

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

EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	Civil Action No. 02-7430
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
MUHLENBERG COLLEGE,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Van Antwerpen, J.

April 29, 2004

Plaintiff Equal Employment Opportunity Commission (“EEOC” or “Plaintiff”) has filed a complaint with this court against Defendant Muhlenberg College (“Muhlenberg” or “Defendant”) for an alleged Title VII violation. Specifically, it alleges that Muhlenberg discriminated against Dr. Da’an Pan (“Dr. Pan”) on the basis of national origin (China) in denying his application for tenure. Muhlenberg now moves for summary judgement on the grounds that its decision to deny tenure was based on legitimate, nondiscriminatory reasons. For the reasons stated below, we grant Muhlenberg’s motion.

I. Factual History

In the fall of 1996, Muhlenberg hired Dr. Pan as an Assistant Professor of Chinese Civilization. Dr. Pan was not assigned to a specific department during his first year of teaching at Muhlenberg. During his second year, however, he became affiliated with the Philosophy Department, where his work was evaluated by the head of the Department, Dr. Ludwig Schlecht. Any work performed outside the Philosophy Department was to be evaluated by a Steering Committee. The Steering Committee, however, was never actually formed.

When Dr. Pan was hired, it was agreed that he would be considered for tenure during his third year of teaching. Ordinarily, professors follow a six year tenure track at Muhlenberg. However, because Dr. Pan had taught for five years at the University of Illinois, Muhlenberg agreed to credit this prior service.

The tenure application process at Muhlenberg begins with an evaluation of candidates by the Faculty Evaluation Committee (FEC). The FEC is an elected body of seven faculty members tasked with evaluating tenure candidates. Each candidate is observed teaching several classes by a member of the FEC, who submits a written recommendation to the candidate's file. The file also contains a Professional Statement prepared by the candidate and any other materials the candidate wishes to submit to the file. Upon reviewing the file and conducting an interview of a candidate, the FEC forwards a positive or negative recommendation for tenure to the Dean of Faculty. The Dean of Faculty then either concurs or disagrees with the recommendation and forwards the file to the President of the College for his review. If the President of the College makes a final positive recommendation, the Educational Policies and Affairs Committee of the Board of Trustees receives the application and votes on its approval. An FEC vote rejecting the candidate is appealable by the candidate to the Faculty Policies and Procedures Committee (FPPC).

In evaluating a tenure candidate, the Faculty Handbook states that the following areas should be considered: (1) teaching; (2) professional activity; (3) service to the college; and (4) commitment to the goals of the college. An evaluation of a candidate's teaching involves consideration of the candidate's Professional statement, teaching observations, syllabi, exams,

interview with the FEC, and Student Informational Response (SIR) questionnaires.¹

In the spring of 1998, Dr. Pan began the tenure application process by attending an informational session conducted by the Faculty Evaluation Committee (FEC). Sometime after the meeting, Dr. Pan requested a meeting with the Dean of the Faculty, Curtis Dretsch, and Dr. Schlecht to address his concern that the FEC might be “pre-disposed” against his application because he had only been at Muhlenberg two years. In his deposition, Dretsch recalled telling Dr. Pan that

he would need to understand that he was being judged on a shorter record because we had agreed to this prior service; that the evidence available to the committee based on his performance at Muhlenberg College would necessarily be a smaller body of evidence because he was standing for review in the third year.

(Dretsch Dep. at 30.)

Dretsch also recalled informing Dr. Pan that he could either proceed with his application or delay its consideration until some future point in time. (Id. at 30.) Plaintiff avers, however, that Dr. Pan was never informed that he could withdraw his application. Moreover, Schlecht later testified that this option was no longer available to candidates when Dr. Pan applied for tenure. (Schlecht Dep. at 33.)

Upon reviewing Dr. Pan’s application for tenure, the FEC unanimously voted to recommend against granting tenure. In evaluating Dr. Pan’s teaching abilities, the committee gave him a rating of “good.” (FEC Evaluation of Dr. Da’an Pan for Tenure and Promotion to Associate Professor at 2.) In its report, the FEC noted that it had received “mixed evidence on the quality of Dr. Pan’s teaching.” (Id. at 1.) While Dr. Pan received praise from certain

¹Students rate their professors’ teaching on a scale of 1 to 5, with 5 being the highest score.

colleagues, he also received criticism regarding the low level of class participation. (Id.) Similarly, while there were several positive comments from students, there were several negative comments concerning lack of organization and structure in the class. (Id. at 2.) One student observed that Dr. Pan's classes had come to be known as "blow off courses." The committee also noted that Dr. Pan had experienced a steady decline in his SIR scores, from 4.485 in Spring 1997, to 3.28 in Fall 1999.

