

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Stephen Gilroy Hall, Ph.D.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-1068 (Ct. of Cl. No. 2010-10106)
The Ohio State University College of Humanities,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on October 30, 2012

William C. Wilkinson, for appellant.

Michael DeWine, Attorney General, *Randall W. Knutti* and
Kristin Boggs, for appellee.

APPEAL from the Court of Claims of Ohio

BRYANT, J.

{¶1} Plaintiff-appellant, Stephen Gilroy Hall, Ph.D., appeals from a judgment of the Court of Claims of Ohio granting summary judgment to defendant-appellee, The Ohio State University ("OSU") College of Humanities, on Hall's employment discrimination claim. Because Hall failed to raise a genuine issue of material fact as to whether OSU's legitimate, nondiscriminatory reason for denying him tenure was merely pretext for race or color discrimination, we affirm.

I. Facts and Procedural History

{¶2} Hall, who is a self-described "dark-skinned African American," filed a complaint against OSU alleging race and color discrimination in violation of 42 U.S.C.

2000(e) and breach of contract. (Oct. 13, 2011 Amended Memorandum, exhibit B, hereinafter "Hall Affidavit.") According to the evidence presented in conjunction with the summary judgment proceedings, Hall received a B.A. in History from Morgan State University, an M.A. in African American Studies from the University of Wisconsin, and a Ph.D. in History from OSU. After briefly teaching at Central State University, Hall returned to OSU as a Visiting Professor.

{¶3} In 2002, OSU offered him a tenure-track position as assistant professor within the university's Department of History. Tenure-track assistant professors serve in a probationary capacity for six years, during which OSU considers them for reappointment annually. At the end of a candidate's probationary period, the university grants promotion and tenure if, following a three-tiered evaluation process consisting of review at the department, college and university levels, the Board of Trustees approves.

{¶4} From 2002 onward, OSU renewed Hall's contract each year, and in 2008 the department's Promotion and Tenure ("P&T") Committee met to initiate Hall's tenure review. Despite the department faculty's endorsement, the College of Humanities' P&T Committee, following an independent review, determined it could not recommend Hall for tenure.

{¶5} At the university level, University Provost Joseph A. Alutto received the department and college P&T Committees' reports and ultimately concluded he would not recommend to the university's Board of Trustees that Hall be promoted and, as a result, be granted tenure. OSU notified Hall of its decision, and his employment with the university ended on June 30, 2010.

{¶6} On August 23, 2010, Hall filed a complaint against OSU in the Court of Claims of Ohio. Following discovery, OSU filed a motion for summary judgment on August 22, 2011. After the parties briefed the motion, the Court of Claims granted OSU's summary judgment motion on November 3, 2011, finding no genuine issues of material fact remained for trial.

II. Assignments of Error

{¶7} Hall appeals, assigning the following errors:

[I.] The trial court erred by failing to construe the evidence in Appellant's favor when it granted Appellee's motion for summary judgment.

[II.] The Appellee was not entitled to summary judgment on Appellant's "color" claim.

Although the Court of Claims granted summary judgment to OSU on all of Hall's claims, Hall's appeal raises issues solely related to his race and color discrimination claims. We, therefore, address only those claims. *See Zacks v. Beck*, 10th Dist. No. 04AP-1364, 2005-Ohio-4567, ¶ 5.

III. First Assignment of Error – Pretext for Discrimination

{¶8} Hall's first assignment of error contends the Court of Claims erred "when it concluded that the evidence could only support an inference that Appellant was denied tenure by reason of a poor teaching record." (Appellant's brief, at 12.) Hall asserts he raised genuine issues of material fact as to whether OSU's reasons for failing to promote him were merely pretext for discrimination.

A. Standard of Review

{¶9} Appellate review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). In appellate review of summary judgment, we stand in the shoes of the Court of Claims, conduct an independent review of the record, and affirm the Court of Claims' judgment if any of the grounds the movant raised in the Court of Claims supports the court's judgment, even if the Court of Claims failed to consider those grounds. *See Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996); *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶10} Summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 65-66 (1978).

