff, Dean Brunner, and others have differing recollections of exactly what the Plaintiff said during the faculty meeting.

128. The Plaintiff's recollection is that he said multicultural education is not a good thing. He recalls speaking at some length about "barbaric" practices engaged in throughout the world, such as female circumcision in the Sudan, slavery in other African countries, bride-burning in India, and discrimination against women in Islamic countries. The Plaintiff recalls saying that Westerners have a moral duty to stand up against such objective evils. Overall, according to the Plaintiff, his remarks reflected the philosophical doctrine of moral absolutism, as opposed to moral relativism.

128a. Dr. Back has a recollection of the Plaintiff making comments at a faculty meeting. His recollection is generally consistent with the Plaintiff's testimony.

129. Dean Brunner recalls the Plaintiff stating bluntly that there are certain cultures he (the Plaintiff) "abhors." Dean Brunner does not remember the Plaintiff engaging in an extended discourse about specific cultural practices.

130. Dean Brunner recalls that a hush fell over the room as the Plaintiff spoke.

131. Similarly, the Plaintiff does not recall any discussion following his monologue. According to the Plaintiff,

no one specifically opposed him from the floor; no one questioned him; no one approached him afterwards to express disagreement.

132. Dean Brunner remembers two faculty members who reacted to the Plaintiff's comments: Dr. Cherry Mauk, Chair of the Mathematics Department, and Dr. Debbie Sieger, Chair of the Social Work Department. According to Dean Brunner, Dr. Mauk rose during the meeting and said "I don't abhor any culture [although] I may dislike certain practices of a culture." Dean Brunner recalls Dr. Sieger coming up to him after the meeting and saying something to the effect of "Why do we have somebody like that on our faculty?"

132a. Dean Brunner did not respond to the Plaintiff's remarks (or to Dr. Sieger's question), but personally thought it strange that somebody, in such a dramatic way, would indicate that they abhorred certain cultures.

133. Dean Brunner stated that as far as he is concerned, faculty members are free to express their views at faculty meetings, whatever those views happen to be.

134. In contrast to the Plaintiff and Dean Brunner, Dr. Ferreira recalls a number of people responding directly to the Plaintiff's remarks. Dr. Ferreira believes that the Plaintiff and these other faculty members were engaged in a good, healthy exchange of ideas.

135. It is possible that Dr. Ferreira's description of events relates to discussions which occurred at one of the earlier meetings conducted by the General Education Task Force,

where the Plaintiff may also have expressed his views, as distinguished from the April 19, 1994 College of Liberal Arts and Sciences faculty meeting conducted by Dean Brunner.

136. Dean Brunner is quite sure that Provost Collings did not attend the April 19, 1994 College of Liberal Arts and Sciences faculty meeting. Provost Collings, on the other hand, remembers an event (not necessarily a faculty meeting) when the Plaintiff vocally objected to clitoral mutilation. On the occasion Provost Collings recalls, the Plaintiff expressed the view that not all cultures are equal. Provost Collings does not remember anyone complaining about that statement at the time.

137. President McFarland was not present at the April 19, 1994 faculty meeting or on any other occasion when the Plaintiff spoke out, and states that he does not even recall hearing about the Plaintiff's comments (whatever they were) until this lawsuit was filed.

138. Like Dean Brunner, both Provost Collings and President McFarland profess to be sensitive to the concept of academic freedom and comfortable with the notion that faculty members are free to express themselves openly at faculty meetings and elsewhere.

138a. Dr. Ferreira testified that he heard some members of the English and History Departments (whose names he could not recall) characterize the Plaintiff as a "fascist" for the views he had expressed at the April 19, 1994 faculty meeting.

138b. Bruce Ezell is the Dean of the College of Graduate studies and Extended Learning at Kutztown. He was acquainted with the Plaintiff, but only on a limited and personal basis. (There is no graduate program in Philosophy at Kutztown.) Dean Ezell recalled that at some point it became "fairly common knowledge," through the campus rumor mill, that the Plaintiff had made some sort of speech at a meeting. Dean Ezell was not present at any such meeting and he has no personal knowledge of the content of the Plaintiff's remarks or the reaction to them.

H. 1993-94 Search (for 1994-95 Academic Year)

139. Beginning in the Fall 1993 semester, the Philosophy Department undertook a tenure-track search to find a permanent replacement for Dr. Lucas.

140. Dr. J. Hall chaired the 1993-94 search committee (as he had the previous year).

141. The Department prepared an advertisement, which was duly approved (Joint Exhibit U). Accordingly, the position was advertised, and well over 200 applications were received.

142. Both the Plaintiff and Dr. Lizza were among the applicants for the tenure-track vacancy.

143. In due course, the search committee sought permission to interview a number of candidates, none of whom was female.

144. On April 1, 1994, Dean Brunner, Affirmative Action Officer Shirleen Dixon, and Search Committee Chair Dr. J. Hall

met to discuss the search committee's request to interview candidates.

145. According to Dean Brunner's notes from the April 1, 1994, meeting, there were 230 applicants in the total pool, including 24 women, 8 of whom had Ph.Ds.

146. Ms. Dixon and Dean Brunner were concerned that the list of proposed interviewees did not include any women.

147. Dean Brunner asked Dr. J. Hall to explain why none of the women applicants had made the short list.

147a. Under Kutztown's local hiring procedures, the basis for eliminating a candidate from consideration is supposed to be specific. The parties agree that, for anyone, and in any search, the clear-cut failure of a candidate to meet the minimum stated qualifications for a position justifies excluding that individual from further consideration. There are also other "red flags," which usually justify eliminating a candidate from further consideration, such as unexplained time gaps in the person's background, inconsistencies in the person's application materials, or excessive "job-hopping" by the person. In any individual case, there may be other valid reasons for eliminating a particular candidate.

148. Dean Brunner was not persuaded by Dr. J. Hall's explanation for not including any women on the short list--that the women applicants were not sufficiently well-qualified for the position. Dean Brunner noted, for example, that the published qualifications for the job included three years experience, which

at least some women applicants had, yet the women were disqualified because they had insufficient experience (compared to other applicants). Dean Brunner also felt the search committee's screening criteria were vague.

149. Dean Brunner and Ms. Dixon requested that the search committee review the pool again and give greater consideration to women and minority applicants.

150. In response to this request, the search committee did conduct a review. They had previously ranked the top candidates and assigned each a numerical score. For purposes of their review, they assigned additional points to the "affirmative" candidates, thus increasing those candidates' overall scores and raising their respective ranks on the committee's master list. This information was then compiled in a document titled "Statistical Review of Candidates" (Joint Exhibit V).

151. On or about April 26, 1994, Dr. J. Hall submitted the Statistical Review of Candidates to Dean Brunner and Ms. Dixon.

152. Dean Brunner, Ms. Dixon, and Dr. J. Hall again discussed the search committee's request to interview candidates, as well as the Statistical Review of Candidates.

153. At some point, Ms. Dixon made a comment to the effect that the Philosophy Department had not been engaging in affirmative action because, when she looked around the room, all she saw were "white male faces."

154. The members of the Philosophy Department have stated that they genuinely believed that they had conducted an "affirmative" search. They did not understand the criticism and questions raised by Dean Brunner and Ms. Dixon. Nor did they understand what they could or should have done differently.

155. On the other hand, Dean Brunner has stated that he genuinely believed that the Philosophy Department either had not given bona fide consideration to women and minorities in the first instance or, at a minimum, had failed to provide persuasive explanations for the elimination of women and minority candidates from further consideration.

156. Dean Brunner and Ms. Dixon refused to approve the Philosophy Department's request to interview any candidates, because no women or minority candidates were on the short list and the committee's explanation for this was not considered acceptable. Thus the tenure-track search was effectively aborted.

157. In the ensuing weeks, there were a number of further meetings and discussions involving the Dean, the Provost, the search committee, and the Department Chair.

157a. Dr. Ferreira recalls both the Dean and the Provost telling the Philosophy Department that publications and teaching experience should not be weighted so heavily for "affirmative" candidates because young females and minorities just out of graduate school are unlikely to score high in those areas.

157b. Provost Collings stated that his focus was on getting more women and minorities into the pool in the first place. He recalls learning from Dr. Back that there are women "out there" who have Ph.Ds in philosophy, yet relatively few of the applicants for the position at Kutztown were women (or minorities). His instinct was to "try again" and "do it differently."

157c. Provost Collings and President McFarland refused to override Dean Brunner's decision to abort the search.

157d. Eventually, the Department and the administration arrived at a compromise, whereby the existing vacancy would be filled on a temporary basis for the 1994-95 academic year, when a new tenure-track search would be conducted.

157e. As part of this compromise, it was agreed that the Plaintiff would be given a temporary appointment for the Fall 1994 semester, and Dr. Lizza would be given a temporary appointment for the Spring 1995 semester. Both of these appointments were at the assistant professor level.

158. As events unfolded, members of the Philosophy Department came to believe that the administration had a certain outcome--the hiring of a woman or a minority--in mind and wanted the Department to bring this to pass. This, however, was never stated to anyone explicitly, verbally or in writing. To the contrary, Dean Brunner, Provost Collings, and President McFarland maintained in 1994, and have consistently maintained, that their goals were to take advantage of the rich pool of applicants

available to the University, and to select the best qualified candidate from the broadest possible pool for any position in the Philosophy Department (or elsewhere), whether that person turned out to be a woman or a minority or not.

I. 1994-95 Search (for 1995-96 Academic Year)

159. In the Fall of 1994, the vacancy which had resulted from Dr. Lucas's retirement still had not been permanently filled, and Professor Watkins had decided to retire. The Philosophy Department therefore undertook to fill two tenure-track positions.

160. Despite his planned retirement, Professor Watkins was chosen to chair the search committee, which also included Dr. Ferreira and Dr. J. Hall.

160a. Joint Exhibit W is a copy of the job advertisement prepared and approved in September 1994.

161. Professor Watkins happens to be an ardent critic of affirmative action. He believes it is illegal to hire a woman and/or minority group member because of gender, race, or national origin. There is no evidence that he harbors any personal biases against any group.

162. Despite his anti-affirmative action viewpoint, Professor Watkins endeavored to ensure that the Philosophy Department vacancies were widely advertised. His actions included identifying an additional publication aimed at females and/or minorities in which the Department could advertise the vacancies.

163. Over 300 people, including the Plaintiff and Dr. Lizza, applied for the two tenure-track vacancies in the Philosophy Department.

164. Dr. Back attended the American Philosophical Association convention at the end of December 1994 and conducted brief interviews with a number of potential candidates who were present at the convention, particularly women and minorities.

165. Utilizing their own professional judgment, and without employing a numerical scoring system, the members of the search committee reviewed each of the hundreds of applications they had received.

166. On January 18, 1995, Professor Watkins submitted a short list to the Affirmative Action Officer, Shirleen Dixon (Joint Exhibit X). In this memorandum, Professor Watkins listed 11 male candidates the search committee and Department Chair had selected for "further review," including Dr. Lizza and the Plaintiff. The memorandum also identified two women the committee was willing to interview in addition to, but not instead of, the eleven males.

167. Ms. Dixon approved the list, and on January 19, 1995, Professor Watkins submitted a similar, more detailed memorandum to Dean Brunner (Joint Exhibit Y).

