STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1948

Seraphin Abou,
Appellant,

vs.

University of Minnesota, et al.,
Respondents.

Filed July 3, 2017
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CV-15-16601

Kelly A. Jeanetta, Kelly A. Jeanetta Law Firm, LLC, Minneapolis, Minnesota (for appellant)

Douglas R. Peterson, General Counsel, Carrie Ryan Gallia, Assistant General Counsel, Minneapolis, Minnesota (for respondents)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

Appellant Seraphin Abou, a mechanical engineer who was denied tenure and promotion at respondent University of Minnesota, challenges the district court's dismissal of his discrimination and retaliation claims. Because Abou does not present genuine issues

of material fact to demonstrate either that the University's legitimate, nondiscriminatory reasons for its employment decisions are a pretext for discrimination or that he suffered an adverse employment action due to the alleged retaliation, we affirm.

FACTS

Dr. Seraphin Abou, who holds a Ph.D. in mechanical engineering, began teaching in the Department of Mechanical and Industrial Engineering at the University of Minnesota, Duluth (UMD) in 2006. Abou, who is originally from Benin in West Africa, studied in France, Poland and Canada. In 1998 he obtained his Ph.D. in mechanical engineering. Abou speaks four languages. He was first hired as an instructor and took a tenure-track position as assistant professor in 2007.

In September 2012, Abou applied for tenure and promotion to associate professor.[1] Consideration of an application for tenure at UMD begins with a departmental recommendation, based on material submitted by the candidate. The department evaluates candidates for tenure by qualitatively reviewing their record of teaching, scholarly research, and service. Then a dean and a vice chancellor, respectively, independently review the application, and each makes a recommendation. Finally, the material goes to

[1] The tenure-and-promotion process is governed by the Board of Regents Policy on Faculty Tenure, as well as the department's own statement with standards for tenure and promotion. That statement indicates that the department awards tenure to persons who have established and are likely to continue a distinguished record of academic achievement leading to a national or international reputation. It sets out standards for evaluating a candidate's teaching, which is considered the primary mission of UMD, as well as the quality of original research and its impact within the professional discipline. Although service is also considered, only a modest level of service is expected from probationary employees.

the UMD chancellor, who makes the final tenure decision. Promotion to associate professor is almost always associated with an affirmative decision on tenure.

Abou's departmental review committee consisted of five tenured professors, including department head Dr. Ryan Rosandich. Abou submitted for review his annual teaching reviews, a statement of professional experience and competence (known as a faculty performance record), journal publications, peer reviews of his teaching, student evaluations, and six letters from external reviewers. After discussion and review, the department review committee voted by secret ballot 4-1 in favor of promoting Abou to associate professor, but 3-2 against granting him tenure.

The departmental review committee stated that Abou had presented a weak case for tenure and promotion. It indicated that although Abou's teaching had improved, his teaching evaluations remained "somewhat below average" with some showing "serious weaknesses." According to the committee, Abou had communication problems and presented misleading or inaccurate material in some courses. The committee noted some progress in Abou's research, but that he had a "failed effort at laboratory development," with significant funds spent on a nonfunctional hydraulics lab. It stated, however, that the most serious issue with respect to Abou's faculty performance record was apparent misrepresentation of his professional work. This included listing a National Science Foundation grant in which he played a very minor part; submitting an FAA grant with a letter that contained misrepresentations about the department and college and indicated receipt of the grant when UMD was only an affiliated institution; and listing 28 published

papers, when only seven of the papers appeared in refereed journals. The committee noted that Abou had made adequate service contributions to the department.

Dean James Riehl next reviewed Abou's materials, including Abou's written response to the department review committee's report. In a letter to Vice Chancellor Andrea Schokker, Riehl stated that Abou's teaching performance had been uneven, with evaluations showing several areas of weakness. Riehl also independently reviewed some of the journal articles in Abou's file. In examining one of the articles (the "Ship Engine Paper"), he observed that Abou had referenced, without attribution, data collected from a ship's engine that Riehl did not believe was in the possession of the university. Riehl confirmed that UMD did not have such an engine and discovered that the relevant passage was taken word for word from another publication. He also noted that Abou had separately listed in his file some articles that were identical, only using different titles. Based on this information, Riehl stated that he had "serious concerns with the quality and content of his published works." He recommended against granting Abou tenure.