{¶11} The party seeking summary judgment initially bears the burden of informing the Court of Claims of the basis for the motion and identifying portions of the record that demonstrate no genuine issues of material fact remain as to the essential elements of the non-moving party's claims. *Dresher* at 293. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. *Id.* Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C) that affirmatively demonstrates the non-moving party has no evidence to support the non-moving party's claims. *Id.*

{¶12} If the moving party satisfies its initial burden, the non-moving party must respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts indicating a genuine issue remains for trial. *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430 (1997); Civ.R. 56(E). The non-moving party may not rest upon the mere allegations and denials in the pleadings but, instead, must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E); *Henkle v. Henkle*, 75 Ohio App.3d 732, 735 (12th Dist.1991).

B. Race and Color Discrimination under Title VII

{¶13} Hall asserts OSU discriminated against him on the basis of race and color "under the provisions of 42 U.S.C. §2000(e), Title VII, of the Civil Rights Act of 1964, and the Fourteenth Amendment to the United States Constitution." (Appellant's brief, at 7.) 42 U.S.C. 2000e-2(a) states, in part, that "[i]t shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

{¶14} A plaintiff in a discrimination lawsuit may pursue "essentially, two theories of employment discrimination: disparate treatment and disparate impact." *Albaugh v. Columbus, Div. of Police*, 132 Ohio App.3d 545, 550 (10th Dist.1999), citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). Hall raises his claims under the disparate treatment theory, contending "OSU's discriminatory denial of tenure was because of Dr. Hall's race and color." (Appellant's brief, at 10.) In a disparate treatment

claim, Title VII imposes upon a plaintiff the initial burden of establishing discrimination through either direct or indirect evidence of discrimination. *Bucher v. Sibcy Cline, Inc.*, 137 Ohio App.3d 230, 239 (1st Dist.2000), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Where a plaintiff has no direct evidence of discrimination, a prima facie case of discrimination may be made through indirect evidence under the burden-shifting framework the United States Supreme Court established in *McDonnell Douglas*.

{¶15} Under *McDonnell Douglas*, a plaintiff first must demonstrate: (1) he or she is a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position in question; and (4) the employer treated a non-protected, similarly-situated person more favorably. *Veal v. Upreach, L.L.C.*, 10th Dist. No. 11AP-192, 2011-Ohio-5406, citing *McDonnell-Douglas* at 802. Once a plaintiff demonstrates a prima facie case, the employer is required to set forth some legitimate, non-discriminatory basis for its action. *Id.* If the employer meets its burden, a plaintiff must be afforded an opportunity to prove by a preponderance of the evidence that the legitimate reasons the employer offered were not its true reasons for its actions but were a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The ultimate burden of persuasion always remains with the plaintiff. *Id.* at 256.

{¶16} OSU's motion for summary judgment did not dispute that Hall established a prima facie case for discrimination. OSU contended instead that because university promotion and tenure policy required a tenure candidate to demonstrate teaching excellence, Hall's poor teaching performance was a legitimate, nondiscriminatory reason for its decision to deny plaintiff tenure.

C. OSU's Evidence of Nondiscriminatory Reason to Deny Tenure

{¶17} In establishing a legitimate, nondiscriminatory reason for the adverse employment action, OSU's burden is one of production. *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 14, quoting *Texas Dept. of Community Affairs*. OSU "need not prove a nondiscriminatory reason" for denying plaintiff promotion and tenure "but need merely articulate a valid rationale." (Emphasis deleted.) *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir.1996), citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993). Accordingly, " '[i]f the employer submits admissible evidence that "taken as true, would

permit the conclusion that there was a nondiscriminatory reason for the adverse action," then the employer has met its burden of production.' " (Emphasis deleted.) *Valentine v. Westshore Primary Care Assoc.*, 8th Dist. No. 89999, 2008-Ohio-4450, ¶ 67, quoting *St. Mary's* at 509.

