

Employment & Labor Law FLASHPOINTS June 2021

Catherine R. Locallo, *Robbins Schwartz* [<http://www.rsnil.com>] , Chicago
312-332-7760 | E-mail Catherine R. Locallo [<mailto:clocallo@robbins-schwartz.com>]

Plaintiff's Cat's Paw Theory of Liability Failed To Scratch Surface

On April 23, 2021, the Seventh Circuit affirmed the district court's grant of summary judgment to Bradley University in an action alleging retaliation claims against the University under the Age Discrimination in Employment Act of 1975 (ADEA), Pub.L. No. 94-135, Title III, 89 Stat. 728. *Sinha v. Bradley University*, 995 F.3d 568, 572 (7th Cir. 2021), *aff'g*, Case No. 18-1319, 2020 WL 1957911 (C.D.Ill. Apr. 23, 2020). In this case, Sinha alleged that the University retaliated against him for declining requests to implement policies that discriminated against older faculty by removing him as department chair and denying him a promotion. As set forth in more detail below, the Seventh Circuit agreed with the district court that the denial of promotion claim was time-barred and that Sinha failed to demonstrate that the supervisor proximately caused his removal as chair.

Sinha's Employment and Charge Filing History

Sinha was hired by the University in August 2008 and was subsequently promoted to an associate professor in 2012. 995 F.3d at 571. At all times relevant to his claims, Sinha was over age 40. During the 2012 – 2013 academic year, Sinha was first elected chair of the finance and quantitative methods (FQM) department. He was reelected as chair during the 2015 – 2016 academic year. During the Fall 2016 semester, Sinha applied to be promoted to the position of full professor. *Id.*

During the Fall 2016 semester, a grievance was filed against Sinha alleging discrimination based on sex. Due to concerns of possible gender discrimination, Provost Zakahi referred the grievance for a Title IX investigation conducted internally by the University. *Id.*

Shortly thereafter in January 2017, Dean Darrel Radson verbally informed Sinha that he was not recommending approval of Sinha's application for promotion to full professor because he did not find that Sinha met the required "rare and extraordinary circumstances" standard since he had been an associate professor for fewer than five years. *Id.* This decision was communicated in writing via e-mail to Sinha on March 1, 2017, and Sinha acknowledged receipt four days later. *Id.*

On February 21, 2017, the Title IX investigation report was issued. *Sinha, supra*, 2020 WL 1957911 at *1. While there was no finding of gender discrimination by Sinha, the investigators specifically noted the dysfunctional environment within the FQM department and that changes needed to be made. *Id.*

Thereafter, the grievance was returned to the faculty grievance committee for processing. 2020 WL 1957911 at *2. The faculty grievance committee decided not to hold a formal hearing on the grievance because such a process would be drawn out, exceedingly ugly, and would only create

future animosity amongst the department. 2020 WL 1957911 at *1. They did, however, decide to recommend that Sinha be removed as chair of the FQM department effective March 22, 2017, to resolve the long history of dysfunction within the department. 2020 WL 1957911 at *2.

On July 31, 2017, Sinha filed a charge of discrimination with the Illinois Department of Human Rights (IDHR) and the Equal Employment Opportunity Commission (EEOC) alleging that his removal as chair of the FQM department was the result of discrimination based on sex, national origin, and retaliation for objecting to the defendant's alleged discriminatory policy against older employees (persuading older faculty to retire). The date of the alleged discrimination was March 22, 2017 (the date he was removed as chair). The charge did not include allegations about the denial of Sinha's Fall 2016 promotion application. *Id.*

During the Fall 2017 semester, Sinha again applied for a promotion to become a full professor. Zakahi denied Sinha's application because he did not think Sinha made a good-faith effort in the application. Specifically, Zakahi stated that Sinha did not include external references, did not include any description of his teaching philosophy, and did not include any description of research programs so his colleagues could understand it. In response, Sinha filed a second charge of discrimination with the IDHR and the EEOC, alleging that the University failed to promote him in response to his second application in retaliation for previously filing a charge of discrimination. *Id.*

In the Fall 2018 semester, Sinha submitted his third application to be promoted to professor. That application was approved, and Sinha was promoted. *Id.*

Proceedings Before the District and Appellate Courts

On August 31, 2018, Sinha filed a complaint in federal court in this matter alleging he was a victim of retaliation for opposing age discrimination in his employment in violation of the ADEA, 29 U.S.C. §621, *et seq.* *Id.* (The complaint also included a claim of employment discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964 (Title VII), Pub.L. No. 88-352, Title VII, 78 Stat. 253, but Sinha agreed to a voluntary dismissal of that claim. 2020 WL 1957911 at *2.) The alleged adverse employment actions included (1) denial of his application for promotion to the position of professor and (2) removal as FQM department chair. *Id.* In connection with the promotion claim, Sinha referenced the 2016 date in the complaint, not his application in 2017 for promotion in 2017. 2020 WL 1957911 at *3. On January 20, 2020, the University filed a motion for summary judgment. 2020 WL 1957911 at *2. The district court granted the motion in favor of the University.