Abou subsequently submitted a correction to the journal that published the Ship Engine Paper, as well as a written response to Vice Chancellor Andrea Schokker related to the dean's recommendation. Schokker reviewed the file and expressed her own concerns about Abou's tenure application. Schokker had concerns about Abou's failure to properly cite material in the Ship Engine Paper; his listing of an National Science Foundation MRI grant that made it appear that he had a larger role that he actually fulfilled; his inaccurate listing of 2012 FAA grant as a research grant; and his failure to state that some grant money

from a Department of Transportation grant had to be returned because the department was not satisfied with his work. She stated:

> Dr. Abou's file presents an uneven record of teaching performance, but he has worked to improve his teaching effectiveness over time. His most recent student evaluations have improved considerably over earlier years. Dr. Abou contributed to the development of the curriculum in the Master of Environmental Health and Safety program in his home department as well as teaching undergraduate classes in the department.
>
> In the area of research, Dr. Abou has a reasonable number of published journal papers and an acceptable record of research funding. While his record appears promising in his Faculty Performance Record, a closer inspection of his journal papers raises some alarming concerns about duplicate publications and unreferenced contributions. These issues call into question his research and publication record and thus make his overall research unacceptable for promotion and tenure.

Schokker indicated that she would not award a person rank without tenure because a person who did not receive tenure would be required to leave under the collective bargaining agreement. She therefore wrote to Chancellor Lendley Black recommending that Abou be denied both promotion and tenure. Abou met with Schokker, but she did not change her recommendation.

Abou then wrote to Chancellor Black, arguing that he had been discriminated against based on his race or national origin. Black, who testified that he routinely examines all documents in a candidate's portfolio, conducted his own review of Abou's materials. He notified Abou that he would not be granted tenure or promotion.

Abou filed an internal complaint with the University's Office of Equal Opportunity and Affirmative Action, alleging that his denial of tenure amounted to discrimination on

the basis of race or national origin. That office conducted an investigation and notified him in August 2013 that it had found no violations.

Following the denial of tenure, in accord with the terms of the relevant collective bargaining agreement, Abou's employment at UMD continued for an additional year, ending at the close of the 2013-14 academic year. In fall 2013, Abou asked Rosandich if he could stay on as an adjunct professor. Rosandich testified that, by then, Abou "had brought legal action against the University of one kind or another," and he told Abou that although he would ask the dean, he thought that Abou's "chances [were] pretty slim because [he] brought legal action against the University." When Rosandich did inquire, Riehl stated that he was unaware of any time that the College of Science and Engineering had allowed a person to stay on after their terminal year. Riehl then spoke to Schokker, who replied that someone in a different college at the university had been allowed to stay on. Riehl testified that he then presumed that "[he] could make a case to have him continue, if that was something [he] . . . and the department wanted to do." But they had "already hired somebody to teach [Abou's] courses," and, after speaking with Rosandich, he decided that "this was not something [they] wanted to do." Abou was not hired as an adjunct professor, and his employment ended in May 2014, after the year in which tenure was denied.

After the university decided not to rehire Abou, he filed discrimination charges with the Minnesota Department of Human Rights and the United States Equal Employment Opportunity Commission. The EEOC determined that no violation occurred. In September 2015, Abou initiated this action, alleging that he was denied promotion and

tenure because of discrimination based on his race or national origin, in violation of Title VII and the Minnesota Human Rights Act. *See* 42 U.S.C. § 2000e-2 (2012); Minn. Stat. § 363A.01-.43 (2016). He also alleged retaliation under those statutes for filing discrimination complaints.

The district court granted the university's motion for summary judgment on both claims. The district court concluded that Abou's claims failed under the test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The district court determined that, under the first portion of the *McDonnell Douglas* test, Abou had failed to produce facts to support a prima facie case of discrimination. It further concluded that, even if Abou had presented a prima facie case, the university had sustained its burden to articulate legitimate, nondiscriminatory reasons for denying him tenure, and Abou had failed to establish that these reasons were pretextual. Finally, the district court determined that Abou had failed to establish a prima facie case of retaliation under either Title VII or the MHRA. Abou appeals.