With regard to Dr. Pan's Professional Activities, the FEC gave him a rating of "excellent." The committee observed that he had presented papers at national and international conferences and was a consultant on feature articles for three national magazines. In addition, he received numerous letters from scholars outside the Muhlenberg community, praising his expertise in research, writing, and translation in the field of Chinese literature. (Id. at 3.)

A majority of the FEC gave Dr. Pan a rating of "good" when assessing his college and public service, while others on the committee gave him a "fair" rating. (Id.)

Finally, the FEC rated Dr. Pan's Commitment to the Goals of the College as "good." (Id. at 4.) The committee noted that Dr. Pan had demonstrated commitment by mentoring a group of African-American students through a program at the Office of Multicultural Life. (Id.) However, it expressed concern that he had belittled the work of certain students by name to the committee during the interview and even handed out copies of a student's work as an example of poor writing. (Id.)

The FEC's recommendation that Dr. Pan be denied tenure was affirmed by both the Dean of Faculty, Dretsch, and the President of Muhlenberg, Arthur Taylor. After receiving notification of his denial, Dr. Pan appealed to the FPPC on the grounds that the FEC had inadequately

considered his teaching abilities and committed procedural violations in considering his application. Like the FEC, the FPPC is a body of seven elected faculty members. Upon receiving Dr. Pan's twenty-six page appeal, the FPPC conducted two days of hearings, in which it took testimony from FEC members, Dretsch, and other faculty members.

With regard to Dr. Pan's teaching record, a majority of the FPPC concluded that a "preponderance of evidence in Dr. Pan's written file, including the letter of the FEC's own observer, points to a conclusion about Dr. Pan's teaching different from that of the FEC's." (FPPC Letter to President Arthur Taylor at 1.) In addition, the FPPC found that the FEC claim that Dr. Pan had not adjusted his teaching style to Muhlenberg was without basis. (Id.) However, the FPPC concluded that the FEC did not place inappropriate reliance on the SIR scores in considering Dr. Pan's application. (Id. at 2.) As to the alleged procedural violations committed by the FEC, the FPPC unanimously found that Dr. Pan had not been notified that the FEC had received his SIR scores and was thus unable to respond to them. (Id.) The FPPC was also unanimous in its finding that the Philosophy Department and the Steering Committee did not meet to formulate a composite recommendation as specified in the "Guidelines regarding tenure-track position in Traditional Chinese Civilization." (Id.) In conclusion, by a vote of three to two,² the FPPC recommended that the President reconsider Dr. Pan's tenure application based on inadequate consideration of his teaching and based on the above mentioned procedural violations. (Id.)

In response to the FPPC's findings and recommendation, President Taylor met with Dr.

²Two members of the FPPC had to recuse themselves because they were members of the Philosophy Department.

Pan, Dr. Schlecht, Dean Dretsch, the FEC, and the FPPC. Plaintiff asserts that several discussions occurred in these meetings which demonstrate he was discriminated against. Prior to his meeting with President Taylor, Dr. Pan testified that he informed Dean Dretsch that he suspected the FEC's decision was motivated by discrimination and that the committee had a strong bias against him. (Pan Dep. at 63.) It is unclear from his testimony whether he was referring to discrimination motivated by his insistence that he be credited for prior service at the University of Illinois or whether he felt it was motivated by his national origin or race. Moreover, during the meeting with President Taylor, Dr. Pan was asked whether he believed there was discrimination underlying the decision to deny him tenure. Dr. Pan stated that he believed he was not granted tenure because the FEC was predisposed against him for having insisted on receiving credit for prior service at the University of Illinois. (Taylor Dep. at 159-60.)

Plaintiff does not dispute this, but instead refers to a comment made by President Taylor which suggested to Dr. Pan that the denial of tenure was based on his national origin. In explaining the FEC's decision, President Taylor said, "They don't understand you because they are playing American chess and you are playing 'go,'" a Japanese chess game. (Pan Dep. at 232.) In addition, Plaintiff notes that President Taylor conducted a meeting with Dr. Schlecht and Dean Dretsch in response to a faculty member's concern that there were racial overtones in the decision to deny Dr. Pan tenure. (Taylor Dep. at 76.) Plaintiff also avers that certain members of the FEC raised the issue of cultural bias in a meeting with President Taylor, however, the deponent it relies on to support this fact indicated that he could not recollect whether the issue was raised. (Benjamin Dep. at 75-80.) Finally, Plaintiff indicates that in a meeting with the FPPC, President Taylor described Dr. Pan as different because he was Chinese. (Pl.'s Brief at

14.) However, in the deposition Plaintiff cites to, President Taylor was actually quoted in the minutes as saying “Pan is different, but we need difference.” (Taylor Dep. at 111.)