168. The committee was given permission to interview six men (Fieser, Beckwith, Matusick, Mendell, Sartwell, and Michael) as well as the two women (Gordon and Sample), along with Dr. Lizza and the Plaintiff (who would be on campus anyway).

169. Interviews were conducted, although some candidates (including Gordon and Sample) declined to be interviewed or did not keep their appointments.

170. A consensus to recommend Dr. Lizza for one of the two tenure-track vacancies developed relatively quickly. (Joint Exhibit Z is a copy of Dr. Lizza's C.V., summarizing his background and qualifications.) By memorandum to Dean Brunner dated March 20, 1995, Professor Watkins informed the Dean of this recommendation.

171. The recommendation to hire Dr. Lizza was accepted by the administration without question or debate, and he was in fact appointed to a tenure-track position, with the rank of assistant professor, effective as of the start of the 1995-96 academic year.

172. The search committee had difficulty deciding whom to recommend for the second position.

173. On April 27, 1995, Professor Watkins sent a memorandum to Ms. Dixon, informing her that the search committee had decided to extend its search and requesting permission to interview two more candidates (Joint Exhibit AA). The memo listed four potential additional interviewees, including one woman who had been added to the list because of her sex. Permission was granted.

174. Two of the four additional candidates came to Kutztown for on-campus interviews in early May.

175. After these additional interviews, the search committee and Dr. Back continued their deliberations.

176. Dr. J. Hall and Dr. Ferreira supported the Plaintiff for the second position.

177. Professor Watkins had not supported the Plaintiff's candidacy in the past but he eventually changed his position. He was influenced by Department members who had gotten to know the Plaintiff during his (Professor Watkins's) sabbatical. He also concluded that he should yield to his colleagues because his retirement was imminent.

178. Dr. Back was not entirely enthusiastic about the Plaintiff's candidacy. He was concerned about the breadth of the Plaintiff's academic background, and his corresponding lack of depth as a philosopher. He was also concerned about the quality of the Plaintiff's teaching. Upon observing one class session, however, he saw that the students in that particular class responded well to the Plaintiff's teaching style. In addition, he felt that every new Kutztown faculty member must undergo an adjustment period, and that the Plaintiff's weaknesses as a teacher were corrigible. Dr. Back therefore decided to support the recommendation to hire the Plaintiff.

178a. On or before May 18, 1995, Dr. Back spoke to Dean David Diaz of Fayetteville State University, where the Plaintiff was then teaching. According to Dr. Back, Dean Diaz praised the Plaintiff's teaching and service and said that he had high teaching evaluations.

178b. Dr. Back further testified that he approached Dean Brunner informally after a meeting of department chairs and said, "Professor Watkins is going to come to you with a recommendation. I think you should listen to this. I think - I support it. I think it's substantive. Something like that. And he said, 'Oh, there's going to be a problem or something.'" Dean Brunner has no specific recollection of this encounter.

179. Shortly after Dr. Back's conversation with the Fayetteville Dean, Professor Watkins met with Dean Brunner to inform him that the Philosophy Department had unanimously decided to recommend the Plaintiff for the second tenure-track position.

180. Professor Watkins recalls verbally summarizing the Plaintiff's accomplishments for the Dean during their meeting. (The Plaintiff's background and achievements are also set forth in his C.V., Joint Exhibit BB.)

181. Professor Watkins recalls Dean Brunner saying "This is going to be a tough one," and proceeding to expound on the Plaintiff's professed opposition to "culture," which bothered some other faculty members.

182. Professor Watkins did not know what Dean Brunner was talking about because he had been on sabbatical and did not attend the April 19, 1994 faculty meeting at which the Plaintiff had spoken out about cultures or cultural practices.

183. Dean Brunner remembers his meeting with Professor Watkins as fairly short. He does not remember the dialogue verbatim. He acknowledges indicating that there might be a

problem with the recommendation to hire the Plaintiff and may well have alluded to what had happened at the faculty meeting on the General Education Model.

184. In any event, Dean Brunner agreed to review the recommendation and get back to Professor Watkins.

185. Dean Brunner did review the file. In particular, he looked carefully at the Plaintiff's teaching evaluations, especially the student responses to Part A.

186. Although Dean Brunner had not detected any problems when he reviewed the Plaintiff's evaluations in the normal course of business in February 1994 and February 1995, according to Dean Brunner, he concluded upon closer scrutiny that the student evaluations evidenced significant problems with the Plaintiff's teaching performance.

186a. Professor Watkins testified at his deposition that, on or about May 22, 1995, Dean Brunner met with the Philosophy Department and announced that he would not support the recommendation to hire the Plaintiff. Professor Watkins says that he demanded to know the Dean's basis for saying that the Plaintiff had poor teaching evaluations, in light of the Dean's own memorandum to the Provost stating that a majority of students had rated the Plaintiff good to very good. Professor Watkins testified that he personally did not believe the Dean's explanation.

186b. Dr. Back and Dr. J. Hall recall that, in an effort to convince Dean Brunner to change his mind, he was at

some point offered a chance to review the Plaintiff's "Part B" student evaluations, but he declined. Dean Brunner does not recall this offer being made, but if it was he probably would have declined because he does not consider such narrative comments objectively informative.

187. By memorandum dated May 26, 1995 (Joint Exhibit CC), Dean Brunner formally informed Provost Collings that he could not support the recommendation to hire the Plaintiff because of his weak student evaluations.

188. According to Dean Brunner, the Plaintiff's comments at the faculty meeting on general education did not ultimately contribute to his decision to reject the hiring recommendation; by the time he made his decision on the matter, the Plaintiff's teaching record was his only concern.

189. Provost Collings analyzed the Plaintiff's student evaluations himself after receiving Dean Brunner's May 26, 1995 memorandum. He agreed with Dean Brunner's assessment.

190. In a series of meetings, discussions, and written communications, the members of the Philosophy Department tried very hard, but ultimately unsuccessfully, to get the administration to reverse the rejection. Neither Dean Brunner nor Provost Collings nor President McFarland would do so.

190a. None of the Philosophy Department members believed that the Plaintiff deserved to be rejected on the basis of his qualifications. They believed that his student evaluations were comparable to those of Dr. Lizza and other

Philosophy Department faculty at the beginning of their Kutztown careers. They believed that students' criticisms of the Plaintiff reflected disagreement with his grading rather than dissatisfaction with his teaching. They believed that the Plaintiff had made changes in light of students' evaluations. They believed that the Plaintiff would continue to improve. They said they were prepared to fire him if he did not do so.

191. The members of the Philosophy Department later filed a grievance against the University, claiming that the rejection of the Department's recommendation to hire the Plaintiff violated the APSCUF-SSHE Collective Bargaining Agreement. The grievance was subsequently withdrawn because the Department members concluded that the grievance had accomplished all that it could accomplish with respect to clarification of policy and procedure.

192. Following the rejection of the Plaintiff's candidacy, the vacancy in the Philosophy Department remained.

193. The Department could at that point have recommended that its "second choice" candidate be hired for the existing tenure-track position.

194. The Department could not agree on a second candidate and therefore did not recommend that someone else be given a tenure-track appointment. At least some members of the Department were also concerned that if the vacancy were filled on a permanent basis it would undercut their efforts to hire the Plaintiff.

195. The Department decided, instead, that the existing vacancy should again be filled by a temporary appointee. The administration was willing to take this approach.

196. The possibility of appointing the Plaintiff to the position on a temporary basis was raised, but Dean Brunner rejected this idea.

197. The Department recommended that Dr. Leemon McHenry be appointed to the vacant position on a temporary basis. There had been some discussion of recommending Dr. McHenry for a tenure-track appointment at that time, and such an appointment would have been duly considered by the administration, but the Philosophy Department ultimately decided to nominate Dr. McHenry for a temporary appointment.

198. This recommendation was accepted, and Dr. McHenry was in fact given a one-year temporary appointment, with the rank of assistant professor.

199. Joint Exhibit DD is a copy of the "pink sheet," documenting the 1995 appointments of Dr. Lizza and Dr. McHenry.

J. 1995-96 Search (for 1996-97 Academic Year)

200. After the start of the 1995-96 academic year, the Philosophy Department undertook another tenure-track search.

201. Dr. Ferreira chaired the 1995-96 Philosophy Department search committee, which also included Dr. J. Hall and Dr. Lizza.

201a. Joint Exhibit EE is a copy of the job advertisement prepared and approved in September 1995.

202. As chair, Dr. Ferreira was receptive in principle to the possibility of hiring a woman or a minority. He thought it would please the administration to bring in a good "affirmative" candidate, that it was required by law, that bringing in such a candidate would secure his own position and help bring the Philosophy Department into the mainstream of university life, and that it would help break what he perceived as Dr. Back's "stranglehold" on the Department.

203. As chair, Dr. Ferreira also was receptive in principle to giving greater consideration to female and minority applicants who, in the past, tended to be discounted as too "junior," as long as they would be able to do the job and make a genuine contribution to the Department.

204. Dr. Ferreira worked more closely with the Affirmative Action Officer and Dean Brunner than his predecessors had.

205. After the available position was advertised, the Philosophy Department received 406 applications.

206. The Plaintiff again was a candidate for the available position. He met the minimum requirements for the job.

207. Unlike the previous year, Dr. Back did not interview potential candidates at the American Philosophical Association annual meeting. He was not permitted to do so because Cheyney University was retrenching and, under the Collective Bargaining Agreement, other SSHE universities were prohibited from interviewing or hiring new faculty for a certain

period of time. Although committed to widening the pool of applicants, Dr. Ferreira did not regret this because, in his view, Dr. Back had actually undermined any effort to attract women and minorities to Kutztown the previous year (by recommending further consideration of only a few women who had extraordinary credentials and who would surely be wooed by more prestigious universities).

208. After reviewing all the applications, the committee created a "long list" of 20 potential interviewees (Joint Exhibit FF).

209. During the retrenchment-related delay, three of the candidates on the long list (including two women) accepted positions elsewhere.

210. Joseph Grcic, a white male with many years of teaching experience, numerous publications, and excellent recommendations looked like a perfect fit for the job, and Dr. Ferreira believes he would have been recommended by the search committee if he had had a good interview, but Dr. Grcic declined to be interviewed.

211. The search committee decided not to place the Plaintiff's name on the long list because the administration had rejected the Plaintiff in May 1995 and the Committee assumed that the administration would not change its position.

212. The members of the search committee arrived at this conclusion even though they personally believed that in

general the Plaintiff's qualifications were comparable to or better than those of other applicants on the "long list."

213. Dr. Back also believed that the Plaintiff should have been on the committee's list, even though he was somewhat troubled by the "breadth vs. depth" issue (The Plaintiff's interests in philosophy and American studies were broad; he lacked depth as a philosopher). Dr. Back's earlier concerns about the quality of the Plaintiff's teaching had receded in importance, in light of the Plaintiff's apparent success as a teacher at Fayetteville State University.

214. Dr. Back and the members of the search committee all agreed to leave the Plaintiff's name off the list.

215. Five candidates, including Dr. McHenry, another white male named Eric Reitan, two women, and Dr. Huang, were formally interviewed.

216. Dr. Ferreira had serious misgivings about Dr. McHenry's teaching and about the overlap in their specialties. There was some discussion about the quality of Dr. McHenry's teaching evaluations, but the other members of the committee and Dr. Back all ultimately supported Dr. McHenry's candidacy.