D E C I S I O N

We address Abou's challenge to summary judgment on his claims of discrimination in the denial of tenure under both federal and state law. Title VII of the United States Code prohibits discrimination against an employee, including hiring or tenure decisions, based on the employee's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000(e)-2(a)(1). The MHRA also provides that an employer may not discriminate against an employee with respect to hiring or tenure based on his or her "race, color, creed, religion, [or] national origin." Minn. Stat. § 363A.08, subd. 2. The same legal analysis applies to

claims brought under both laws. *See, e.g.*, *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (1999).

At the outset, we observe that tenure decisions implicate a combination of factors that often set them apart from other employment decisions. *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir. 1984). Contracts for academic tenure, which are akin to lifetime contracts for personal service, involve unusual commitments in terms of time and collegial relationships. *Id.* And courts are generally reluctant to review the merits of a tenure decision, which evaluates contributions in a specialized academic field. *Id*. Thus, "[w]hile Title VII unquestionably applies to tenure decisions, judicial review of such decisions is limited to whether the tenure decision was based on a prohibited factor." *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 976 (8th Cir. 1991).

We further review whether, after the tenure denial, the university retaliated against Abou for filing discrimination complaints. Abou argues that the failure to rehire him as an adjunct professor was an act of retaliation. When asserting a claim of retaliation in response to protected activity, a plaintiff must demonstrate that the employee engaged in statutorily protected conduct, that the employer committed an adverse employment action, and that a causal connection exists between the two. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983).

We review the district court's grant of summary judgment to the university on Abou's discrimination and retaliation claims to determine whether a genuine issue of material fact exists and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. We review the district court's decision de novo, viewing the facts in the

light most favorable to Abou and giving him the benefit of all reasonable inferences. *Robinson v. Am. Red Cross*, 753 F.3d 749, 754 (8th Cir. 2014).

I. Abou failed to establish a genuine issue of material fact concerning whether his denial of tenure was pretext for discrimination.

Abou alleges that he was denied tenure because of discrimination based on his race and national origin. To succeed on this claim, Abou must show either direct evidence of discrimination or evidence sufficient to create an inference of discrimination under the burden-shifting framework established in *McDonnell Douglas*. 411 U.S. at 802, 93 S. Ct. at 1824; *see Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Because Abou does not contend that direct evidence of discriminatory intent exists, we apply the *McDonnell Douglas* analysis to evaluate his Title VII and MHRA claims. *See Hoover*, 632 N.W.2d at 542.

Under the *McDonnell-Douglas* framework, the plaintiff must first make out a prima facie case of discrimination. 411 U.S. at 802, 93 S. Ct. at 1824; *Goins v. West Grp.*, 635 N.W.2d 717, 724 (Minn. 2001). In a denial-of-tenure case, a plaintiff sustains this burden by producing evidence that he or she was a member of a protected class, was qualified for tenure, and "was not granted tenure in circumstances permitting an inference of discrimination." *Zahorik*, 729 F.2d at 92. If the plaintiff establishes a prima facie case, the burden shifts to the employer to provide admissible evidence of a legitimate, nondiscriminatory reason for the denial of tenure. *See Hoover*, 632 N.W.2d at 542. If the employer does so, the presumption of discrimination disappears, and the plaintiff must then establish that the employer's reason is a mere pretext for discrimination. *Id*. While the

burden of producing evidence shifts during this analysis, the burden of persuasion remains on the plaintiff throughout the case to show that the employer's action was motivated by unlawful intent. *Orbovich v. Macalester Coll.*, 119 F.R.D. 411, 415 (D. Minn. 1988); *Goins*, 635 N.W.2d at 724.

Here, we assume, without deciding, that Abou satisfied the prima-facie case requirement of *McDonnell Douglas*. *See Kobrin v. Univ. of Minn.*, 34 F.3d 698, 702 (8th Cir. 1994). The burden then shifts to the university to articulate a nondiscriminatory reason for the tenure denial. *See id.* In Abou's situation, the university points to Abou's inadequate scholarly research and publications—in particular the uncited, unreferenced data in his Ship Engine Paper—as the nondiscriminatory reason for tenure denial. While the departmental review committee raised additional concerns, the dean and vice-chancellor, who made the recommendation to the chancellor, characterized only Abou's research and publication record as "unacceptable for promotion and tenure" in light of "alarming concerns about duplicate publications and unreferenced contributions."