Following these meetings, President Taylor affirmed his decision to deny tenure and, as per Muhlenberg’s policies, formed an ad hoc Committee of the Board of Trustees to review the case. The Committee reviewed the case and voted to support the President’s decision. Dr. Pan then left Muhlenberg after one additional year of teaching, as was customary. However, Plaintiff alleges that certain other professors were offered teaching contracts in lieu of tenure.

II. Standard of Review

The court shall render summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is “material” only if it might affect the outcome of the suit under governing law. Id. at 248. All inferences must be drawn and all doubts resolved, in favor of the non-moving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985).

On a motion for summary judgment, the moving party bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party must respond with facts of record that contradict the facts identified by the movant and may not rest on mere denials. Id. at 321 n. 3 (quoting Fed. R. Civ.

P. 56(e)). See First Nat'l. Bank of Pa.v. Lincoln Nat'l. Life Ins. Co., 824 F.2d 277, 282 (3d Cir. 1987). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson, 477 U.S. at 248-249.

III. Discussion

In an employment discrimination case, within the context of tenure denial, Plaintiff bears the initial burden of making out a prima facie case that the tenure candidate was (1) a member of a protected class; (2) was qualified, but rejected for tenure; and (3) similarly situated non-members of the protected class were treated more favorably. See Roebuck v. Drexel Univ., 852 F.2d 715, 726 (3d Cir. 1988). Once plaintiff establishes a prima facie case of discrimination, the burden then shifts to the defendant employer to offer evidence of a legitimate, nondiscriminatory reason for the denial of tenure. Id. If the employer meets this burden, the burden shifts back to plaintiff to produce evidence that the legitimate, nondiscriminatory reason was a pretext for discrimination. Id. In order to defeat summary judgment at this stage, plaintiff must offer sufficient evidence to cause a fact finder to “either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer’s action.” Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1990).

A. Plaintiff’s Prima Facie Case

Defendant argues first that Plaintiff has not met its burden of establishing a prima facie case. According to Defendant, Plaintiff cannot show that Dr. Pan was qualified for tenure or that he was similarly situated to non-members of the protected class who were treated more favorably.

i. Whether Dr. Pan was qualified for tenure

With regard to whether Dr. Pan was qualified to receive tenure, Defendant points to concerns that were raised about Dr. Pan's teaching in both faculty and student evaluations. In response to Defendant's argument that Dr. Pan was not qualified for tenure, Plaintiff points out correctly that the Third Circuit has held that in the context of tenure, Plaintiff "need only show that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made." Bennun v. Rutgers Univ., 941 F.2d 154 at 176 (3d Cir. 1991). Since Dr. Pan did indeed receive a letter from Dean Dretsch on July 15, 1998, indicating that he was scheduled for tenure review in the upcoming academic year, we find that the second element of the prima facie case has been met.

ii. Whether non-members of the protected class were similarly situated to Dr. Pan

We now consider whether Plaintiff has sufficiently established that non-members of the protected class who were similarly situated were treated more favorably. During the period in which Dr. Pan was evaluated for tenure, six other professors were also under consideration. Of those six professors, only the five that received "excellent" ratings in teaching were granted tenure. Professor 6,³ who received a rating of "good," was denied tenure. Plaintiff, relying on Bennun, responds that a difference in teaching ratings is not a proper basis for excluding professors from comparison. In Bennun, the defendant, Rutgers University, argued that the plaintiff was not similarly situated to a professor who had been granted tenure because that professor had been rated "outstanding" in two categories and the plaintiff had received a lesser

³The professors under consideration have been identified by number in the record in order to protect confidentiality.

rating in those categories. Id. at 178. The court held, however, that to deny comparison on this basis would be to say that the comparators must be “identically situated,” rather than “similarly situated.” Id. Plaintiff relies on this holding to support its argument that Dr. Pan can thus be considered similarly situated to the tenure candidates who received “excellent” ratings in teaching.

However, we do not believe that the court’s holding in Bennun is as analogous as Plaintiff would like it to be. In holding that comparators must be similarly, but not identically, situated, the Third Circuit referred to its decision in EEOC v. Franklin & Marshall, 775 F.2d 110 (3d Cir. 1985), in which it implied that “two professors in the same specialty who are evaluated within two years of each other by the same college can sometimes have their credentials compared. The propriety of such comparison is case specific.” Bennun, 941 F.2d at 178. Thus, the court went on to hold, even if one professor was a “teaching-oriented” professor and another was a “research-oriented professor, a comparison between the two can be made to determine if Rutgers’ five objective criteria for advancement to full professor were evenly applied.” Id. The point which the court emphasized in Bennun is that the professors were comparable because they were both biochemistry professors in the Zoology and Physiology Department. Id. This was enough, the court found, to enable it to evaluate whether the objective criteria had been evenly applied. In the instant case, none of the professors relied on for comparison were even in the same department as Dr. Pan. However, since Defendant does not argue this point, it has apparently conceded that differences in departmental affiliations or academic fields are not a bar to comparison. Thus we conclude that Plaintiff has established its prima facie case.