217. Because of the pendency of Dr. Ferreira's application for tenure, he did not want to antagonize the Department Chair, Dr. Back, or otherwise "rock the boat." Dr. Ferreira therefore decided to go along with his colleagues, who recommended Dr. McHenry for the tenure-track vacancy.

218. Dean Brunner refused to approve the recommendation to hire Dr. McHenry. Dean Brunner was concerned about the quality of Dr. McHenry's teaching, both at Kutztown and at the university where he had previously taught.

219. Provost Collings also turned down the nomination of Dr. McHenry on the grounds of poor teaching.

220. Four other candidates who had been interviewed remained. Dr. Reitan, a white male, was believed to lack depth. Similarly, Dr. O'Connor, a woman, had too narrow a specialization and expertise regarding a writer (Iris Murdoch) who was not really a philosopher. Dr. Preti, the second woman, had not been well received by students, and the committee suspected that she was only attracted to Kutztown because of its proximity to New York. That left Dr. Huang.

221. Dr. Huang was a promising Chinese national who had limited teaching experience but had published a great deal. As far as Dr. Ferreira recalls, he had no record of past community service. Dr. Back was concerned about Dr. Huang's limited teaching experience, but described him as "very, very smart." Dr. Back also stated that Dr. Huang was doing interesting research in an area the Department needed, and was hardworking, sociable, and friendly. Dr. Huang's background is summarized in his C.V. (Joint Exhibit GG).

221a. Dr. Back testified that Dr. Huang's ethnicity was not a factor in the Department's decision to include him on the list of finalists for the available position.

222. Because Dr. Huang had received his undergraduate and Ph.D. degrees in China, his record was somewhat harder than average for the search committee to analyze. No student evaluations of his teaching were available for the committee's consideration. In addition to his Chinese degrees, he also had completed additional doctoral course work at Harvard Divinity School and was writing his dissertation. He was interested in religious thought. The search committee noted that there was some interest within the University in establishing a minor in religious studies, and Dr. Huang might be able to contribute to such a program. Most students responded well to him when he came to campus. One or two may have had difficulty understanding Dr. Huang's accented English, which is not entirely surprising because most Kutztown students have had little or no contact with people from other cultures. The search committee, however, and later the administration, had little or no difficulty understanding Dr. Huang. They discounted this issue completely.

223. The search committee and the Department Chair concluded that Dr. Huang was the best available candidate. Dr. Lizza was particularly excited about him. On Friday, May 17, 1996, the Department formally recommended to Dean Brunner that Dr. Huang be hired.

224. Dr. Huang was considering another job offer and needed to know quickly whether Kutztown would actually extend him a formal offer of employment.

225. On Monday, May 20, 1996, Dean Brunner formally approved the recommendation to hire Dr. Huang. In arriving at this conclusion, Dean Brunner could not consider written teaching evaluations because Dr. Huang did not have any to present. Dean Brunner did consider the comments regarding teaching in one of Dr. Huang's letters of recommendation, which were positive.

226. Thereafter, Provost Collings also approved the recommendation.

227. Dr. Huang was duly appointed to a tenure-track position with the rank of assistant professor.

228. Dr. Huang has completed one full year of teaching at Kutztown. The Philosophy Department and its Chair recommended his reappointment, and he is expected to continue teaching at Kutztown during 1997-98.

229. Joint Exhibit HH is the "pink sheet" documenting the 1996 appointment of Dr. Huang.

K. Miscellaneous

230. During the first two years of a tenure-track faculty member's career, the faculty member is subject to dismissal without cause, but this provision of the APSCUF-SSHE Collective Bargaining Agreement is very rarely invoked. (After a tenure-track faculty member's second year of teaching, a decision not to renew the faculty member's contract must be for cause and may be grieved.)

231. President McFarland had no personal contact with the Plaintiff when he was a temporary faculty member at Kutztown.

232. Provost Collings and Dean Brunner had very little direct contact with the Plaintiff.

233. Dean Brunner is generally considered a fair and rational person.

234. While at Kutztown, the Plaintiff organized a major meeting on campus of the Jonathan Edwards Society. The Plaintiff invited Dean Brunner to greet the scholars who attended the meeting and recalls being impressed with the Dean's remarks. Dean Brunner remained for the opening ceremonies but did not attend the entire conference. Dr. Back observed significant organizational problems with the conference. He noted, however, that the conference occurred during the Plaintiff's first semester at Kutztown, when he was adjusting to his courses, Kutztown's students, etc.

235. The Plaintiff regards Kutztown University students as typical of students at "normal schools" which have become universities. In the Plaintiff's view (which is not necessarily unique), they are not intellectually curious or lively in class, and the life of the mind does not seem to be that important to most Kutztown students.

236. Dr. Lizza, who shared an office with the Plaintiff, testified that the Plaintiff required his students write essays. According to Dr. Lizza, the Plaintiff then spent at least an hour with each student, reviewing the student's essay. Dr. Lizza was not aware of any other member of the Philosophy Department who spent this amount of time with each

individual student. According to Dr. Lizza, the students seemed pleased with the one-on-one review of their work.

237. The Plaintiff states that, while teaching at Clarkson University, students selected him for two or three awards.

238. Allentown and Reading, two cities which are not far from Kutztown, have sizeable minority communities. The campus community and the immediately surrounding area are much more homogeneous.

239. Kutztown University is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools. Periodically, representatives of the Middle States Association visit the campus, analyze material provided by the University, and report on their findings. Such reports cover numerous substantive aspects of university operations. One of the many areas considered is affirmative action.

III. DISCUSSION

The Plaintiff claims that he was the victim of two types of discrimination. The first claim alleges a violation of his right to free speech, and the second alleges discrimination based upon his gender and race. Both of these claims involve complex legal issues and require us to resolve many subissues before reaching any final conclusions. We will address the protected speech claim first.

A. First Amendment Claim

The Plaintiff believes that Defendants Brunner, Collings, and McFarland failed to hire him as a tenure-track faculty member because of controversial remarks he made at a faculty meeting on April 19, 1994. The Plaintiff claims that these Defendants' actions violated his right to free speech, as guaranteed by the First and Fourteenth Amendments and by 42 U.S.C. § 1983.

At a faculty meeting on April 19, 1994, Dean Brunner reviewed the components of a newly proposed general education model. The Plaintiff recalls Dean Brunner saying something to the effect of, "I don't see how there could be, but is anyone here opposed to multi-cultural education?" Dean Brunner does not recall using these words, but agrees that the Plaintiff raised his hand and was recognized. Although the parties differ in their recollection of what the Plaintiff said, they agree that he expressed himself in a dramatic and forceful manner. The Plaintiff recalls speaking at length on why multicultural education is not a good thing, in the process describing "barbaric" practices condoned by some other cultures, such as female circumcision in the Sudan, slavery in other African countries, bride-burning in India, and discrimination against women in Islamic countries. The Plaintiff remembers espousing a philosophy of moral absolutism and asserting that Westerners have a moral duty to stand up against such evils. Dr. Back, Chair of the Philosophy Department, stated that his recollection is

generally consistent with the Plaintiff's. Dean Brunner remembers the Plaintiff stating that there were certain cultures which he "abhors," but does not remember the Plaintiff offering any extended discourse about specific practices. Facts 124-129.

The Plaintiff does not recall any subsequent discussion of his remarks at the faculty meeting, and he asserts that no one spoke with him about his remarks at any time thereafter. Dean Brunner remembers Dr. Cherry Mauk, Chair of the Mathematics Department, rising at the faculty meeting and stating, "I don't abhor any culture [although] I may dislike certain practices of a culture." Dean Brunner also remembers being approached by Dr. Debbie Sieger, Chair of the Social Work Department, after the meeting, and her asking "Why do we have somebody like that on our faculty?" Dean Brunner did not respond to Dr. Sieger's question or to the Plaintiff's remarks. He asserts his belief that faculty members are free to express their views at faculty meetings, whatever those views happen to be. Facts 130-133.

Dr. Ferreira, a member of the Philosophy Department, has testified that he heard some members of the English and History Departments label the Plaintiff a fascist because of the views he expressed at the April 19, 1994 meeting. Bruce Ezell, Dean of the College of Graduate Studies, testified that it became fairly common knowledge through the campus rumor mill that the Plaintiff had made some sort of speech at a meeting. Facts 138a-138b.

The Plaintiff alleges that the Defendants, acting under color of state law,¹ violated his First Amendment right to free speech by refusing to hire him because of remarks he made, despite the fact that a departmental search committee recommended him for the job. Our inquiry into this claim must address several subissues.² First, we must decide whether the Plaintiff's remarks at the faculty meeting were protected by the First Amendment. See Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995). Second, if we conclude that the Plaintiff's speech was protected, we must then determine whether that speech was a motivating factor in the decision not to hire him. See id. If we conclude that the Plaintiff's speech was a motivating factor behind the decision not to hire him, we must determine whether the Defendants could have reached that decision for other reasons. See id. Finally, should we answer each of these questions in the Plaintiff's favor, we must then determine whether the Defendants are entitled to qualified immunity. We will address each of these issues in turn.

1. First Amendment Protection

As a preliminary matter, we note that whether or not the Plaintiff's speech falls under the protective umbrella of the

¹ Kutztown University is a state university. The Defendants have conceded that they acted under color of law. Stipulated Outline of Legal Issues at 2.

² We compliment Defense counsel on their Memorandum of Law. This submission is very clearly written and it reflects a sound understanding of the various legal issues to be addressed in this case.

First Amendment is a question of law, see id., and that the burden of establishing that conduct was constitutionally protected lies upon the Plaintiff. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). In order for a public employee's speech to qualify for such protection, it must address a matter of public concern. Azzaro v. County of Allegheny, 110 F.3d 968, 976 (3d Cir. 1997). The Supreme Court has explained that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 147-148 (1983).

We have reviewed many cases both from within this circuit and without in order to gain a sense of how this standard is being applied. Having done so, we note that the application of this standard to this case is particularly difficult for two reasons.

First, the parties disagree about how we should define the Plaintiff's speech. The Defendants would have us treat it as mere commentary upon a proposed curriculum, Defendants' Memorandum of Law ("Defendants' Memo") at 9, while the Plaintiff would have us treat it as speech concerning issues of broad social concern, Plaintiff's Memorandum of Law ("Plaintiff's Memo") at 16. Dean Brunner's invitation for commentary at the April 19, 1994 meeting seems to have been designed to elicit comments upon the concept of multicultural curricula. However, the Plaintiff exceeded the scope of Dean Brunner's invitation,

commenting upon a much broader range of social concerns, which were only tangentially related to the issue before the faculty. The Plaintiff's response reflects the assumption that a multicultural curriculum is one which teaches students to accept other cultures and other cultures' practices as morally correct, rather than to apply a critical lens to such studies. While we question this assumption, we will examine the Plaintiff's § 1983 claim in light of what he said, rather than what he was invited to say.