{¶18} To support its contention that failure to demonstrate teaching excellence generally constitutes a valid rationale for denying tenure to a candidate under OSU's policies, OSU presented the affidavit of Human Resources Director Chitra Iyer. According to Iyer, OSU bases its tenure determinations on "convincing evidence that the candidate has (1) achieved excellence as a teacher; (2) achieved excellence as a scholar; and (3) is one that provides effective service, and can be expected to continue a program of high quality teaching, scholarship and service." (Aug. 22, 2011 OSU Motion for Summary Judgment, exhibit A, hereinafter "Iyer Affidavit."); *see also* Faculty Rule 3335-6-04(B)(1) (stating the promotion and tenure review procedures require reviewing faculty to assess "quality and effectiveness of teaching, quality and significance of scholarship, and quality and effectiveness of service"). Iyer's affidavit also incorporates several authenticated letters, memoranda and reports showing OSU reviewed Hall pursuant to these three criteria and determined he failed to demonstrate teaching excellence. *See* Civ.R. 56(E); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222 (8th Dist.1986) (holding the correct method of introducing documents not included within the list of evidentiary materials set forth in Civ.R. 56(C) is to incorporate them by reference in a properly framed affidavit pursuant to Civ.R. 56(E)).

{¶19} According to OSU's evidence, Hall's tenure review commenced in Fall 2008 with the department's P&T Committee meeting to consider Hall's performance "in the areas of research, teaching, and service." (OSU Motion for Summary Judgment, exhibit A-4, October 8, 2008 letter from Chair of the Department of History's Promotion and Tenure Committee Nathan Rosenstein to Chair of the Department of History Peter Hahn, hereinafter "Oct. 8, 2008 Rosenstein letter.") By this time, Hall had secured a prestigious publisher for his manuscript, and few questioned his "excellent and important body of scholarly research." (Oct. 8, 2008 Rosenstein letter.) Likewise, the P&T Committee recognized Hall's "good service in the History Department and to the profession." (Oct. 8,

2008 Rosenstein letter.) Discussion of Hall's teaching abilities, however, "was quite extensive and opinions were mixed." (Oct. 8, 2008 Rosenstein letter.)

{¶20} Among the available measures of Hall's teaching performance were students' "discursive," or narrative, evaluations, peer evaluations based on classroom visits from colleagues, and Student Evaluation of Instruction ("SEI") score sheets for each of Hall's course offerings from 2002 to 2008. SEI scoring allowed Hall's students to rate his performance in ten areas on an ascending scale of one to five. Each score report then calculated Hall's mean score for each area and provided, for comparison purposes, the mean scores of other professors at the department-, college-, and university-levels. (Oct. 8, 2008 Rosenstein letter.)

{¶21} Although the departmental P&T committee members registered displeasure with Hall's frequently low SEI scores and uneven student and peer evaluations, the committee ultimately voted 27 to 5 in favor of promoting Hall to the rank of Associate Professor with tenure, reasoning he had "demonstrated an acceptable level of skill and effectiveness in the classroom." (Oct. 8, 2008 Rosenstein letter.) On October 8, 2008, Department of History Chair Peter Hahn received the departmental P&T Committee's report.

{¶22} In 2007, as part of Hall's fifth year review, Hahn had expressed his "concern" with Hall's SEI scores, "confirmed by the written, subjective evaluations by students and by faculty colleagues." (OSU Motion for Summary Judgment, exhibit A-2, Mar. 12, 2007 letter from Peter Hahn to Dean John Roberts and Stephen Hall.) In his October 18, 2008 tenure review letter to College of Humanities Dean John Roberts, Hahn reiterated his earlier view that "[m]easures of the quality of Professor Hall's teaching indicate some cause for concern." (OSU Motion for Summary Judgment, exhibit A-5, Oct. 18, 2008 letter from Hahn to Roberts, hereinafter "Oct. 18, 2008 Hahn letter.") Hahn wrote he nevertheless overcame his "strong potential reservations" after hearing department members' "generally positive interpretations of this data" and endorsed the committee's positive recommendation. (Oct. 18, 2008 Hahn letter.)