However, Plaintiff has not established its prima facie case with regard to other professors

who were either permitted to withdraw their application or obtain teaching contracts in lieu of tenure. As to “Professor 9,” who was permitted to resubmit his application for tenure after it was apparent in 1997-1998 that his teaching record would be viewed by the FEC as substandard, Defendant avers that such an option was no longer available when Dr. Pan applied for tenure the following year. The Faculty Handbook was accordingly amended to remove this option prior to Dr. Pan’s tenure consideration. Given the change in policy, Dr. Pan cannot be deemed to have been similarly situated to Professor 9. With regard to the professors who were offered contracts in lieu of tenure, relying on notes taken in a meeting with Dr. Pan, President Taylor testified that the possibility of a contract position was discussed in lieu of tenure, but that Dr. Pan felt that a contract position would be insulting. (Taylor Dep. at 108.) Dr. Pan testified that no such conversations occurred. (Pan. Dep. at 279-80.) Given the existence of notes which suggesting that such a conversation did occur, we are inclined to find that Plaintiff has not produced sufficient evidence to establish a genuine issue of material fact. However, even if we were to find that no such conversation occurred, we still find that Plaintiff has not established a prima facie case in this regard, since neither of the professors who were offered teaching contracts underwent tenure review and the extensive evaluation associated with that process.

B. Defendant’s Proffered Legitimate, Non-discriminatory Reasons for Denying Tenure

Having determined that Plaintiff has established a prima facie case of discrimination in being denied tenure, the burden now shifts to Defendant to proffer a legitimate, non-discriminatory reason. Defendant contends that Dr. Pan was not granted tenure because his teaching standards fell below the college’s standard for excellence, as evidenced by his declining SIR scores and mixed reviews from faculty, alumni and students. Specifically, Defendant cites

to the FEC's evaluation of Dr. Pan's teaching which incorporated comments from faculty and students regarding the lack of student participation in Dr. Pan's classes. The FEC noted that while Dr. Schlecht was complimentary of Dr. Pan's ability to present concepts and engage the class, he also felt that "[t]here were not many student questions or comments during the classes I attended, despite efforts from Professor Pan to encourage more vocal participation." (FEC Evaluation at 1.) In addition, the FEC noted that a department colleague wrote in his evaluation: "I was disappointed that [Dr. Pan] was unable to generate more of a discussion." (Id.) That same colleague, in an evaluation written six months later, noted that there had been improvement in class participation. (Id.) However, another colleague wrote that "while trying to elicit some discussion from students . . . [he] had modest success . . . [a] small core of students actively participated." (Id. at 2.) In addition, Dean Dretsch testified that after observing Dr. Pan's teaching, he felt there was some "kind of disconnect between Dr. Pan and his students that made him less effective than would have been considered acceptable." (Dretsch at 13.) Similar comments were made by Dr. Benjamin, a member of the FEC. (Benjamin Dep. at 56.)

Following the FEC's recommendation against tenure, President Taylor conducted a meeting with the FEC members in order to understand the basis for the recommendation. (Taylor Dep. at 63.) President Taylor characterized each of the members' comments in that meeting as "negative" or "devastatingly negative." (Id.) Certain members of the FEC described their interview with Dr. Pan as "abrasive," "uncollegial," and "the worst interview in 40 years." (Id.) Further concerns were expressed in the FEC's Report about the fact that Dr. Pan attributed the poor performance of certain students to their own poor education, rather than any shortcomings he might have had as a teacher. (FEC Evaluation at 4.)

As to the student evaluations, Defendant points to the SIR report in which Dr. Pan's scores appeared to be declining. Dr. Pan received the following SIR scores during his years of teaching at Muhlenberg:

Fall 1996	4.46	Fall 1997	4.0	Spring 1998	3.67	Fall 1998	3.38
Spring 1997	4.79	Fall 1997	4.09	Spring 1998	3.23	Fall 1998	3.09
Spring 1997	4.18	Fall 1997	3.21	Spring 1998	3.67	Fall 1998	3.36

Defendant also alleges that Dr. Pan received an average SIR score of 3.28 during the fall semester of the year in which he was evaluated for tenure.⁴ (Def.'s Br. at 23.) The average score professors receive at Muhlenberg is 4.0. The FEC also noted in its evaluation the mix of positive and negative comments from students and alumni. For example, some students remarked on Dr. Pan's energy and enthusiasm, while others commented that the course could have been better organized. One student wrote that Dr. Pan's classes "came to be known as blow-off classes." (Claff Letter.) Another wrote: "I wish I could strongly recommend him but I want to ensure that Muhlenberg students get the best teaching possible and I feel that Dr. Pan's style needed to be changed." (Gordon Letter, October 11, 1998.)