Second, because the content of any employee's remarks and the context in which they were made will differ in every case, it is not surprising that no guiding precedent exists which mirrors the facts of the case at bar. Nevertheless, having considered the general guidelines established by the Supreme Court and the Third Circuit as well as many other cases in which those guidelines have been applied, we conclude that the Plaintiff was speaking about a matter of public concern at the April 19, 1994 faculty meeting.³

In Rankin v. McPherson, 483 U.S. 378 (1987), the Supreme Court held that a data entry clerk employed by the sheriff's office could not be fired for saying that she hoped the next attempt on President Reagan's life succeeded. The Court

³ The Plaintiff's submissions did not significantly aid us in our analysis of the case law relevant to his § 1983 claim. The analysis section of the Plaintiff's original Memorandum of Law devotes only one single-spaced, unindented page to the § 1983 claim, and cites no cases in support of this claim.

explained, "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." Id. at 386-387. The Court ruled that although a statement may be ill-considered, it is not therefore bereft of constitutional protection. We find that the Plaintiff's statements about the need for Westerners to stand up to the "barbaric" practices of other cultures implicated just such issues of public policy.

The Supreme Court has also held that remarks need not be made in a public forum to be of public concern. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979). Therefore, the fact that the arguments were made in a faculty meeting rather than a more public forum does not render them matters of private, rather than public, concern. See Mumford v. Godfried, 52 F.3d 756 (8th Cir. 1995) (The court suggested that even if a professor's speech were directed toward faculty members alone, this would not exclude it from First Amendment protection). Similarly, the Third Circuit has ruled that an attempt to divine whether an individual was speaking as a public employee or as a private citizen is not conclusive on the issue of whether the speech is protected. Azzaro, 110 F.3d at 979.

The Third Circuit has had many opportunities to apply the standards established by the Supreme Court. In Johnson v. Lincoln Univ., 776 F.2d 443 (3d Cir. 1985), a tenured faculty member was terminated for making statements and writing letters

complaining about low academic standards within the chemistry department. The Third Circuit wrote,

Speech touches upon a matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community."

In this case, while personal disputes may have generated many of the events in the chemistry department, the record reveals that at least some of the controversy concerned **questions of educational standards and academic policy of a scope broader than their application within the department. . . .**

Certainly, questions of academic standards are of "apparent . . . interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."

Id. at 452, citing Connick, 461 U.S. at 146, 149 (emphasis supplied).

In the case before the court, we believe the Plaintiff spoke out against practices which related to matters of "political, social, or other concern to the community," id., such as ritual bride burning in India, female circumcision in the Sudan, slavery in other African countries, and discrimination against women in Islamic countries.⁴

⁴ Our view is consistent with a computer search of Westlaw's "ALLNEWS" database, which indicates that in 1994 these issues were the subjects of articles and editorials as follows: 358 articles on female circumcision, 86 articles dealing with bride burning, and at least 4 articles on discrimination against women in Islamic countries. We do not suggest any bright line rule that a certain quantity of media coverage is required to make an issue one of "public concern," and we would have reached the same result without this search. The search parameters which produced these results were "female circumcision," "bride burning," and "discrimination /5 women /5 Islam!" respectively. Each search was run with the additional connector, "and date (1994)". No search was performed to identify the number of

The Defendants argue that the Plaintiff's comments were "comparable to an economics professor denouncing state-run economies and expressing faith in the sanctity of the free market, or an astrophysics professor theorizing about the existence of multiple universes." Defendants' Memo at 8-9. While the statements the Defendants offer as examples may not implicate issues of public concern, the Plaintiff's comments are readily distinguishable. In the instant case, the Plaintiff stated that "Westerners have a moral duty to stand up against such objective evils." Fact 128. The Plaintiff was in essence calling upon those present to oppose multicultural education (as he saw it) as well as specific practices of other cultures. Such a call to action, advocating opposition to a proposed university-wide curriculum and to specific cultural practices, is not equivalent to abstract theorizing about the values of the free market or the existence of multiple universes. Other courts have reached the same conclusion for speech opposing specific practices. See e.g. Jeffries v. Harleston, 21 F.3d 1238 (2d Cir.), vacated, 513 U.S. 996 (1994) (professor's speech criticizing public school curriculum for reflecting bias against minorities involved public issues); Scallet v. Rosenblum, 911 F. Supp. 999, 1018 (W.D. Va. 1996), aff'd, 106 F.3d 391 (4th Cir.) (Table), cert. denied, 117 S.Ct. 2482 (1997) ("Scallet's advocacy of diversity in faculty meetings is protected under the First

articles dealing with modern-day slavery in African countries.

Amendment because it relates to matters of public concern"). After reviewing relevant case law, it seems clear that the Plaintiff's speech at the April 19, 1994 faculty meeting, although unsolicited, certainly addressed matters of public concern.

Ordinarily, when a court decides that a public employee's speech touched upon a matter of public concern, that court would then go on to balance the employee's interest in his or her speech against the employer's interest in regulating its own affairs in an orderly manner. See e.g., Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will County, 391 U.S. 563, 568 (1986). However, in this case the Defendants have conceded that any such balancing test would come down in the Plaintiff's favor. Defendants' Memo at 6, note 6. Therefore, since we have already ruled that the Plaintiff's speech involved a matter of public concern, we find that his speech was entitled to First Amendment protection.

2. Motivating Factor

Having concluded that the Plaintiff's speech was entitled to First Amendment protection, we must then determine whether this speech was a motivating factor behind the decision not to hire the Plaintiff to fill a vacant tenure-track faculty position. In this, the second stage of our inquiry into the Plaintiff's § 1983 claim, the Third Circuit has made it clear that "the plaintiff has the burden of showing that the protected activity was a substantial or motivating factor in his

termination." Johnson, 776 F.2d at 454, citing Mt. Healthy, 429 U.S. at 287.

Dean Brunner has stressed that the Plaintiff's remarks did not contribute to the Dean's decision to reject the Philosophy Department's hiring recommendation, and that the Plaintiff's teaching record was the only concern. Fact 188. We are not convinced. The Plaintiff has presented evidence sufficient to support the contention that his speech was a motivating factor behind the decision not to hire him. This evidence includes the Dean's previous reviews of the Plaintiff's evaluations, the student evaluations of a colleague who was hired just before the Plaintiff was recommended by the Department, and comments made by Dean Brunner during the nomination process.

a. The Dean's Evaluations

Prior to Dean Brunner's announcement that the Plaintiff would not be hired because of concern about his teaching evaluations, the Dean had already reviewed the Plaintiff's teaching evaluations on two separate occasions. In the first instance, Dean Brunner sent a memo to Provost Collings, dated February 8, 1994, which stated, "Student evaluation data also revealed that [the Plaintiff] was an effective teacher. The majority of students rated him 'Good' to 'Very Good.' . . . From the data presented I found him to be an effective and conscientious temporary faculty member." Joint Exhibit D, p.13. In the second instance, Dean Brunner again sent a memo to Provost Collings, dated February 15, 1995, stating, "From the materials I

reviewed, I concluded that [the Plaintiff] performed his teaching and professional responsibilities in a satisfactory manner." Joint Exhibit D, p.25.

The Defendants attempt to downplay the importance of these memos with three different arguments. First, the Defendants point out that the Plaintiff was only one of a large number of faculty members whose evaluations were being reviewed, and that the review was thus somewhat cursory. Second, the Defendants claim that the language used in each of the memos has the ring of a form letter. Third, the Defendants indicate that temporary faculty members may be held to a lesser standard than tenure-track faculty members. These arguments, while somewhat probative, do not persuade us to discount Dean Brunner's positive reviews of the Plaintiff entirely. To accept either of the first two arguments would be to discredit the integrity of the review process generally and to render Dean Brunner's role in that process meaningless. Furthermore, while we believe that Dean Brunner "gives somewhat greater attention to the evaluations of tenure-track faculty members than he gives to the evaluations of temporary faculty members," Fact 45, this does not prompt us to fully discredit his evaluations of the Plaintiff as a temporary faculty member. The fact is, prior to the Plaintiff's nomination by the Philosophy Department, there is no indication that his teaching evaluations were in any sense viewed as problematic.

b. Student Evaluations

In addition to the inconsistency in the Plaintiff's reviews, other evidence indicates that the remarks he made at the April 19, 1994 faculty meeting were held against him when he applied for a tenure-track position.

In the Fall of 1994, the Philosophy Department undertook to fill two tenure-track faculty positions. Fact 159. Over 300 people applied for these vacancies, including the Plaintiff and one Dr. Lizza. Fact 163. A consensus to recommend Dr. Lizza for one of the vacancies developed relatively quickly, and this recommendation was accepted by the administration without question or debate. Facts 170-171. Approximately two months later the departmental search committee unanimously recommended the Plaintiff to fill the second position. After Dean Brunner reviewed the Plaintiff's application, including his teaching evaluations, he refused to support the committee's recommendation, citing serious concerns about the Plaintiff's teaching evaluations. Facts 185-186a.

Between 1993 and 1994, it appears that the Plaintiff taught a total of 11 courses at Kutztown. Dr. Lizza, who was hired to fill the first vacancy in the Philosophy Department, appears to have taught 8 courses at Kutztown in the same time period.⁵ On balance, we find that Dr. Lizza's teaching

⁵ The Defendants allege that the Plaintiff's SRI scores were lower than those of five other temporary faculty members hired to fill tenure-track positions at the same time the Plaintiff was nominated for such a position. Rather than compare the Plaintiff's evaluations to those of these other faculty members within the college, we will focus on the scores of Dr.

evaluations were quite comparable to the Plaintiff's. We make this finding based upon the following data.

Dean Brunner has stated that in reviewing the student evaluations, he looks closely at what he considers to be the most important questions: 1, 2, 3, 9, 10, 11, 12, 17, and 20. Fact 48. A question-by-question comparison of students' evaluations of the Plaintiff and Dr. Lizza is instructive.

Question 1 asks "To what extent was the instructor prepared for class?" Dean Brunner states that he expects at least half the students to answer (A) "always," and most of the rest of the students to answer (B) "most of the time." Fact 49.⁶ We will assume that "most of the rest of the students" means at least 80%. Applying this standard to the Plaintiff, we note that in 6 of his 11 classes, less than half of the students answered

Lizza, the faculty member within the Plaintiff's Department who was hired at the same time the Plaintiff was recommended. The fact that Dr. Lizza and the Plaintiff had taught at Kutztown for approximately the same amount of time and the fact that they were applying for positions within the same department in exactly the same time frame make Dr. Lizza's student evaluations more probative for purposes of comparison. We discount the significance of Dr. McHenry's evaluations, as Dean Brunner's refusal to offer him a tenure-track position reflected the Dean's concern "about the quality of Dr. McHenry's teaching, both at Kutztown **and at the university where he had previously taught.**" Fact 218 (emphasis supplied). The parties did not include any portion of the latter evaluations as part of the record.

⁶ The Plaintiff has submitted several pages of data compiled from the student evaluations for various professors. We interpret Dean Brunner's standard for question one to mean that he expects over 50% of all responding students to mark (A) and at least 80% of the remaining students to mark (B). Plaintiff has based his conclusions on the number of classes in which at least 80% of the students marked (A) or (B). We do not believe that this accurately reflects Dean Brunner's statement.

(A). In one of those classes (B) accounted for less than 80% of the remaining responses. Applying the same standard to Dr. Lizza, we find that in 6 of his 8 classes, less than half of the students answered (A). In four of those classes (B) accounted for less than 80% of the remaining responses.

Question 2 asks "Did the instructor organize the course material effectively?" Dean Brunner states that he expects almost all students to answer (A) "yes, generally." Fact 50. We will assume that "almost all" means at least 85% of the students. Applying this standard to the Plaintiff, it appears that he satisfied this standard in 4 of 11 classes. Applying the same standard to Dr. Lizza, it appears that 1 of 8 classes met the standard.