Because the university provided a legitimate, nondiscriminatory reason for its action, Abou has the burden of establishing that the university's proffered reason is a pretext for discrimination. *Hoover*, 632 N.W.2d at 542. "[T]o avoid summary judgment under the *McDonnell Douglas* third step, the . . . plaintiff must put forth sufficient evidence for the trier of fact to infer that the employer's proffered legitimate nondiscriminatory reason is not only pretext but that it is pretext for discrimination." *Id.* at 546.

In *Hoover*, the supreme court concluded that the plaintiff presented a "collection of evidence" that cast doubt on the legitimacy of the employer's proffered reason for

discharge and allowed a rational factfinder to determine that the real reason was discrimination. *Id*. at 547. Abou argues that, similarly, he provided a "collection of evidence" sufficient to create a jury question on whether the university's proffered reasons for denying him tenure amounted to mere pretext for discrimination. This "collection of evidence," Abou contends, includes evidence that similarly situated employees who were granted tenure; that the university's stated reasons for not granting him tenure were not true; and that university policies were violated during the process in which he was denied tenure. We address each pretext argument in turn.

Abou's treatment compared to similar employees

Abou argues that he was treated differently from two other similarly situated employees who received tenure, Drs. Robert Feyen and Hongyi Chen. We note that "[a]t the pretext stage, the test for determining whether employees are similarly situated to a plaintiff is a rigorous one." *Bone v. G4S Youth Servs., LLC*, 686 F.3d 948, 956 (8th Cir. 2012) (quotation omitted). The plaintiff must show that he or she and employees outside of the plaintiff's protected group were "similarly situated in all relevant respects." *Id.* (quotation omitted).

Abou argues that he was similarly situated to Feyen, who was offered promotion and tenure the year before Abou applied, because Feyen had teaching evaluation scores averaging only 0.4 points higher than Abou's over the time they taught at UMD and only 0.2 higher in the last three years before each applied for promotion and tenure. But the critical consideration in the denial of tenure for Abou was his inadequate research. In contrast to Abou, Feyen's research was praised as making a national contribution. And

Feyen was not required to correct a published article to insert a missing citation, as Abou was required to do. Even if teaching were the critical comparison, as the university points out, Feyen's teaching evaluation scores on a six-point scale ranged from 3.4-5.7, while Abou's ranged from 2.9-5.2. And there is no evidence that the committee focused only on the last three semesters when making its tenure recommendation or that they considered the difference in scores insignificant.

Abou also argues that the committee overlooked exaggerations that Chen made on her faculty performance record when she successfully applied for tenure, whereas it did not do so for him. But puffery in Abou's faculty performance record was not a critical nondiscriminatory reason for Abou's tenure denial.[2] And the record does not establish that Chen—who was not required to submit a correction to one of her published articles—had research and publication errors similar to those of Abou. On this record, Abou has not shown that he was similarly situated to Feyen and Chen for purposes of the rigorous test at the pretext stage. *See id*. at 956.

Lack of factual support at departmental review committee level

Abou does not challenge Vice Chancellor Schokker's statements that he failed to appropriately reference material in his research or that he listed duplicate publications. Rather, he argues that the departmental review committee's stated reasons for recommending against tenure lacked factual support. He contends that factual errors made

[2] Although Abou points to a statement by one departmental committee member that one of his publications was a "work of fiction," that statement was not endorsed by higher level decisionmakers.

at the first level of the tenure process demonstrate that the Chancellor's decision on tenure, which was based upon Abou's inadequate research and publication, amounted to a mere pretext for discrimination.

This form of argument is characterized as a "cat's paw" theory of liability. Under that theory, "if a supervisor performs an act motivated by [an unlawful] animus that is intended . . . to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Staub v. Proctor Hosp.*, 562 U.S. 411, 422, 131 S. Ct. 1186, 1194 (2011).[3] Abou alleges that, although the higher-level reviewers stated that their tenure review was independent, they were in fact relying on the departmental committee's recommendation, which was tainted by discrimination.