Based on the foregoing evidence submitted by Defendant, we conclude that Defendant has met its burden of establishing legitimate, non-discriminatory reasons for not granting Dr. Pan tenure.

⁴Although Plaintiff does not contest this assessment, we note that the Comparison Chart of SIR Scores Defendant submitted does not actually list a score for the Fall 1999 semester. The most recent score is 3.36, which Dr. Pan received for the Fall 1998 semester.

C. Defendant's Legitimate, Non-Discriminatory Reasons as Pretext

The burden now shifts to Plaintiff to demonstrate that the legitimate, non-discriminatory reasons offered by Defendant for denying Dr. Pan tenure were a pretext for its decision based on national origin. In essence, “the test is whether the plaintiff ultimately persuades the factfinder that the employment decision was caused by bias.” Fuentes, 32 F.3d at 763. Thus, to avoid summary judgment, Plaintiff must show that the legitimate, non-discriminatory reason offered by Defendant was “either a post hoc fabrication or otherwise did not actually motivate the employment action.” Id. at 764. In doing so, Plaintiff must produce evidence that the reasons given by Defendant are fraught with such “weaknesses or implausibilities, inconsistencies, incoherencies, or contradictions [. . .] that a reasonable factfinder could rationally find them unworthy of credence.” Fuentes, 32 F.3d at 765, citing Ezold v. Wolf, Block, Schorr, and Solis-Cohen, 983 F.2d. 531, 533 (3d Cir. 1993). Moreover, it should be understood that tenure decisions are made on subjective judgments and “experienced faculty members may well come to different conclusions when confronted with voluminous and nuanced information about a colleague’s overall capacity to make a long-term institutional contribution.” Vanasco v. National-Louis Univ., 137 F.3d 962, 968 (7th Cir. 1998).

Plaintiff argues that “Dr. Pan’s review process smacks of discrimination” because his cultural differences, and therefore national origin, were motivating factors in Defendant’s decision to deny tenure. (Pl.’s Brief at 28.) As evidence that national origin was a motivating factor, Plaintiff refers us first to the depositions of Dr. Anna Adams, President Taylor, and Dr. Benjamin. However, the specific references Plaintiff makes to these depositions do not substantiate Plaintiff’s claim. In Dr. Adams’ deposition, she was asked whether the issue of

cultural differences came up at the FPPC meeting. She answered

I believe the president asked if we thought that that was an issue. We talked about the possibility of that being an issue, although nobody believed that the FEC consciously denied Dr. Pan's tenure because he was Chinese.

(Adams Dep. at 46.)

The fact that the appeals committee discussed whether cultural issues had been a motivating factor in the FEC's decision cannot be deemed evidence of discrimination, especially since the deponent testified that no one thought that cultural issues were the reason for denial of tenure. In addition, Dr. Adams explained that she felt President Taylor had asked about cultural issues "because he's been involved in enough law suits or read enough lawsuits to know that this might be raised as a concern, although it was not raised ever in the appeal or the proceedings." (Id. at 47.) As to President Taylor's testimony, Plaintiff cites a portion in which its attorney read minutes from a meeting between the president, Dr. Pan, Dean Dretsch, and Dr. Schlecht. The minutes read by the attorney attributed the following comments to Dr. Schlecht: "Appreciate way you are handling this. I don't think any bias on FEC, but someone who comes from different culture can be misunderstood from time to time. I believe what happened in interview, some things weren't appreciated." (Taylor Dep. at 107.) However, these comments seem to signal a defense of Dr. Pan's conduct during the FEC interview by his proponent, rather than an attempt to explain the decision to deny tenure. Moreover, the issue of cultural differences was clearly being raised by Dr. Schlecht, not President Taylor. With regard to Dr. Benjamin's testimony, Plaintiff's attorney questioned him about some notes taken by an unknown person at meetings attended by Dr. Benjamin:

Q. Based on his recollection of the meeting after reviewing the documents that I have in

conjunction with the documents presented by Ms. Conrad, do you recall if anyone discussed cultural biases in regards to Dr. Pan?

A. I don't recall that at this meeting.

Q. I want to draw your attention to the second page, the top. And it has the initials JM, and I'm assuming that is Jim Marshall based on those who were present at the meeting. JM per the notes may have stated something to the effect that this is a cultural bias. And based on that sentence or phrase, does that refresh your memory as to whether or not the issue of a cultural bias was discussed?

A. I don't remember this meeting, so I'm not quite sure what to answer for this.

* * *

Q. Again, I want to ask you whether or not you recall a discussion regarding cultural differences of Dr. Pan.

A. Not at this meeting.

Q. So if it says here that to what extent – to I want to say succeed, but I can't understand that. It has the phrase cultural difference. And I just wanted to know if that would refresh your recollection as to whether or not it was discussed. And if it doesn't, then okay.