Question 3 asks "To what extent was the instructor clear in presenting course material?" Dean Brunner states that he would question teaching effectiveness if more than 15% of students answered (C) "less than half the time" or (D) "hardly ever, if at all." Fact 51. Plaintiff satisfied this standard in 8 of 11 classes. Dr. Lizza satisfied the standard in 2 of 8 classes.

Question 9 asks "Did the instructor treat the students with respect and without prejudice?" Dean Brunner expects at least 90% of the students to answer (A) "always" or (B) "most of the time." Fact 52. The Plaintiff met this standard in 7 of 11 classes. Dr. Lizza met the standard in all 8 classes.

Question 10 asks "Did the instructor maintain good interpersonal relations with the class?" Dean Brunner expects a majority of students to answer (A) "yes." Fact 53. Both the Plaintiff and Dr. Lizza satisfied this standard in each of their classes.

Question 11 asks "Were the objectives and student responsibilities of the course made clear either orally or in writing at the beginning of the term?" Dean Brunner expects the majority of students to answer (A) "yes." Fact 54. Both the Plaintiff and Dr. Lizza met this standard in every class.

Question 12 asks "To what extent was instruction (including teaching methods) consistent with course objectives?" Dean Brunner expects the majority of students to answer (A) "always" or (B) "most of the time." Fact 55. The Plaintiff met this standard in all 11 classes. Dr. Lizza met this standard in 7 of 8 classes (scoring exactly 50% in one class).

Question 17 asks "Were graded materials returned soon enough and with sufficient review or evaluation to be useful in the learning process?" Dean Brunner expects the majority of students to answer (A) "yes, always" or (B) "most of the time." Fact 56. Plaintiff satisfied this standard in 9 of 11 classes. Dr. Lizza satisfied the standard in all of his classes.

Question 20 asks "All things considered, how do you rate the instructor's performance?" Dean Brunner finds it troubling if more than 10% of the students in a class consider the faculty member to be (D) "poor" or (E) "very poor." Fact 57.

The Plaintiff satisfied the Dean's standard in 5 of 11 classes. Dr. Lizza satisfied the same standard in 2 of 8 classes.

The table below summarizes the extent to which the Plaintiff and Dr. Lizza lived up to the expectations set forth by Dean Brunner.

	Number of Courses Taught by the Plaintiff Which Satisfied Dean Brunner's Expectations	Number of Courses Taught by Dr. Lizza Which Satisfied Dean Brunner's Expectations
Question 1	5 of 11 (45%)	2 of 8 (25%)
Question 2	4 of 11 (36%)	1 of 8 (13%)
Question 3	8 of 11 (73%)	2 of 8 (25%)
Question 9	7 of 11 (64%)	8 of 8 (100%)
Question 10	11 of 11 (100%)	8 of 8 (100%)
Question 11	11 of 11 (100%)	8 of 8 (100%)
Question 12	11 of 11 (100%)	7 of 8 (88%)
Question 17	9 of 11 (82%)	8 of 8 (100%)
Question 20	5 of 11 (45%)	2 of 8 (25%)

Based upon these statistics, we find that the Plaintiff's teaching evaluations were comparable to Dr. Lizza's.⁷ The Defendants assert that they scrutinize the student evaluations very closely, especially when deciding whether to hire someone for a tenure-track position. Joint Exhibit CC.

⁷ None of this should suggest that Dr. Lizza was in any way a poor candidate. We compare the two candidates only to demonstrate that the Plaintiff's student evaluations were comparable to those of the candidate who was chosen for the other vacancy, passing through the selection process with flying colors. In doing so, we credit Defendants' admission that the Plaintiff and Dr. Lizza had "roughly comparable student evaluations." Defendants' Reply Memo at 9.

Assuming that Dr. Lizza passed such a review, we fail to understand how the Plaintiff, whose evaluations were comparable to Dr. Lizza's, could have failed the review.

Nor are we persuaded by the Defendants' argument that Provost Collings and President McFarland independently reviewed the Plaintiff's evaluations and supported Dean Brunner's decision not to hire the Plaintiff. See Defendants' Memo at 16. The Defendants have admitted that the Provost and President of the University agreed with all of the Dean's recommendations between 1993 and 1996. Facts 97-98.

c. The Dean's Comments

Other evidence supports the conclusion that the Plaintiff's remarks at the faculty meeting were, at least in part, a factor behind the decision not to hire him as a tenure-track faculty member. For example, the Chair of the Philosophy Department testified that he approached Dean Brunner informally, after a meeting of department chairs and said, "Professor Watkins is going to come to you with a recommendation. I think you should listen to this. I think--I support it. I think it's substantive," and that Dean Brunner replied, "Oh, there's going to be a problem." Fact 178b. In addition, Dr. Watkins, who chaired the search committee, testified that during his meeting with Dean Brunner, where he announced the Department's unanimous recommendation to hire the Plaintiff, Dean Brunner said, "This is going to be a tough one," and commented on the Plaintiff's professed opposition to "culture," which bothered some other

faculty members. Facts 179-181. Dean Brunner acknowledges indicating that there might be a problem with the recommendation to hire plaintiff and possibly referring to what happened at the faculty meeting. Fact 183. We will accept the Defendants' assertion that the Plaintiff was not an obvious first choice to fill the position. Nevertheless, the Supreme Court has stated that even "a borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct." Mt. Healthy, 429 U.S. at 286.

3. Defendants' Burden

The Plaintiff has established that his speech at the April 19, 1994 faculty meeting was protected and was a motivating factor behind the decision not to hire him as a tenure-track faculty member. The burden now shifts to the Defendants to show, by a preponderance of the evidence, that they would have reached the same decision even in the absence of the protected conduct. See id. at 287.

The Defendants have argued that the decision not to hire the Plaintiff was motivated by poor student evaluations. As we have stated, we are unpersuaded by this explanation.

The Defendants also argue that Dr. Lizza's background was more impressive than the Plaintiff's. Although we do not dispute that Dr. Lizza's credentials are most impressive, we are not persuaded by the Defendants' argument. Both Dr. Lizza and the Plaintiff received graduate degrees from well-respected

institutions, and in some respects the Plaintiff's achievements outshone those of Dr. Lizza.⁸ In addition, we note that at least one nonparty who was intimately acquainted with the situation testified that he personally did not believe the Dean's explanation. Fact 186a.

The Dean would have an obvious interest in avoiding persons whose remarks might work against faculty harmony. Given this interest, and the Defendants' failure to suggest a plausible alternative explanation for their decision, we conclude that the Plaintiff's controversial remarks, of which Dean Brunner was well aware, were held against him in the final analysis.

4. Qualified Immunity

The Defendants have not shown that they would have made the same decision regarding the Plaintiff notwithstanding the protected speech. Nevertheless, they may still be entitled to qualified immunity if they can show that a reasonable public official would not have known that their conduct violated clearly established rights. Grant v. City of Pittsburgh, 98 F.3d 116, 121 (3d Cir. 1996). This determination involves both an objective and a subjective test. We must first objectively determine whether the Plaintiff's right was clearly established. We must then subjectively consider whether a reasonable person

⁸ For instance, the Plaintiff brought the national conference of the Jonathan Edwards Society to Kutztown University in 1994.

would have known that what he or she was doing violated that right.

a. Was The Right Clearly Established?

In order to determine whether the Plaintiff's right was clearly established, we must look to the status of the law at the time the incident occurred. Burns v. County of Cambria, Pa., 971 F.2d 1015, 1024 (3d Cir. 1992); see also Abdul-Akbar v. Watson, 4 F.3d 195, 202 (3d Cir. 1993). The Third Circuit has not established a hard and fast rule regarding how much case law is needed to render a principle clearly established, see Lattany v. Four Unknown U.S. Marshalls, 845 F. Supp. 262, 266 n. 4 (E.D. Pa. 1994), but a single federal district court decision from another jurisdiction is not enough. Brown v. Grabowski, 922 F.2d 1097, 1118 (3d Cir. 1990), cert. denied, 501 U.S. 1218 (1991). In addition, there need not be any precedent directly on point in order for a principle to be clearly established, DiJoseph v. City of Philadelphia, 953 F. Supp. 602, 606 (E.D. Pa. 1997), citing Good v. Dauphin County Social Serv. for Children and Youth, 891 F.2d 1087, 1092 (3d Cir. 1989), although there must be "some but not precise factual correspondence between relevant precedents and the conduct at issue." In re City of Philadelphia Litigation, 49 F.3d 945, 970 (3d Cir.)(internal quotation omitted), cert. denied, 116 S.Ct. 176 (1995).

We agree with the Defendants that several cases which help to clarify the protected status of the Plaintiff's remarks were decided after the conduct giving rise to this action. For

example, Azzaro, 110 F.3d 968, was decided in 1997, and Scallet, 911 F. Supp. 999, was decided in 1996. However, there was sufficient case law on the books prior to 1995 to render the Plaintiff's right clearly established. For example, Mt. Healthy, 429 U.S. 274, in which a public school teacher's phone calls to a local radio program were given constitutional protection, was decided in 1977. Givhan, 439 U.S. 410, in which a public school teacher's complaints about perceived racial discrimination in the assignment of personnel was found to be protected speech, was decided in 1979. Connick, 461 U.S. 138, in which a questionnaire circulated by a public employee regarding working conditions and certain supervisors was found to contain some protected speech, was decided in 1983. Within the Third Circuit, Johnson, 776 F.2d 443, in which a professor's complaints about certain academic and administrative practices within his department were held to involve matters of public concern, was decided in 1985. In addition, Jeffries, 21 F.3d 1238, a high-profile case in the Second Circuit, held that a professor's racially biased remarks criticizing New York City's public university system were entitled to constitutional protection. Jeffries was decided in 1994, on the day before the faculty meeting during which the Plaintiff made his controversial statements.

Although no precedent exists which exactly mirrors the facts at issue in the case now before the court, a survey of relevant case law in effect prior to the decision not to hire the Plaintiff is instructive. A review of this case law convinces us

that the Plaintiff's right to speak out about matters of public concern was sufficiently well defined to put the Defendants on notice that a decision not to hire him based upon statements he made at the April 19, 1994 meeting was illegal.

b. Knowledge of a Reasonable Person

The Defendants correctly point out that a reasonable college administrator might not have known that discriminating on the basis of commentary upon curriculum violated a person's constitutional rights. See Scallet v. Rosenblum, No. 96-1138, 1997 WL at *2 (4th Cir. Jan. 29, 1997). However, as we have already stated, the Plaintiff's speech transcended purely curricular commentary, and addressed much broader matters of public concern. While the right of a professor to comment upon a proposed curriculum may have been murky in 1995, the right of a public employee to speak out on matters of general public concern was well defined. As such, a reasonable person would have known that refusing to hire the Plaintiff because of controversial statements he made during a faculty meeting was improper.

Our decision is bolstered by our previous finding that the explanation offered by the Defendants for their decision was pretextual. The fact that the Defendants felt compelled to offer this pretextual explanation supports the conclusion that the Defendants knew or at least suspected that their reason for refusing to hire the Plaintiff was improper.