Untimeliness of the Denial of Promotion Claim

To sue under the ADEA, an employee must file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged unlawful employment practice. 29 U.S.C. §626(d)(1)(B); *Flannery v. Recording Industry Association of America*, 354 F.3d 632, 637 (7th Cir. 2004). The date of the unlawful practice "is when a 'final, ultimate, [and] non-tentative' decision was made for which the employee receives unequivocal notice." *Sinha, supra*, 2020 WL 1957911 at *3, quoting *Draper v. Martin*, 664 F.3d 1110, 1113 (7th Cir. 2011). Failure to timely file a charge with the EEOC will ordinarily bar an ADEA claim. *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994).

On July 31, 2017, Sinha filed his first charge with both agencies alleging that his removal as chair of the FQM department was the result of discrimination and retaliation for objecting to the

defendant's discriminatory policy against older employees. *Sinha, supra*, 2020 WL 1957911 at *3. This charge did not include any allegations about the denial of Sinha's 2016 promotion application for the full professor position, which occurred on March 1, 2017. Accordingly, Sinha had until December 26, 2017, to file his charge with the Illinois Department of Human Rights (IDHR) and EEOC regarding the 2016 promotion denial, but he failed to do so. *Id.*

To save his claim, Sinha argued that the 2016 reference in the complaint was a scrivener's error and that it was supposed to be the denial of promotion in response to his second application for which a timely charge was filed. He also argued that discovery further supported that the subject of the complaint was the second denial of his promotion. Both of Sinha's arguments were unsupported by the record. *Id.* Also, this was not a continuing violation claim because each denial of promotion was a discrete act. 2020 WL 1957911 at *4. Accordingly, the Seventh Circuit concluded that Sinha's claim regarding a violation of the ADEA for failure to promote him to professor in 2016 was time-barred. 2020 WL 1957911 at *5.

No Cat's Paw Theory of Liability for Retaliation Claim

The ADEA protects individuals who are 40 years old or older from employment discrimination based on opposition to their employer's unlawful practices. 29 U.S.C. §§623(d), 631(a). A terminated employee may prevail in an ADEA-based claim if he or she shows that an adverse action would not have occurred but for his or her employer's discriminatory motive. *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999). Even when there is no evidence of animus on the part of the final decision-maker, a plaintiff may prevail if he or she can establish that another employee, who did harbor such bias, exercised controlling influence (the "cat's paw" doctrine). *Johnson v. Koppers*, 726 F.3d 910, 914 (7th Cir. 2013).

Sinha contended that he produced indirect evidence that shows he opposed Radson's efforts to oust elderly members of the FQM department, and, as a result, he was removed as chair. *Sinha, supra*, 2020 WL 1957911 at *6. The University argued that Sinha failed to provide any evidence to demonstrate that Zakahi, who was the decision-maker in this instance, had a retaliatory motive when he removed Sinha as chair. Zakahi clearly testified that Radson did not recommend Sinha's removal as chair and that Zakahi's decision to remove Sinha as department chair was based on his review of both the faculty grievance committee and Title IX reports. 2020 WL 1957911 at *7. Both reports expressed concern that the dysfunctional environment within the FQM department would persist unless the dean, provost, and senior vice president took steps to implement changes that will address and mitigate the issues that are within their purview. *Id.* Further, the faculty grievance committee recommended Sinha's removal as chair. 2020 WL 1957911 at *1. Radson was not part of the faculty grievance committee. 2020 WL 1957911 at *7.

The Seventh Circuit agreed with the district court that there is no evidence of animus on the part of Zakahi and that Sinha could not advance a cat's paw theory of liability that Radson's alleged bias was the proximate cause of his removal as chair of the FQM department. 2020 WL 1957911 at *6. Accordingly, the grant of summary judgment in favor of the University was affirmed. 2020 WL 1957911 at *7.

Key takeaways from this case include the following:

1. There is no forgiveness for a time-barred claim.
2. The University's legitimate rationale about the denial of promotion to full professor in both cases was well documented and communicated to Sinha. Namely, the first application did not

meet the high threshold for promotion for a candidate with less than five years as an associate processor and the fact that Sinha did not put forward a satisfactory application from which the decision-maker could support the promotion.

3. Radson was not part of the removal as department chair decision. The decision-maker clearly testified that he made the sole decision and what he based his decision on, which negated the cat's paw theory for his claim.

4. Employers should consider training human resource professionals and members of the leadership team so that they are cognizant of potential cat's paw situations.

For more information about employment and labor law, see CAUSES OF ACTION: EMPLOYMENT ACTIONS (IICLE®, 2021). Online Library subscribers can view it for free by clicking here [https://www.iicle.com/IicleOnline/Detail/34180] . If you don't currently subscribe to the Online Library, visit www.iicle.com/subscriptions [http://www.iicle.com/subscriptions] .