And then the next sentence, the initials CD, it reads, if the differences are cultural, to what extent do we as college have to accommodate them. Does that refresh your recollection as to what was discussed in regards to cultural differences?

A. You know, I really don't remember this meeting.

* * *

Q. I draw your attention to the last page, 2602, under the initials JM, who I assume is Jim Marshall, the fourth line down it reads, hope no cultural bias. Does that refresh your recollection at all as to whether or not cultural issues were discussed at this meeting?

A. Not at this meeting.

(Benjamin Dep. at 75.)

Aside from the fact that these notes were not taken by Dr. Benjamin and he had no recollection

of the purported content of the meeting, the reference to cultural bias is simply too vague to substantiate a charge of discrimination. If anything, like the comments attributed to Dr. Schlecht, they suggest that a supporter of Dr. Pan, Dr. Marshall, was attempting to address the criticisms of Dr. Pan by chalking them up to cultural differences. Moreover, Plaintiff has not offered testimony from Dr. Marshall which would substantiate these claims. While we are obligated in a motion for summary judgment to take all reasonable inferences in a light most favorable to Plaintiff, we need not do so when there is no sufficient evidentiary basis. There is no indication whatsoever as to what Dr. Marshall might have been referring in this case. Furthermore, the testimony of the alleged reference to cultural bias was made by Plaintiff's attorney and not by a witness in this case. It would therefore not be appropriate for us to construe these statements as evidence in the case.

As further evidence that Defendant's legitimate, non-discriminatory reasons for denying Dr. Pan tenure were pretextual, Plaintiff directs our attention to the inconsistencies and procedural violations noted by the FPPC in its report on Dr. Pan's appeal. In the report, the FPPC, by a vote of four to one, wrote that quotations from Drs. Schlecht and Schick were taken out of context and that the preponderance of evidence in Dr. Pan's file "points to a conclusion about Dr. Pan's teaching different from that of the FEC's." (FPPC Evaluation at 1.) In addition, the FPPC added that the FEC's statement that Dr. Pan had not been successful in adjusting to the teaching style of Muhlenberg was without basis and that the FEC did not adequately consider Dr. Pan's pedagogical objectives in his Professional Statement. (Id. at 2.) The report also noted that by the same vote, the FPPC found that the FEC did not misrepresent alumni comments, that the SIR scores did not contain "meaningful statistical inaccuracies," and that they were not

inappropriately relied upon. (Id.) Based on these findings, the FPPC, by a vote of three to two, recommended reconsideration of Dr. Pan's teaching evaluation. (Id.) Regarding the procedural violations alleged by Dr. Pan in his appeal, the FPPC unanimously found that Dr. Pan had not been notified that his SIR scores had been reported to the FEC, and therefore was not given a chance to respond to them, and that a composite recommendation was not formulated by the Philosophy Department and Steering Committee, as required by the "Guidelines regarding tenure-track position in Traditional Chinese Civilization." (Id.) Based on these procedural violations, a majority of the FPPC (three members) concluded that "had the violations not occurred, there was at least the potential of a different outcome" and that the denial of tenure should be reconsidered. (Id.)

Plaintiff, relying on Stewart v. Rutgers State Univ., 120 F.3d 426 (3d Cir. 1997), argues that the inconsistencies and procedural violations noted by the FCCP are sufficient evidence of pretext. In Stewart, after she was denied tenure, the plaintiff filed a grievance in which she alleged that the decision was arbitrary and capricious, contained material factual errors, and was motivated by gender and racial discrimination. Stewart, 120 F.3d at 430. The Third Circuit held that the district court erred in granting summary judgment because it failed to consider a university grievance committee's findings that the denial of tenure had been "arbitrary and capricious" and "could not have been reached by reasonable evaluators." Id. at 433. The grievance committee noted in its report that it was unfair for the tenure evaluators to characterize the candidate's contribution to scholarship as "promising" when six out of nine reference letters described her work as considerably better than "promising." Id. In addition, the grievance committee found the evaluators' concerns regarding the quality and independence of the

candidate's work were without merit, since none of the nine letters written by outside reviewers supported these concerns. Id. Finally, the committee reported that the tenure evaluation failed to reflect that six peers were highly positive of the plaintiff's work.