5. Other Defendants' Liability

Our analysis of the Plaintiff's § 1983 claim establishes that Defendant Brunner is liable for rejecting the recommendation of the departmental search committee and refusing to hire the Plaintiff to fill a vacant tenure-track position. We note that Dean Brunner is liable only in his official capacity.

The Plaintiff asserts that Defendants Collings and McFarland should also be found liable for this conduct. We believe the law clearly mandates otherwise. The Third Circuit has written, "For supervisors, liability can be established in two ways: (1) through allegations of personal direction or of actual knowledge and acquiescence, or (2) through proof of direct discrimination by the supervisor." Keenan v. City of Philadelphia, 983 F.2d 459, 466 (3d Cir. 1992)(internal quotation omitted). There is no respondeat superior liability under § 1983. See Freeman v. McKellar, 795 F. Supp. 733, 740 (E.D. Pa. 1992).

The Jointly-Prepared Statement of Facts states that "President McFarland was not present at the April 19, 1994 faculty meeting or on any other occasion when the Plaintiff spoke out, and states that he does not even recall hearing about the Plaintiff's comments (whatever they were) until this lawsuit was filed." Fact 137. The Plaintiff has offered no evidence to the contrary. The Statement of Facts also supports the notion that President McFarland simply rubber-stamped Provost Collings's recommendations regarding faculty hiring during the time period at issue in this case. "President McFarland, however, delegates

most of his responsibility for faculty hiring to the Provost. The President does little but sign contracts." Fact 96. In addition, "President McFarland has agreed with all or virtually all of Provost Collings's conclusions regarding faculty hiring during the period at issue in this case." Fact 98. We find that the Plaintiff has not established facts sufficient to hold Defendant McFarland liable on the § 1983 claim.

We reach the same conclusion regarding Defendant Collings. Provost Collings testified that he was present at a meeting when the Plaintiff vocally objected to clitoral mutilation, although it appears that this was not the April 19, 1994 faculty meeting. Fact 136. The Plaintiff has produced no evidence that Defendant Collings was aware of the remarks at issue in this case, or that the one comment which Defendant Collings admitted hearing contributed to his decision to support Dean Brunner's refusal to hire the Plaintiff. On the contrary, the evidence supports an inference that Provost Collings's review of Dean Brunner's recommendation was cursory. "Dean Brunner does not recall any occasion between 1993 and 1996 when Provost Collings disagreed with his conclusion regarding whether a person should be hired for a temporary or tenure-track faculty position." Fact 97. There is simply no basis for concluding that Defendant Collings directly discriminated against the Plaintiff or played a significant role in the decision to deny him tenure-track employment.

B. Title VII Claim

The Plaintiff alleges that the May 1995 decision not to offer him a tenure-track position and the 1996 decision to hire Dr. Huang, rather than the Plaintiff, for a tenure-track position constitute two separate instances of unlawful discrimination. Under federal law, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).⁹ The fact that the Plaintiff is white does not deny him protection under Title VII. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

We agree with the Defendants' assertion that it makes no sense to analyze the Plaintiff's claim as a pure sex discrimination claim. See Defendants' Memo at 30. The department in which the Plaintiff was seeking a tenure-track position is composed entirely of male professors. In addition, the individuals hired to fill the tenure-track vacancies for which the Plaintiff was applying were both male. This being the case, we agree with the Defendants that the Plaintiff's claim should be treated as a type of sex-plus claim. See Arnett v. Aspin, 846 F. Supp. 1234, 1238 n. 4 (E.D. Pa. 1994)(a woman rejected in favor of another woman failed to make out a prima facie case of pure sex discrimination, but may still have alleged

⁹ The parties agree that the Plaintiff has complied with all statutorily mandated prerequisites for filing suit under Title VII. Stipulated Outline of Legal Issues at 1.

a sufficient sex-plus claim). A plaintiff proceeding on this theory does not allege discrimination against a protected class as a whole, but rather discrimination against a certain subclass within the protected class, id. at 1238, in this case the subclass of white Anglo-Saxon males.¹⁰ Thus, the Plaintiff's case is neither a pure reverse discrimination case nor a pure sex-plus case, but rather a reverse discrimination sex-plus case. This court has held that a Title VII discrimination claim may be based on a combination of impermissible factors. See e.g., Fucci v. Graduate Hospital, 969 F. Supp. 310, 316 n. 9 (E.D. Pa. 1997). Therefore, we find that the Plaintiff has properly brought his claim under Title VII.

In analyzing the Plaintiff's disparate treatment claim,¹¹ we will apply the four part inquiry outlined by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973). Under McDonnell Douglas, a plaintiff must establish four things: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied and was qualified for a position for which the employer was seeking applicants; (3) despite the

¹⁰ Because the exhibits appended to the Jointly-Prepared Statement of Facts do not distinguish between white Anglo-Saxon males and other white males, we have no basis for considering whether Anglo-Saxons in particular were the victims of discrimination. This being the case, we will treat the Plaintiff's claim as alleging discrimination against white males generally.

¹¹ The parties have briefed this approach and we find that they deem this to be what is commonly called a "pretext" case rather than a "mixed motive" case. This approach is consistent with the facts.

plaintiff's qualifications, the employer did not select the plaintiff; and (4) non-members of the protected class received more favorable treatment (e.g. the position remained open and the employer continued to seek applications from persons with the plaintiff's qualifications). Id. at 802; see also Stewart v. Rutgers, 120 F.3d 426, 432 (3d Cir. 1997). Once a plaintiff has established such a prima facie case by a preponderance of the evidence, the burden of production shifts to the defendant to articulate some other legitimate, non-discriminatory reason for the challenged action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-511 (1993). Assuming that the defendant in turn sustains this burden, the burden of production shifts once more to the plaintiff to show that the proffered non-discriminatory explanation is pretextual. Id. at 507-508.

We agree with the Defendants that the rationale behind the McDonnell Douglas test incorporates the assumption that an employer's acts, unless otherwise explained, are likely to be based upon factors which are impermissible. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). Case law has held that this assumption should not apply when the plaintiff is a member of a group which has traditionally been favored in society. See Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986). This reasoning has caused courts to modify the McDonnell Douglas analysis in reverse discrimination cases. See e.g., Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997); Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993). As

articulated by the Court of Appeals for the District of Columbia Circuit:

The original McDonnell Douglas standard required the plaintiff to show that he belonged to a racial minority. Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the light of common experience would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society.

Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

Although the Third Circuit has not yet addressed this issue, one lower court has recently held that "to make out a prima facie case of reverse discrimination, a plaintiff must also show background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against the majority." Ludovico v. U.S. Healthcare, Inc., No. 96-61, 1997 WL 288592, *5 (E.D. Pa. May 21, 1997). There are, however, a substantial number of lower court cases which do not apply a heightened McDonnell Douglas standard. See e.g., Ulrich v. Exxon Co., U.S.A., 824 F. Supp. 677, 684 (S.D. Tex. 1993); Stock v. Universal Foods Corp., 817 F. Supp. 1300, 1306 (D. Md. 1993), aff'd, 16 F.3d 411 (4th Cir. 1994) (table); Lemnitzer v. Philippine Airlines, Inc., 816 F. Supp. 1441, 1448 (N.D. Cal.

1992); Collins v. School District of Kansas City, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990); Cohen v. Community College of Philadelphia, 484 F. Supp. 411, 420 (E.D. Pa. 1980).

Discrimination is often very difficult to prove. In view of the pervasive nature of affirmative action, it may be time to reexamine the heightened standard.

Nevertheless, in view of the holdings of the three circuit courts, we will modify the McDonnell Douglas test and impose upon the Plaintiff the burden of establishing that Kutztown University tended to discriminate against white males during the relevant time period. We note the parties' agreement that this standard should apply in this case. See Plaintiff's Memo at 2; Defendants' Memo at 33-34.

It is undisputed that the Plaintiff can satisfy the second and third elements of the McDonnell Douglas test. It is clear that the University advertised tenure-track vacancies for the 1994-95, 1995-96 and 1996-97 academic years, Facts 141, 160a, and 201a, and that the Plaintiff applied for these positions. Facts 142, 163, and 206. It is also clear that the Plaintiff satisfied the minimum criteria identified in the advertisements. Joint Exhibits V and X, and Fact 206. The parties also agree that the Plaintiff was not hired for any of the tenure-track positions for which he applied. We will therefore focus our analysis on the remaining portions of the modified McDonnell Douglas test, namely whether the Plaintiff has established a tendency on the part of the Defendant University to discriminate

against white males, and whether or not women and minorities received preferential treatment in the hiring process. The Plaintiff can establish this by showing "background circumstances" which support an inference of discrimination. See Harding 9 F.3d at 153. Such background circumstances may take two forms: "(1) evidence indicating that the particular employer at issue has some reason or inclination to discriminate individually against whites. . ." and "(2) evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." Id.

In other words, the Plaintiff will prevail if he can establish either that the University tends to discriminate against white males, or that the circumstances surrounding the 1995 and 1996 decisions not to hire him are sufficiently suspect to warrant the conclusion that he was individually discriminated against on account of his race and gender. We will divide the Plaintiff's arguments into these two categories and consider them in turn.

1. Evidence Indicating a Tendency to Discriminate Against White Males

The first element of the McDonnell Douglas test traditionally requires a plaintiff to show that he or she is a member of a protected class. As stated above, we will modify this requirement in this case, and require the Plaintiff to show instead that Defendant Kutztown University tends to discriminate against white males. See Daly v. Unicare Corp.--Township Manor

Nursing Center, 1995 WL 251385, *4 (E.D. Pa. April 26, 1995).

Although the Plaintiff has alleged only two specific instances of discrimination, we must consider other allegedly discriminatory policies and practices which the Plaintiff claims demonstrates a discriminatory hiring tendency on the part of the Defendant University.

a. Affirmative Action Policy

The Plaintiff argues that the University's affirmative action policy itself is unconstitutional. The policy in effect at the time relevant to this case is summarized in a document titled "Hiring the 'Most Qualified' Candidate." Fact 81. This document states that "the employment of unqualified faculty, staff, or administrators should never occur at Kutztown University. . . . At Kutztown University we always attempt to hire the most qualified candidate for a position." The policy later states,

It is lawful to consider race, ethnicity, and gender as additional credentials in a hiring decision. Thus, when a department or unit is determined to be underrepresented according to the Office of Affirmative Action from the perspective of race, ethnicity, and/or gender, these criteria must be added to the traditional criteria of academic degrees. . . .

Joint Exhibit P. No evidence has been presented that the University discriminated against minorities or women in the past.

We have serious doubts about whether the policy outlined in "Hiring the 'Most Effective' Candidate" satisfies the two prong test established by the Supreme Court in United

Steelworkers of America v. Weber, 443 U.S. 193 (1979). See Taxman v. Board of Educ. of the Township of Piscataway, 91 F.3d 1547, 1558 (3d Cir. 1996). We note that a plan which merely encourages giving consideration to affirmative action concerns when evaluating qualified applicants is not per se unconstitutional, see e.g. Regents of the University of California v. Bakke, 438 U.S. 265, 316-319 (1978), but the fact that Kutztown University did not identify any prior discrimination which it was trying to remedy through its affirmative action policy would likely render the policy outlined in "Hiring the 'Most Qualified' Candidate" illegal. Adarand Constructors, Inc. v. Pena, ___ U.S. ___, 115 S.Ct. 2097, 2109 (1995).