{¶23} The College of Humanities' P&T Committee next considered the matter. In its letter to Roberts, the college P&T Committee recommended against promotion "based on a thorough appraisal of Professor Hall's dossier and its supporting materials, including

his publications and peer and student evaluations of teaching." (OSU Motion for Summary Judgment, exhibit A-6, Dec. 22, 2008 letter from Frederick Aldama to Roberts, hereinafter "Dec. 22, 2008 Aldama letter.") The committee cited Hall's "unprecedentedly low SEI scores" that "reflect a pattern of decline" and "discursive comments from students corroborat[ing] the problematic teaching record * * * reflected by the extremely low SEI scores," as reason to conclude Hall did "not meet the criteria for 'excellence as a teacher' required for tenure as stated in the Department of History's APT [Appointment, Promotion, and Tenure] document (page 18)." (Dec. 22, 2008 Aldama letter.)

{¶24} In his January 5, 2009 letter to University Provost Alutto, Roberts supported the college P&T Committee's negative recommendation. Noting Faculty Rule 3335-6-02(C) stipulated that an award of tenure and promotion " 'must be based on convincing evidence that the faculty member has achieved excellence as a teacher and as a scholar, and as one who provides effective service.' " Roberts concluded "Professor Hall has met these criteria in the areas of research and service, but not in the area of teaching." (OSU Motion for Summary Judgment, exhibit A-7, Jan. 5, 2009 letter from Roberts to Alutto, hereinafter "Jan. 5, 2009 Roberts letter.") Roberts declared Hall's teaching record "a record of gradual decline" and elaborated with a year-by-year review of Hall's teaching performance, exploring not only Hall's SEI scores but also quoting students' discursive evaluations. Roberts concluded, "[I]t is clear that Stephen Hall reaches some people. But they are too few to make a convincing case that the record indicates excellence in teaching." (Jan. 5, 2009 Roberts letter.) As Roberts continued, "Quite the reverse: if this case were to be put forward with a positive recommendation, the College would thereby abdicate the right ever to use teaching excellence as a criterion for promotion and tenure. The facts are clear: Professor Hall is an ineffective teacher who does not meet the standard of excellence in this critical area." (Jan. 5, 2009 Roberts letter.)

{¶25} After considering both the department's and the college's positions, Alutto determined he would not recommend Hall's promotion to the OSU Board of Trustees. On March 30, 2009, Alutto wrote to Hall's peers on the Department of History faculty setting forth his reasons for issuing a tenure decision contrary to the faculty's recommendation. The provost explained, "After carefully reviewing the candidate's dossier and all of the internal and external documentation as well as the department's AP&T document, I find

the evidence related to the candidate's teaching record fails to meet the department, college and university criteria for promotion to the rank of Associate Professor with tenure." (OSU Motion for Summary Judgment, exhibit A-8, Mar. 30, 2009 letter from Alutto to Department of History faculty, hereinafter "Mar. 30, 2009 Alutto letter.") "[A]n established record of excellence in teaching is required to meet the criteria at all levels for promotion to the rank of Associate Professor with tenure." (Mar. 30, 2009 Alutto letter.)

{¶26} OSU's evidence supports its contentions that teaching excellence is a prerequisite for tenure under its policy, that evaluators carefully considered Hall's tenure candidacy before concluding he failed to meet the school's standard for excellence in teaching, and that his failure to achieve teaching excellence was the reason OSU denied him tenure.

D. Plaintiff's Evidence of Pretext

{¶27} Once an employer establishes a legitimate, nondiscriminatory reason for the action taken, a plaintiff must present evidence that an employer's stated justification was mere pretext for impermissible discrimination. *See Boyd v. Ohio Dept. of Mental Health*, 10th Dist. No. 10AP-906, 2011-Ohio-3596, ¶ 27. To meet his or her burden, a plaintiff must submit evidence that an employer's proffered reason (1) had no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Knepper v. Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011-Ohio-6054, ¶ 12, citing *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir.2000). Under any of the three options, a plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject an employer's explanation and infer that the employer intentionally discriminated against him. *Knepper* at ¶ 12, citing *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003). To this end, Hall contends his "Affidavit, Interrogatory Responses and deposition created numerous issues of fact." (Appellant's brief, at 14.)