Plaintiff asserts that the Stewart case is remarkably similar to Dr. Pan's experience at Muhlenberg. However we must distinguish it on several grounds. First, while both alleged inconsistencies and procedural errors in their appeals, only the plaintiff in Stewart alleged discrimination. Second, the findings of the grievance committee in Stewart were much more conclusory than those made by the FPPC. In Stewart, the grievance committee concluded that the tenure denial decision was arbitrary and capricious and that such a decision "could not have been reached by reasonable evaluators." Id. In the instant case, the FCCP concluded that a "preponderance of the evidence in Dr. Pan's file [. . .] points to a conclusion about Dr. Pan's teaching different from that of the FEC's" and recommended that the president reconsider the case based on "inadequate consideration of his teaching." With regard to the procedural violations, only three of the members of the committee felt that "had the violations not occurred, there was *at least the potential* (emphasis added) of a different outcome." These conclusions are substantially weaker than the unequivocal conclusion that the grievance committee reached in Stewart that the decision "could not have been reached by reasonable evaluators."

Moreover, the specific criticisms of the grievance committee were more substantial than those argued in this case. In Stewart, the grievance committee noted that the tenure evaluators failed to take into account the fact that six of the nine letters written for the plaintiff were highly positive and characterized her work as more than "promising." Additionally, the grievance committee found no support for the tenure committee's calling into question the quality and

independence of her work. In the instant case, the FCCP found that the FEC had taken comments made by Drs. Schlecht and Schick regarding lack of class participation out of context. However, it did not make a similar finding regarding a third colleague, whose comment corroborated Drs. Schlecht and Schick's statements.⁵ Additionally, it did not find that similarly negative comments made by alumni and students were misrepresented in any way or that the SIR scores were inappropriately relied upon. Thus it is apparent that while the FCCP found fault with the use of comments by Drs. Schlecht and Schick, it did not discount the negative evaluations from a third member of the faculty or from students and alumni. Plaintiff has offered no evidence which would cause us to doubt the sincerity of the FEC in taking these factors into account when they decided to recommend against granting Dr. Pan tenure.

With regard to the procedural violations, the FPPC found that Dr. Pan was not notified that his SIR scores had been reported to the FEC. However, as Defendant points out, no candidate for tenure was notified that the FEC had received their SIR scores. (Dretsch Dep. at 55-56.) Moreover, Dean Dretsch testified that all candidates are informed that the SIR scores will be provided to the FEC as part of the tenure review process. (Id.) Since all candidates were treated the same with regard to the SIR scores, we cannot conclude that the failure to notify Dr. Pan that his SIR scores for the fall semester had in fact been received by the FEC was a pretext for discrimination.

As to the failure of the FEC to obtain a composite recommendation from the Philosophy Department and a Steering Committee that was to be established to assess Dr. Pan's teaching

⁵One FEC member wrote that Dr. Pan "had modest success . . . [a] small core of students actively participated. (FEC Evaluation at 2.)

outside the Philosophy Department, we do not find this procedural violation supports Plaintiff's pretext argument. While the Steering Committee was indeed never established, Defendant argues, and Plaintiff does not dispute, that the FEC received evaluations from those who would have been on the Steering Committee, had it been established. Evaluations were submitted by Dr. Schlecht, the head of the Philosophy Department; Dr. Darryl Jodock, a member of the original Search Committee; and Dr. George Heitman, a member of the International Studies Department. Thus, while Defendant failed to establish an official Steering Committee that could contribute to the formation of a composite recommendation, we find that by receiving evaluations from a diverse group of faculty members who would have likely formulated such a report, the FEC achieved the same result. In addition, the failure of Defendant to follow its own policies does not, in and of itself, necessarily suggest discrimination. See Randle v. City of Aurora, 69 F.3d 441, 454 (10th Cir. 1995). Plaintiff has not offered any evidence to suggest that Defendant's failure to form the Steering Committee was motivated by discrimination.

While Plaintiff does attempt to offer evidence supporting its contention that Dean Dretsch and President Taylor were motivated by discriminatory animus, we do not believe it demonstrates that the reasons given by Defendant for denying tenure were a "post-hoc fabrication." Fuentes, 32 F.3d at 764. While it is true that Plaintiff need not demonstrate discrimination at every level of the evaluation process, Roebuck, 852 F.2d at 727, the discrimination complained of must still be substantiated by evidence that would lead a reasonable factfinder to find that the legitimate, non-discriminatory reasons given for denying tenure to be unworthy of credence. Fuentes, 32 F.3d at 765.

Plaintiff avers that Dean Dretsch "tried to threaten and intimidate Dr. Pan if he

complained about discrimination to the FEC.” (Pl.’s Br. at 32.) However, the citations provided by Plaintiff to substantiate this accusation demonstrate that it is wholly unsupported. Dr. Pan indicated Dean Dretsch’s reaction in the following excerpt from his deposition when he raised the possibility of arguing discrimination in his appeal:

A. Well, he said, you know, because I said – I told him that I suspected a bias against me. And he said, you know, if you stick to the procedural violations, you know, I would be, you know, testifying for you, because before that he had reassured me that as long as the FPPC made a recommendation fo reconsideration, you know, the decision would be, you know, reversed.