Although the existence of an illegal affirmative action policy may give rise to a suspicion of discrimination against members of the majority, we must consider the manner in which the policy was applied before we can determine whether an actual tendency to discriminate against white males did in fact exist at the University.

There is no direct evidence that the Defendants relied upon the affirmative action policy in effect at the time when deciding not to hire the Plaintiff in 1995 and 1996. In addition, we credit Dean Brunner's testimony that he never intentionally exerted any pressure to hire women or minorities. Some members of the Philosophy Department testified that they felt pressured to hire women and minorities to fill vacancies,

but this general impression is unsupported by concrete evidence or specific examples. Although an impression of bias among some members of the faculty is a matter of concern, it is insufficient, in this case, to establish a discriminatory hiring tendency at Kutztown.

It is clear that a university may not discriminate against members of the majority simply to diversify its faculty, see Taxman, 91 F.3d at 1563 (3d Cir. 1996). Nevertheless, the SSHE's "Equity Plan" supports only a notion of a diverse faculty. The Plaintiff has presented no evidence that either this document or "Hiring the 'Most Qualified' Candidate" were directly applied to any particular hiring decisions, and, as we discuss below, the relevant hiring statistics fail to demonstrate that the existence of these documents resulted in a discriminatory hiring trend. We conclude that the existence of these two aspirational documents, in this case, does not provide persuasive evidence of a tendency on the part of the University to discriminate against white males.

b. Affirmative Action Office's Role

The Plaintiff also complains that the role played by the Affirmative Action Office in the hiring process is unconstitutional and illustrates a policy of discrimination against white males. We considered the following facts in determining whether this is so. Any advertisement for a tenure-track faculty position must be approved by the Affirmative Action Office, which may then determine where the advertisement will be

placed. Facts 75 and 76. Once applications are received, the search committee forwards the names and addresses of the applicants to the Affirmative Action Office, which then sends a questionnaire to all applicants, asking them to identify their gender and minority status. The Affirmative Action Office may send a memo to the search committee chair "strongly encouraging" him or her to interview female and minority candidates "if it is determined that they meet the qualifications of the position." Facts 78 and 79. Members of the search committee screen all applications and come up with a short list of 10-20 candidates. Fact 85. The dean, search committee chair, and affirmative action officer review the short list before inviting any candidate to interview. Fact 87. Once interviews are complete, the department faculty members arrive at a recommendation. Fact 90. The dean reviews the department's decision, comparing the candidate's qualifications to the published job description. Once the dean reviews the recommendation, he or she forwards it to the affirmative action officer, who certifies that the search complied with the University's affirmative action procedures. The recommendation is then sent to the provost and from there to the president. Facts 93-96. Once a position is filled, the department fills out pink sheets (listing the candidates who were interviewed and the final selection), green sheets (listing candidates not interviewed and the reasons for such decisions), and an Affirmative Action Summary form. These forms are all sent to the Affirmative Action Office. Fact 99. At the beginning of

any search, the Affirmative Action Office explains all applicable procedures to the search committee chair. Fact 80.

After reviewing the Jointly-Prepared Statement of Facts, it appears to us that the University's policy is to recruit the broadest possible pool of applicants and then to hire the most qualified candidate from that pool, without regard to race, gender, ethnic origin, or other personal characteristic. Although the Affirmative Action Office has some authority to ensure that the pool of applicants includes "affirmative" candidates, the Affirmative Action Office has no say in which of the candidates on the short list will be chosen for any given position.

It appears that the Affirmative Action Office wields no power independently at any point during the search process. In the beginning, a representative from that office meets with the search committee chair only to review relevant procedures. The Office then reviews proposed advertisements, apparently to ensure that they include a statement that "Kutztown University is an Affirmative Action/Equal opportunity Employer and actively solicits applications from qualified women and minority candidates." Joint Exhibit N. The Office also collects demographic data from the applicant pool, and may encourage the search committee to interview "affirmative" candidates "if it is determined [by the search committee] that they meet the qualifications of the position." The Affirmative Action Office is also involved in giving approval to invite candidates to

interview, but only in conjunction with the committee chair and dean, and nothing in the record suggests that this function has evolved into some sort of dictatorial veto power wielded by the Affirmative Action Office in favor of non-whites or females. In fact, in the Plaintiff's case, he was interviewed for the 1995-96 position, and the decision not to place him on the short list for the 1996-1997 position was made by the search committee. The fact that the search committee apparently failed to interview the Plaintiff for the latter position only because it felt that the administration would refuse to hire him is immaterial to this inquiry.

If the Affirmative Action Office set any gender or race-based quotas, we could well find that the Plaintiff had shown discrimination. However, in this case there is no indication that the Affirmative Action Office sets quotas on the number of female or minority candidates to be interviewed or hired. Neither is there any evidence that the Affirmative Action Office plays any part in determining which of the final candidates will be chosen to fill any faculty position. The evidence cited by the Plaintiff regarding the functions of the Affirmative Action Office fails to demonstrate an actual tendency on the part of the University to discriminate against white males.

c. Hiring of a Black Female

The Plaintiff also argues that the circumstances surrounding the hiring of a professor in the Biology Department

provides evidence of discriminatory tendencies against white males at the University. During the 1993-94 year, a black, female biologist was employed by the University as a temporary faculty member. The Biology Department needed to hire a tenure-track faculty member. At the conclusion of the search process, the Department's first choice was a Filipino woman. The black, female temporary faculty member was the Department's second choice. Knowing this, the administration offered to convert a temporary position into a tenure-track position, provided that the black, female biologist would be hired in the second position. The Department agreed, and both women were appointed to tenure-track positions. Fact 104. The Provost testified that the second position was created (1) because there was a real need in the Department to fill the vacancy on a permanent basis, and (2) because appointing a black, female biologist would help diversify the faculty. Fact 104a.

We understand the Plaintiff's frustration with this scenario. It does not seem fair that a position was created for one candidate in the Biology Department, while the Philosophy Department was left with a vacancy because it wanted to hire the Plaintiff. The fact that the biologist's race and gender were mentioned by the Provost makes it easy to jump to conclusions about the hiring process at Kutztown.

Nevertheless, we do not believe that this demonstrates a general discriminatory attitude toward white males. First of all, the biologist was not hired to fill a vacancy which was

advertised to the general public. The Provost testified that the position was created with a single candidate in mind. Thus, the woman hired to fill the second position in the Biology Department was not depriving any white male of a job. The need for another position happened to coincide with the availability of another very attractive candidate.

If the black, female biologist had been hired solely with an eye toward diversifying the faculty, we believe this action would have been unconstitutional, see Taxman, 91 F.3d at 1559, and would have helped to establish a discriminatory tendency against white males. However, this was not such a case. Provost Collings gave two explanations for his decision to create a position for the biologist. The first reason he gave is both credible and legal, while the second is in most cases illegal. The presence of the latter explanation does not vitiate the former. The biologist hired for the newly-created position had solid teaching evaluations, Joint Exhibit L, and was apparently a very agreeable candidate to the Biology Department. There is no reason to think that the Biology Department would have been denied another tenure-track position in the future had it chosen not to hire the black, female candidate. If the Biology Department had not been amenable to that particular candidate's appointment or had felt that a better qualified candidate was likely to surface, it could have turned down the Provost's offer and requested another tenure-track position at a later date. The

fact that it did not do so implies that the black, female biologist was a very attractive candidate in her own right.

The Jointly-Prepared Statement of Facts offers some support for the inference that the person hired to fill the second vacancy in the Biology Department was hired because of her race and gender. However, having reviewed the record very carefully, it seems more likely that this person would have been hired, regardless of her race and gender, in response to an existing need within the Department. The implications of her hiring are ambiguous at best, and do not establish that the University tended to discriminate against white males generally.

d. 1994-95 Tenure-Track Position

Although the parties have not called upon this court to determine whether the failure to offer the Plaintiff a tenure-track position beginning in the 1994-95 academic year was directly discriminatory, the Plaintiff argues that the circumstances surrounding this search for a tenure-track faculty member illustrate a pattern of discrimination against white males.

In the Fall of 1993, the Philosophy Department began a search to find a tenure-track faculty member. Dr. Hall chaired the search committee. The Department prepared the advertisement, which was duly approved, and over 200 applications were received. Facts 139-141. There were 24 women in the pool, 8 of whom had Ph.Ds. Fact 145. The committee sought permission to interview a number of candidates, none of whom were female. Fact 143. The

candidates were ranked by a numerical score. Fact 150. On April 1, 1994, the Dean, Affirmative Action Officer, and Committee Chair met to discuss the request. Fact 144. The Affirmative Action Officer and Dean were concerned that the list did not include any women. Fact 146. The Committee Chair explained this was because the women who applied lacked experience compared to those placed on the short list. Dean Brunner pointed out that some of the female applicants had the teaching experience required by the advertisement, and he expressed concern that the screening criteria employed by the committee were too vague. The Dean and Affirmative Action Officer requested that the Committee review the pool again and give greater consideration to women and minority applicants. The Committee assigned additional points to "affirmative" candidates and prepared a "Statistical Review of Candidates," which was submitted to the Dean and Affirmative Action Officer. Facts 148-151. The Dean still did not believe that the committee gave bona fide consideration to female candidates, and the Dean and Affirmative Action Officer decided not to authorize any interviews. As a result, the tenure-track search was aborted. Facts 155 and 156. The Dean and Provost told the Department that publications and teaching experience should not be weighted too heavily for "affirmative" candidates because young females and minorities just out of school would be unlikely to score high in those areas. Fact 157a. The Department and administration finally agreed to fill the position on a temporary basis for the coming year, during which time a new

search would be conducted. Fact 157d. The Plaintiff was appointed to fill the temporary position during the Fall semester, and Dr. Lizza during the Spring semester. Fact 157.

These facts do not support an inference that the University was discriminating against white men when it came to hiring tenure-track faculty members. At the time, the Department, search committee, and proposed list of interviewees were all composed exclusively of white males. Against this background, it seems reasonable for the Dean and Provost to have been concerned about possible discrimination against female and minority candidates in the screening process. We do not believe that the steps taken by the Defendants to make sure that female and minority candidates were not placed at a disadvantage when deciding whom to interview indicate a general predisposition to discriminate against white males.

It is not discrimination for an employer to seek to obtain a diverse job applicant pool or to recruit female and minority applicants. Duffy 123 F.3d at 1038-1039. This is precisely what the Defendants seem to have been attempting. There is no evidence that any of the Defendants were exerting pressure on anyone to hire a woman or member of a racial or ethnic minority to fill the position. This being the case, the circumstances surrounding the search to find a tenure-track faculty member to begin teaching in the 1994-95 academic year do not suggest a tendency on the part of the Defendant University to discriminate against white males.

e. Statistical Evidence Regarding Faculty Hired from 1993 to 1997

The Plaintiff also argues that the number of women and minorities hired by the College of Liberal Arts and Sciences reflects a pattern of discrimination against white males. We note that such statistics may be used to establish a tendency to discriminate against members of the majority. See Daly, 1995 WL 251385, *6.

In this case, the relevant hiring statistics may be summarized as follows:

Tenure Track Positions

Academic Year	Positions Available	Males Hired	Females Hired	Minorities Hired
1993-94	0	0	0	0
1994-95	9	6	3	4
1995-96	7	6	1	2
1996-97	4	3	1	1

Temporary Positions

Academic Year	Positions Available	Males Hired	Females Hired	Minorities Hired
1993-94	32	14	18	1
1994-95	34	16	18	1
1995-96	26	13	13	0
1996-97	30	9	21	0

Joint Exhibit Q.