We disagree. Abou has presented no evidence to suggest that the review process at higher levels was not independent. Dean Riehl, Vice Chancellor Schokker, and Chancellor Black each separately examined Abou's file and evaluated his record. It was Dean Riehl,

[3] Judge Posner has articulated the origin of the "cat's paw" theory:

> In the fable of the cat's paw (a fable offensive to cats and cat lovers, be it noted), a monkey who wants chestnuts that are roasting in a fire persuades an intellectually challenged cat to fetch the chestnuts from the fire for the monkey, and the cat does so but in the process burns its paw. In employment discrimination law the "cat's paw" metaphor refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action.

Cook v. IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir. 2012).

not the departmental review committee, who independently investigated the Ship Engine Paper and discovered Abou's lack of attribution to another source, which required a correction. And at the next level, Vice Chancellor Schokker did not consult with the dean before reviewing Abou's record; she stated that she "had enough of [her] own concerns so that it was immaterial if there were other ones." Finally, we note that, in some respects, the higher-level review was actually more favorable to Abou than the departmental recommendation. For instance, although Abou's departmental committee criticized his teaching, Schokker stated in her review that his teaching performance had improved over the years.

Further, even if we were to assume that the higher-level reviews were not independent, the record contains no evidence that the departmental committee displayed the type of discriminatory bias or material misrepresentation of the reasons for recommending tenure denial that would lead to evidence of pretext under a "cat's paw" theory. Abou challenges the committee's statements that (1) he had communication problems; (2) his external reviewers did not express strong support; (3) he had weak teaching evaluations; (4) his lab was nonfunctioning; and (5) he improperly listed journal articles and grants. But, as addressed below, neither bias nor material representations lurk behind these statements.

Abou points out that the only specific communication issues raised by the committee were an inability to understand his accent and issues with his email correspondence. But he fails to identify a situation in which colleagues or students criticized his accent or in which communication problems resulted in animus toward him

based on his national origin. *Cf. Guimaraes v. Supervalu, Inc.*, 674 F.3d 962, 974-75 (8th Cir. 2012) (noting that a plaintiff had argued discrimination based on her supervisor's allegedly ridiculing her accent by pretending not to understand her, but that she failed to present evidence that anyone referenced her accent). And nowhere are specific "communications issues" referenced as a problem in the higher-level reviews.

Regarding the external reviewers, as the university notes, those reviewers were not notified of Abou's failure to attribute a source in the Ship Engine Paper and his later submission of a correction. And with respect to the departmental review committee's characterization of Abou's teaching evaluations, the record does show that, as the committee noted, his teaching evaluations were below the departmental average.[4] Abou argues that the record does not support the committee's statement that he failed to develop a functional lab and that his lab did operate in 2011. But any factual disputes on this issue are not material because the record shows that, at higher levels, university decisionmakers did not mention this issue as a basis for denying tenure.[5]

[4] Vice Chancellor Schokker observed that his yearly teaching performance reviews showed improvement. But a yearly review differs qualitatively from a full-tenure review, which takes into account cumulative performance and may yield different results. *See Brousard-Norcross*, 935 F.2d at 978 (holding that "[t]o hold the College to the results of the pre-tenure review would require us to substitute such a review for the actual tenure decision process").

[5] The departmental committee also noted that Abou played only a minor part in a National Science Foundation grant listed in his faculty performance record and that, although he listed 28 publications in professional journals, only 7 of those appeared to be published in refereed journals. But Abou presented evidence that he clarified the record on the grant for higher-level reviews and that he made a mistake in listing the papers because he followed the format used by other professors in applying for tenure.

In summary, any factual discrepancies at the departmental review committee level—of which we find few—are far from the evidence of discrimination that may lead to evidence of pretext under a "cat's paw" theory. For example, in applying this theory, the United States Supreme Court held that a hospital could be held liable when its employees, who were motivated by an anti-military bias, discharged a technician based on his army-reserve obligations. *Staub*, 562 U.S. at 414-15, 422, 131 S. Ct. at 1189, 1194. And the Eighth Circuit Court of Appeals has upheld a jury verdict of sex discrimination when a company used higher levels of review only as a "conduit of [a supervisor's] prejudice" after the supervisor treated a female security guard differently from male guards in investigating minor misconduct. *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1060 (8th Cir. 1993). But when a decisionmaker has made an independent determination on whether to terminate the plaintiff and did not serve merely as a conduit for those who had unlawful motives, the "cat's paw" theory fails. *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 725 (8th Cir. 1998).