(Pan Dep. at 72.)

Prior to this testimony, the defense attorney questioned Dr. Pan on what type of bias he felt had occurred:

Q. Now it states here that in May of ‘99 you informed the then Dean Dretsch that you intended to inform the FPPC that you believed your tenure denial was motivated by discrimination.

A. Yeah. That was toward the end of the meeting [. . .] Mr. Dretsch said, you know, now I would like to open our discussion to talk about your – your appeal. And then during the conversation I said, you know, I think the FPPC, you know, had a strong, you know, bias against me, something like that.

* * *

Q. So it’s your position then that the FEC was motivated by discrimination?

A. Right. Right. I was – I said I suspect, yeah, there was an element of bias involved.

Q. A bias. What do you mean by bias?

A. A bias means an unfair judgment. Yeah, an unfair view of the candidate’s qualifications, yeah.

Q. And in fact, you raised that very issue prior to the tenure process, didn’t you?

A. Prior to the – I don’t – I’m not quite clear about your question.

Q. Well, didn't you send an e-mail to Dr. Schlecht that said it seems to me that some committee members are predisposed to have tenure candidates with prior service serve more than two years at Muhlenberg before they are considered for tenure?

A. Yeah. That was my concern raised during a preapplication, I think, orientation session.

(Pan Dep. at 62-64.)

First, it is unclear from this testimony what type of discrimination Dr. Pan was alleging to have experienced in his conversation with Dean Dretsch. Given his prior concerns that his service credit would cause the FEC to be biased, the fact that Dr. Pan did not raise the issue of discrimination in his twenty-six page appeal to the FPPC, and that when asked by President Taylor whether he felt he had been unfairly treated, he did not recall saying he had, a finding of discrimination based on the above statements by Dr. Pan would not be a reasonable inference. It is more reasonable to infer that the bias Dr. Pan was complaining about was with regard to his prior service credit, which is not a prohibited consideration under Title VII. Similarly, the so called "threat" by Dean Dretsch that he was willing to testify as to the procedural violations, but not regarding bias against Dr. Pan, seems more reasonably characterized as an unwillingness to testify to something that Dean Dretsch did not believe occurred. With regard to the instances in which Plaintiff avers that the issue of "cultural difference" was raised in Dean Dretsch's presence, we have already concluded that such references are vague and do not support a conclusion that it was a basis for the denial of tenure. We are unwilling to censor institutions of higher learning by holding that mere mention of the term "cultural difference" in the context of tenure review constitutes discrimination.

Finally, Plaintiff has made much of the comment made by President Taylor to Dr. Pan

that “[t]hey don’t understand you because they are playing American chess and you are playing ‘go,’” a Japanese chess game. As with the other statements proffered by Plaintiff to show the implausibility of the legitimate, non-discriminatory reasons put forth by Defendant, we cannot reasonably infer from this statement, seemingly taken out of context, that President Taylor’s evaluation of Dr. Pan was tainted by discrimination. Dr. Pan testified that President Taylor

tried to understand why the FEC was negative about my tenure eligibility. Okay. And he tried to understand in my favor. He said, you know, they don’t understand you. They’re playing American chess and you’re playing go. Go means a Japanese chess game.

(Pan Dep. at 232.)

Thus it is apparent that President Taylor was referring to the interaction between the FEC and Dr. Pan, rather than his own views. Moreover, while the statement did refer to games from two different countries, it can more reasonably be inferred as describing a communication problem between Dr. Pan and the FEC.

IV. Conclusion

Defendant’s Motion for Summary Judgment is granted. While Plaintiff has met its burden of establishing a prima facie case of discrimination with regard to Dr. Pan’s tenure denial, it has not produced sufficient evidence to call into question the legitimate, non-discriminatory reasons proffered by Defendant. An appropriate order will follow.

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

EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	Civil Action No. 02-7430
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
MUHLENBERG COLLEGE,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 29th day of April, 2004, upon consideration of Defendant's Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56, filed on March 16, 2004, and brief in support thereof filed on March 16, 2004; and Plaintiff EEOC's Brief in Opposition to Defendant Muhlenberg College's Motion for Summary Judgment, filed on April 16, 2004, it is hereby ORDERED that:

- 1) Defendant's Motion for Summary Judgment is GRANTED;
- 2) This case is closed.

BY THE COURT:

Franklin S. Van Antwerpen, U.S.D.J.

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

EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	Civil Action No. 02-7430
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
MUHLENBERG COLLEGE,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 29th day of April, 2004, JUDGMENT is hereby ENTERED in favor of Defendant and against Plaintiff with regard to all claims.

BY THE COURT:

Franklin S. Van Antwerpen, U.S.D.J.