{¶28} Hall first contends he demonstrated pretext by "showing that teaching alone is not grounds for denial." (Appellant's brief, at 19.) To support his contention, Hall presented his own affidavit averring teaching "has not historically been utilized as a basis to deny tenure," so that "[d]enial of tenure in [his] case was based upon according a degree of weight to teaching that was contrary to that stated in OSU History Department

tenure policy." (Oct. 3, 2011 Hall's Amended Memorandum in Opposition, exhibit B.) Both Hall's earlier deposition testimony and the referenced tenure policy contradict his affidavit.

{¶29} Hall submitted no evidence to support his conclusory statement that OSU historically did not use teaching as a basis to deny tenure. Beyond that, Hall's own August 3, 2011 deposition testimony supports OSU's position that teaching excellence is a prerequisite for promotion and tenure. When asked at his deposition "how the criteria was explained to [him] for being offered tenure and promotion," Hall answered that "a candidate must achieve excellence in teaching, research and service in order to be * * * successfully promoted to associate professor." (Hall Depo. 15-16.) Contradicting his claim that OSU's tenure decision accorded teaching a degree of weight out of line with the university's stated policy, he admitted in his deposition that it is "highly possible" he "could arguably fail at one [of the three criteria] and be denied tenure even if [he was] highly successful at the two others." (Hall Depo. 20.)

{¶30} "[A]n affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, paragraph three of the syllabus; *see also Darden v. Columbus*, 10th Dist. No. 03AP-687, 2004-Ohio-2570, ¶ 28. Neither Hall's memorandum opposing OSU's summary judgment motion nor his affidavit explain the contradictions between his affidavit and his deposition statements.

{¶31} As to the referenced department tenure policy, Hall fails to cite any particular statement in the policy that supports his claims. Contrary to the conclusory statement in his affidavit, OSU's policy unequivocally states the department requires tenure candidates to demonstrate excellence in teaching. *See* Complaint, exhibit B, Appointment, Promotion and Tenure: Criteria and Procedures. As an example, under "Department Mission," the policy states that "[t]he interrelated activities of research and teaching are essential to the advancement of [the] Departmental mission. Excellence in these areas is therefore accorded the highest priority, with faculty service to the Department, the College, the University, and the community rendered in support of that

priority. The Department expects that each of its members will be productive in the areas of research, teaching, and service."

{¶32} Further, the policy corroborates a statement in Iyer's affidavit that convincing evidence must demonstrate a candidate's achievement in teaching, research and service before the university will grant tenure. Under "Section VI. Reviews for Promotion with Tenure, and for Promotion[,] * * * B. Criteria: Promotion from Assistant to Associate Professor with Tenure," the policy states that in addition to achievement in research and service, a tenure candidate "should have demonstrated excellence as a teacher of history." (Complaint, exhibit B.) Describing the general procedures for considering tenure candidates, the policy requires each member of a reviewing body to examine the candidate's materials and assess "both strengths and weaknesses of the candidate's record in research, teaching, and service." (Complaint, exhibit B.) Finally, the policy stipulates that "[d]ocumentation of every promotion and tenure or promotion case will, where appropriate, include" student evaluations for all courses, summaries of SEIs, course documents such as syllabi and exams, a self-assessment from the candidate, and detailed peer evaluations. (Complaint, exhibit B.)

{¶33} In the final analysis, Hall's own deposition and documentary submission contradict his statements challenging the importance of teaching performance in tenure review, and Hall offers no explanation for the disparities. Hall's proffered evidence thus fails to create a genuine issue of material fact as to whether the weight OSU accorded teaching in Hall's tenure review demonstrates pretext for discrimination.

{¶34} Hall next claims he demonstrated pretext "through the showing * * * that no dark-skinned African American has ever received tenure in the Department." (Appellant's brief, at 19.) Addressing this point, Hall's affidavit avers that "[h]istorically the OSU History Department has granted tenure to Blacks on a disproportionately low basis" and "has never granted tenure to a large dark-skinned Black man." (Hall Affidavit.) Hall's statements suggest the representational disparities are evidence that OSU's reliance on teaching excellence was pretextual and that in reality discriminatory animus motivated its tenure decisions.