Although we realize that the above table reflects all of the data from the relevant time period, we are concerned about

the reliability of such a small sample. This is particularly so in the absence of expert testimony. Even if we were to credit this data, comparing the number of white men hired to fill tenure-track positions during these years with the number of women and minorities hired to fill such positions over the same time period produces no evidence that the University is discriminating against white males when it comes to hiring tenure-track faculty. On the contrary, the fact that so many more women are hired to fill lower-paying, less prestigious, temporary positions may even suggest a bias in favor of white males applying for tenure track positions. Therefore, we are unpersuaded by the Plaintiff's argument that the number of female and minority faculty members hired between 1993 and 1997 reflects a pattern of discrimination against white males.

The five specific arguments discussed above each fail individually to establish a tendency of discrimination against white males. Even considered collectively, this evidence does not support an inference that Kutztown University discriminated against white males in its hiring decisions during the relevant time period.

2. Evidence of Discrimination in the Plaintiff's Particular Case

The Plaintiff may still establish a prima facie case of reverse discrimination if he can show that "there is something 'fishy'" about the decisions not to offer him either of the tenure-track teaching positions for which he applied. Harding, 9

F.3d at 153. The Plaintiff claims that the circumstances surrounding the searches for tenure-track faculty members to fill two positions in the Philosophy Department for the 1995-96 academic year and one position for the 1996-97 academic year show that he was discriminated against because of his race and gender.

a. 1995-96 Tenure-Track Position

In the Fall of 1994, another professor in the Philosophy Department decided to retire. The Department therefore had to fill two tenure-track positions. Professor Watkins was chosen to chair the search committee. In September 1994 an advertisement was prepared and approved. Professor Watkins is a critic of affirmative action, but despite this he endeavored to publicize the positions in publications aimed at females and minorities. Over 300 people applied for the two positions. The Department Chair interviewed female and minority candidates at a convention of the American Philosophical Association held in December 1994. Facts 159-164. In January 1995, Professor Watkins submitted a short list of eleven male candidates to the Affirmative Action Office. The list also identified two women the committee was willing to interview in addition to, but not instead of, the eleven males. The list was approved. Facts 166 and 167. A consensus to hire Dr. Lizza formed relatively quickly, and this recommendation was approved by the administration. Facts 170 and 171. The committee requested permission to interview two more candidates, and a list of four men and one woman (added because of her gender) was

submitted. Permission was granted, and two more candidates were interviewed. Facts 173 and 174. In May, the committee unanimously decided to recommend the Plaintiff for the second position. The Department Chair approached the Dean, who said that the recommendation would be problematic. Professor Watkins then approached the Dean and was told that hiring the Plaintiff would be difficult because of things the Plaintiff had said at a faculty meeting. Facts 176-182. Dean Brunner reviewed the Plaintiff's file and refused to accept the recommendation, citing concern with the Plaintiff's teaching record. Professor Watkins challenged this explanation, and the Department tried to persuade the Dean to reconsider. Facts 185-186b. The Dean did not change his position, and the Provost and President backed his decision. No member of the Philosophy Department believed the Plaintiff should have been rejected because of his teaching evaluations. Facts 189-190a. Following this decision, the second vacancy remained open. Fact 192. The Department could not agree on another candidate, and some Department members were concerned that filling the vacancy would undercut their efforts to hire the Plaintiff. The Department and administration compromised and decided to hire a temporary faculty member, although the Dean refused to consider the Plaintiff for that position. Facts 194-196. Dr. McHenry was given the temporary appointment. Fact 198.

As we have discussed previously, the circumstances surrounding the Dean's decision not to hire the Plaintiff are somewhat suspicious. See supra § III.A.2. Nevertheless, we do

not believe that the Plaintiff has established by a preponderance of the evidence that this decision was the product of reverse discrimination.

As we have stated previously, the fact that the administration wanted to make sure that "affirmative" candidates were included in the pool of applicants considered for the position does not imply that any pressure was exerted upon the committee to hire a woman or minority rather than a white male. See Duffy, 123 F.3d at 1039.

In addition, there is abundant evidence that white males were not placed at a disadvantage in the process. We note that the person hired to fill the first vacancy in the Philosophy Department was a white male. Fact 13. The members of the search committee were all white males. Facts 11, 12 and 16. The Chair of the Philosophy Department was a white male. Fact 10. The individual eventually selected to fill the position on a temporary basis was a white male. Fact 14. And from the evidence presented, it appears that either four or five of the seven tenure-track appointments in the college made during 1995 went to white males. Joint Exhibit Q. We agree with the sentiment expressed by the Fourth Circuit in Duffy, and find that for white males to harbor a general discriminatory animus against other white males would be "a rather extraordinary bigotry." 123 F.2d at 1039.

We understand the Plaintiff's suspicion that the decision not to accept the Philosophy Department's recommendation

to hire him as a tenure-track faculty member in 1995 was tainted in some way. Nevertheless, we cannot conclude that the taint had anything to do with the Plaintiff's race and gender.

b. 1996-97 Tenure-Track Position

The final evidence of reverse discrimination cited by the Plaintiff has to do with the search for a tenure-track professor to begin teaching during the 1996-97 academic year. Dr. Ferreira, a proponent of affirmative action, chaired the committee to fill this position, and a job advertisement was approved in September 1995. Dr. Ferreira worked more closely with the Affirmative Action Officer and Dean than his predecessors had. Four hundred and six applications were received. The Plaintiff again applied and met the minimum requirements for the job. Facts 201-206. The search committee created a long list of 20 potential interviewees, but did not place the Plaintiff's name on the long list because the administration had rejected him previously, and they assumed the administration would not change its position. Facts 208 and 211. The committee arrived at this conclusion although they personally believed that the Plaintiff's qualifications were comparable to or better than those of other applicants on the long list. Fact 212. Five candidates, including two women and Dr. Huang, a male Chinese national, were interviewed. Fact 215. Dr. McHenry was recommended for the position, but the Dean refused to hire him, citing concern about his teaching evaluations at Kutztown and elsewhere. Facts 216 and 218. Regarding the remaining

candidates, the search committee felt that the remaining white man lacked depth, one woman was overly specialized, and the other woman was not well received by students. This left Dr. Huang, who had limited teaching experience, but had published a great deal. The Department Chair testified that Dr. Huang's ethnicity had nothing to do with the decision to include him on the list of finalists. Facts 220-221a. The search committee and Department Chair concluded that Dr. Huang was the best available candidate. Fact 223. The Dean approved the decision, and Dr. Huang was hired as a tenure-track faculty member. Facts 225-227.

Although the candidate eventually hired to fill this position was Chinese, there is no evidence that he was preferred over the Plaintiff because of his race. In fact, Dr. Huang and the Plaintiff were never placed in direct competition for the position because the search committee did not place the Plaintiff on its short list. Dr. Huang came to the application process with very impressive credentials. He was in the process of completing his second doctoral degree and had a long list of publications and some teaching experience. Joint Exhibit GG. a substantial disparity in the qualifications of a plaintiff who applied for a job and the person who was eventually hired to fill that position may be indicative of reverse discrimination. See Harding, 9 F.3d at 153-154. However, we do not find any such disparity when comparing the credentials of the Plaintiff and Dr. Huang.

The fact that a Chinese national was eventually hired to fill a position which had been denied the Plaintiff does not necessarily imply that the Plaintiff was the victim of reverse discrimination. Section III.A.2 of this Memorandum presents a more likely explanation for the Plaintiff's failure to be appointed, and we have just discussed the reasons justifying Dr. Huang's appointment. Thus, the Plaintiff has failed to establish that he was subjected to reverse race and gender discrimination when he applied for a tenure-track position in 1996.

The only arguably preferential treatment which Dr. Huang received has to do with how quickly the Department's recommendation to hire him was approved by the administration. However, the Jointly-Prepared Statement of Facts states that Dr. Huang was considering another job offer and needed an answer quickly. Fact 224. We credit this explanation and find no other reason to believe that the Plaintiff was the victim of reverse race and gender discrimination when he was denied a tenure-track position in 1996.

3. Summary of Title VII Analysis

Because the Plaintiff has failed to prove a prima facie case under the modified McDonnell Douglas standard applicable to allegations of reverse discrimination, we need not assess the explanation which the Defendants have offered to justify their refusal to hire the Plaintiff. Although we have addressed this explanation in Section III.A.2 of our Memorandum, that discussion is moot in the context of the Plaintiff's Title VII claim, since

the Plaintiff has failed to carry his initial burden with respect to this claim. However, even if we were to proceed with our analysis of the Plaintiff's Title VII claim and find the Defendants' offered explanation pretextual, the Plaintiff would not necessarily prevail on his Title VII claim. We have already found that the refusal to hire the Plaintiff to fill a tenure-track vacancy was motivated by remarks he made at a faculty meeting, and we find this a far more plausible explanation than race and gender discrimination.

IV. CONCLUSIONS OF LAW

Pursuant to Fed. R. Civ. Pro. 52(a), we state the following conclusions of law.

A. Section 1983 Claim

1. The Plaintiff has met his burden of establishing that his speech at the April 19, 1994 faculty meeting was entitled to constitutional protection.

2. The Plaintiff has also met his burden of establishing that his speech at the faculty meeting was a motivating factor in the decision not to hire him as a tenure-track faculty member in the Philosophy Department. For this reason the burden of production shifted to the Defendants.

3. The Defendants have not satisfied their burden of suggesting a credible alternative explanation for their decision not to hire the Plaintiff, and we hold that the explanation offered by the Defendants is pretext.

B. Title VII Claim

4. The Plaintiff has established that he applied for tenure-track positions in the Philosophy Department at Kutztown University in 1995 and 1996, that Defendant Kutztown University was soliciting such applications, that he was qualified for such a position, and that he was not hired to fill such a position.

5. The Plaintiff has failed to establish that Defendant Kutztown University tended to discriminate against white males in its hiring decisions during the relevant time period or discriminated against him on the basis of his gender and race.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DR. RICHARD A.S. HALL, : Civil Action
: :
Plaintiff : :
: :
v. : No. 96-4516
: :
KUTZTOWN UNIVERSITY OF THE : :
PENNSYLVANIA STATE SYSTEM OF : :
HIGHER EDUCATION, et al., : :
: :
Defendants :

ORDER

AND NOW, this 12th day of January, 1998, it is hereby
ORDERED as follows:

1. The Court finds for and enters judgment in favor of the Plaintiff on the Section 1983 claim against Defendant Brunner;
2. The Court finds for and enters judgment in favor of Defendants Collings and McFarland on the Section 1983 claim;
3. The Court finds for and enters judgment in favor of Defendant Kutztown University on the Title VII claim;
4. The Plaintiff will submit and serve a brief on the issue of damages within ninety days of the date of this Order;
5. Within thirty days following service of Plaintiff's brief, Defendant Brunner shall respond with a brief concerning damages;
6. The Court encourages the Parties to resolve the issue of damages amicably, and without court intervention, as intended in the Stipulated Outline of Legal Issues.

BY THE COURT:

Franklin S. Van Antwerpen
United States District Judge