Here, unlike cases where a cat's-paw analysis has been applied, the record is devoid of evidence that the departmental review committee had discriminatory motives in its treatment of Abou. In fact, that committee voted to promote him, although without tenure. This recommendation, which was not embraced by the Dean, Vice Chancellor, or Chancellor, does not evidence lower-level bias. It demonstrates just the opposite. When combined with a thorough, vigorous review, which was independent—and in several instances differing from—the departmental review, we conclude there was no basis for

Abou's argument that the higher level of review was a "conduit of prejudice."[6] Abou has failed to present a genuine issue of material fact on pretext based on lack of factual support for the university's decision.

Violation of policies

Abou argues that a factfinder may infer that his denial of tenure was a pretext for discrimination because university's violated its own policies during the tenure-review process. An employer's deviation from its own policy by applying it unequally may create a factual dispute as to pretext, precluding summary judgment. *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 874-75 (8th Cir. 2010). Abou argues that (1) Riehl improperly considered communication complaints that were not contained in Abou's faculty performance review or brought to his attention; (2) Riehl held him to a standard of developing research that is higher than university policy requires; and (3) the university did not investigate his failure to cite the source of the data in the Ship Engine Paper as plagiarism under its academic-misconduct policy.

We disagree that any policy violations permit an inference of pretext in this case. Although Riehl did address complaints about Abou's teaching, he was more concerned about Abou's apparent misrepresentations in his scholarly work, which called into question his research and publication record. And Riehl's statement that Abou failed to develop

[6] Our conclusion is buttressed by the fact that Abou had a chance to submit his own arguments to both the dean and the vice chancellor, giving reasons that he believed the committee's recommendation to be unfounded. *See, e.g.*, *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 566 F.3d 733, 745 (8th Cir. 2009) (rejecting "cat's paw" theory when an applicant for tenure "received a vigorous and thorough review" and had opportunity to voice her concerns regarding prior votes before upper-level reviewers).

research "in which he is clearly identified as an expert" is a reasonable interpretation of university policy in view of Riehl's 15-year history of evaluating tenure applications as dean. Nor has Abou cited any policy that would require an investigation of academic misconduct in the tenure process. Thus, the record shows that the higher-level recommendations on tenure were not based on impermissible considerations under university policy. Finally, there was no evidence presented that the university applied its policy in an unequal manner, so as to permit an inference of discrimination. *Cf. Lake*, 596 F.3d at 875 (stating that "Lake was fired under [the employer's policy], and white employees were not").

In summary, unlike the plaintiff in *Hoover*, Abou has failed to present a "collection of evidence" that would cast doubt on the legitimacy of the university's reasons for denying him tenure and allow a rational factfinder to determine that the real reason was discrimination. 632 N.W.2d at 546-47 (noting that the plaintiff presented a "collection of evidence" of discrimination based on disability when, after her diagnosis with fibromyalgia, her work was subject to an unprecedented audit and she was discharged, unlike other employees with similar performance issues). Abou strongly disagrees with the university's tenure decision, but he presents no more than a suspicion that the decision was motivated by discrimination. *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 448 (2d Cir. 1999) (stating that "[a]n inference is not a suspicion or a guess, . . . [but rather] a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact [that is known to exist]" (citation omitted)). A suspicion is not a material fact. And this court's role is to focus on whether Abou raises a reasonable inference of

discrimination, not to "sit as a super-personnel department that reexamines an entity's business decisions." *Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998) (quotation omitted). This principle particularly applies where lifetime tenure decisions are involved. Abou failed to present facts that would permit an inference that the university's stated reason to deny him tenure was a pretext for discrimination.

II. Abou failed to establish a prima facie case of discriminatory retaliation in the university's adverse employment action.