{¶35} Hall, however, failed to refute OSU's evidence indicating excellence in teaching is a significant factor in achieving tenure at OSU. A "reason cannot be prov[en]

* * * 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." (Emphasis deleted.) *St. Mary's* at 515; see also *Marbley v. Metaldyne Co.*, 9th Dist. No. 21377, 2003-Ohio-2851, ¶ 11, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143-44 (2000) (holding "plaintiff must produce evidence demonstrating that the employer's stated reasons were factually untrue"). Hall's evidence does not indicate OSU's reason for denying Hall tenure was false or insufficient to merit the result.

{¶36} Moreover, even if Hall's statements were sufficient to undermine OSU's reasons, Hall did not present related evidence to accompany his representational disparity statements. An "employee's bare assertion that the employer's proffered reason has no basis in fact is insufficient to call an employer's honest belief into question, and fails to create a genuine issue of material fact." *Joostberns v. United Parcel Servs., Inc.*, 166 Fed.Appx. 783, 791 (6th Cir.2006); *Smith v. Kelly*, 2d Dist. No. 2011 CA 77, 2012-Ohio-2547, ¶ 31, citing *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 307 (1977) (determining disparate treatment is shown "through a combination of statistical evidence demonstrating substantial disparities buttressed by evidence of general policies or specific instances of discrimination"); *Goodyear v. Waco Holdings, Inc.*, 8th Dist. No. 91432, 2009-Ohio-619, ¶ 32 (concluding "[m]ere conjecture that the employer's stated reason is a pretext for intentional discrimination is an insufficient basis for the denial of a summary judgment motion made by the employer"); see *Gogate v. Ohio State Univ.*, 42 Ohio App.3d 220, 225-26 (10th Dist.1987), quoting *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir.1980) (holding "[d]eterminations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges").

{¶37} Hall's affidavit next claims "[t]he tone and content of the June 2009 correspondence concerning [Hall] written by Dean Roberts is evidence of racial animus" because "[t]here was no rational basis for the language used by the Dean, such as the word dysfunctional." (Hall Affidavit.) To support his contentions, Hall submitted a copy of Roberts' letter; OSU's motion also submitted a copy of the letter.

{¶38} Roberts' letter yields no explicit or implicit reference to Hall's race or color. On the contrary, the dean extensively articulated his reasoning in accordance with the applicable "research, teaching, service" tenure-review framework. After praising Hall's scholarship as "very high quality," Roberts thoroughly considered Hall's teaching record, discussing SEI scores, students' narrative feedback, and peer evaluations. (Jan. 5, 2009 Roberts letter.) As the dean observed, Hall's SEI scores repeatedly placed him in the "bottom 3% of all teachers of similar-sized courses." (Jan. 5, 2009 Roberts letter.) After discussing the third class in two years from which Hall received scores placing him in the bottom three percent, Roberts noted these three classes were of differing sizes, "indicating that Stephen Hall is in the bottom 3% of all teachers not just for introductory lectures of over 60 students, and for mid-size courses of 20-60 students, but also for graduate-level courses of 5-20 students. The record shows a systematic failure, indicating truly dysfunctional teaching." (Jan. 5, 2009 Roberts letter.) Roberts' letter, including the factual basis, directly contradicts Hall's conclusory allegation that Roberts' comments and use of the word "dysfunctional" lacked a rational basis.

{¶39} A party cannot avoid summary judgment solely by submitting a self-serving affidavit containing nothing more than bare, conclusory contradictions of the moving party's evidence. *Zacks* at ¶ 29, citing *Bell v. Beightler*, 10th Dist. No. 02AP-569, 2003-Ohio-88. Hall's affidavit regarding Roberts' letter reduces to a conclusory assertion that the critical language Roberts used to describe Hall's teaching performance is evidence of Roberts' discriminatory animus. " 'Intentional discrimination cannot be proven by conclusory allegations made by the charging party.' " *King v. Enron Capital & Trade Res. Corp.*, 10th Dist. No. 00AP-761 (Apr. 5, 2001), quoting *Hollowell v. Soc. Bank & Trust*, 78 Ohio App.3d 574, 581 (6th Dist.1992).

{¶40} The remaining assertions of Hall's affidavit state he "was denied tenure by reason of [his] race, size and complexion" so that "[t]he denial of tenure in [his] case was based on both race and color discrimination." (Hall Affidavit.) Again, " 'self-serving statements by the charging party that he believes he was discriminated against because of race are not enough' " to insulate that party from summary judgment. *King*, quoting *Hollowell* at 581. Hall's statements merely assert discrimination without setting forth specific facts sufficient to demonstrate a genuine issue for trial. *See also* Civ.R. 56(E).

White v. Vrable, 10th Dist. No. 98AP-1351 (Sept. 30, 1999), citing *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69 (12th Dist.1989) (holding the purpose of an affidavit is to demonstrate that a genuine issue of material fact remains for trial and, therefore, the affidavit must set forth specific facts and not merely legal conclusions or opinions).

{¶41} Hall's statements alternatively could be interpreted to suggest OSU's tenure review process results in systemic discrimination against an entire class of persons pursuant to the disparate impact theory of employment discrimination, a theory that does not require proof of discriminatory motivation. *Abram v. Greater Cleveland Regional Transit Auth.*, 8th Dist. No. 80127, 2002-Ohio-2622. Although Hall's "historical" averments are consistent with a disparate impact claim, he otherwise fails to present the arguments and evidence necessary to support such a claim. *See Albaugh* (holding the plaintiff in a disparate impact case must identify the specific employment practice that is allegedly responsible for any observed statistical disparity, and then must prove causation by offering sufficient statistical disparities, rather than specific incidents, showing that the practice in question caused the demonstrated adverse impact); *Abram* at ¶ 45, quoting *Robinson v. N. Olmsted*, N.D. Ohio No. 1:93CV1203, 1997 U.S. Dist. LEXIS 17620 (May 7, 1997), citing *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988) (holding the appellants' burden is "to show an adverse effect caused by the employment practice and to offer 'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs * * * because of their membership in a protected group' "); *Miller v. Potash Corp. of Saskatchewan, Inc.*, 3d Dist. No. 1-09-58, 2010-Ohio-4291, ¶ 49, citing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656-57 (1989) (holding "[t]he plaintiff is obliged to do more" than "merely alleg[e] a disparate impact, or point to a generalized policy," but "is responsible for 'isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities' "). Hall's affidavit thus falls short of creating an issue for trial under a disparate impact theory of discrimination.

{¶42} Because Hall failed to demonstrate a genuine issue of material fact remains in determining whether OSU's proffered legitimate, nondiscriminatory reason for

Hall's tenure rejection was merely a pretext for impermissible discrimination, the Court of Claims properly granted summary judgment to OSU. Hall's first assignment of error is overruled.

IV. Second Assignment of Error - Color-Based Discrimination

{¶43} Hall's second assigned error contends the Court of Claims erred "in not addressing Dr. Hall's color claim." (Appellant's brief, at 20.) Although the Court of Claims' decision often refers to Hall's race discrimination claim alone, the court acknowledged Hall's color discrimination claim as well. In reviewing Ohio's employment discrimination statute, the court's decision omitted the inapplicable protected areas of religion, sex, national origin, disability, age or ancestry to focus on unlawful discriminatory practices "because of the race [or] color * * * of any person." (Decision, 3.) The court's decision later concluded Hall's "bald assertions that he was denied tenure because of his race and color are unsupported and do not prove pretext." (Decision, 7.)

{¶44} Although the Court of Claims' decision did not address Hall's color discrimination allegation separately, the court's analysis applies to resolve both claims. Similarly, our de novo review reveals Hall failed to provide an adequate evidentiary basis from which a reasonable trier of fact could deduce OSU's reasons for denying Hall tenure were pretext for either race- or color-based discrimination. Accordingly, notwithstanding the Court of Claims' alleged omission, the court correctly concluded OSU is entitled to summary judgment on both of Hall's discrimination claims. Hall's second assignment of error is overruled.

V. Disposition

{¶45} Having overruled Hall's two assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.