An employer who engages in retaliation in response to an employee's protected activity commits a Title VII violation. *See* 42 U.S.C. § 2000e-3(a). The MHRA also prohibits reprisal against an employee because that person has filed a claim of discrimination. *See* Minn. Stat. § 363A.15. To establish a prima facie case of retaliation, an employee must show that he or she engaged in statutorily protected conduct, that the employer committed an adverse employment action, and that the two actions were causally connected. *Fletcher*, 589 N.W.2d at 101-02. To establish this causal link, a plaintiff seeking to defeat summary judgment on a retaliation claim must either present direct evidence of retaliation or create an inference of retaliation under the *McDonnell Douglas* burden-shifting framework. *Young-Losee v. Graphic Packaging Int'l., Inc.*, 631 F.3d 909, 912 (8th Cir. 2011).

Here, it is undisputed that Abou engaged in statutorily protected conduct by filing an internal discrimination complaint with the university, as well as an EEOC complaint. But in order to succeed on his retaliation claim, he must also demonstrate that he was subjected to an adverse employment action. *See Fletcher*, 589 N.W.2d at 101-02. On this

record, we do not see any such adverse action. When no job opening currently exists, a plaintiff cannot be said to have suffered an adverse employment action for failure to hire or retain. *Wilson v. Cook Cnty.*, 742 F.3d 775, 784 (7th Cir. 2014); *see also Jones v. City of Springfield*, 554 F.3d 669, 673 (7th Cir. 2009) (stating that the lack of a job opening constitutes a legitimate reason for an employer's failure to hire or promote). "[I]f there is no vacancy to be filled, . . . that would normally be the end of a Title VII claim." *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1118 (7th Cir. 1992).

Here, the district court concluded that Abou did not suffer an adverse employment action when the university declined to rehire him because there was no position then available. We agree. "Title VII does not mandate the creation of new positions." *Jones*, 554 F.3d at 673. Riehl testified that when someone is given a terminal contract, the hiring process starts to replace that person, and that when Abou expressed interest in an adjunct position, someone had already been hired to cover the courses that he had been teaching. We acknowledge that Riehl's comment that "[he] could make a case to have [Abou] continue, if that was something [Riehl] . . . and the department wanted to do" is concerning. But there is no evidence to suggest that Riehl had created a position for someone in Abou's situation in the past.[7] And Abou presented no evidence that anyone in his department had

[7] Although the Vice Chancellor indicated that this may have happened in another college, Abou presented no evidence of such an occurrence at the College of Science and Engineering. A party opposing summary judgment "cannot rely upon mere general statements of fact but rather must demonstrate . . . that specific facts are in existence which create a genuine issue for trial." *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

been hired to stay on after their terminal year or that a job existed for which he was not hired. *See, e.g.*, *Cooper v. St. Cloud State University*, 226 F.3d 964, 968 (8th Cir. 2000) (holding that a university had no obligation to create a position for the plaintiff in order to avoid Title VII liability); *cf. Williams v. R.H. Donnelley, Inc.*, 199 F. Supp. 2d 172, 178-79 (S.D. N.Y. 2002) (stating that on a claim that a new position should have been created, the appropriate consideration is whether the employer intended to create a position, but did not do so because the applicant was in a protected class). In this situation, the university had no duty to create a position for Abou. Thus, because Abou has failed to furnish evidence that a job opening existed during the period when he attempted to regain employment with the university, he has not demonstrated the second requirement for a retaliation claim. *Fletcher*, 589 N.W.2d at 101-02.

Abou points out Rosandich's testimony that when Abou came to discuss the possibility of being rehired as an adjunct, he told Abou, "[P]ersonally, I think your chances are pretty slim, because you brought legal action against the University." This comment is troubling. Abou maintains that this remark amounts to direct evidence that the University was retaliating against him for filing discrimination claims. We note that statements by those who are "closely involved" with an employment decision may be considered direct evidence of retaliation. *Torgerson v. City of Rochester*, 634 F.3d 1031, 1045 (8th Cir. 2011) (quotation omitted). And the university acknowledged at oral argument that this comment is concerning. But this statement goes to the third requirement of proving a case of discriminatory retaliation: the causal connection between the filing of a complaint and the adverse employment action. When, as here, no adverse employment

action occurred, we need not reach the issue of whether such a connection exists. *See Rush*, 966 F.2d at 1118.

In summary, where Abou cannot point to an open position for which he was qualified or a pattern of creating positions for someone in his situation, there is no genuine issue of material fact sufficient to merit a trial on retaliation. The district court did not err by granting summary judgment.

Affirmed.