

No. 25-3037

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Xu Han,
Plaintiff-Appellant,

v.

Temple University,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

**BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AND UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL**

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STATEMENT OF INTEREST

The United States and Equal Employment Opportunity Commission (EEOC) have a substantial interest in this appeal, which raises important questions concerning the proper standards for establishing liability under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Attorney General and EEOC share enforcement authority under Title VII, *see* 42 U.S.C. § 2000e-5(a), (f)(1), and under Title I of the ADA, *id.* § 12117(a). The United States and EEOC file this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF ISSUES¹

1. Whether a reasonable jury could find that Temple University denied Xu Han tenure because of his disability or protected activity.
2. Whether a reasonable jury could find that Temple University denied Xu Han tenure because of his race, sex, or national origin.

¹ The United States and EEOC take no position on any other issue.

STATEMENT OF THE CASE

A. Statement of Facts.²

Xu Han was an assistant professor of statistics at Temple University's Fox School of Business. A47. Han is a Chinese man who has myasthenia gravis, an autoimmune condition. A47, A52. In 2021, Han applied for tenure at Temple – his second attempt after initially seeking tenure in 2019. A61, A69. Temple denied Han tenure, and his employment ended shortly thereafter when his contract expired. A73.

1. Evidence relating to Han's ADA claims.

Han offered evidence that a key reviewer recommended against tenure because of a disability bias or retaliatory intent.

Like many universities, Temple uses a multi-stage review process to make tenure decisions. *See* A56-A61. In Han's case, the initial levels of reviewers – the Department Committee (by unanimous vote), the Department Chair, and the Fox School Committee (by a 5-4 vote) – all recommended in favor of tenure. A70-A71.

² Because this appeal involves a grant of summary judgment, the facts must be construed in the light most favorable to Han as the non-moving party. *See Qin v. Vertex, Inc.*, 100 F.4th 458, 469 (3d Cir. 2024).

Things changed, however, when Han's application reached the Dean's Office. Around that time, Han emailed the Dean's Office to ask whether an upcoming course he was teaching "could go virtual due to [his] health conditions." A471. Upon receiving Han's message, a member of the Dean's Office – Associate Dean Aubrey Kent – wrote in an email: "If [Han] was scheduled for in person, then his medical shit doesn't matter, since he hasn't done the appropriate paperwork to be virtual." A107, A470. In a later email, Kent wrote, "hopefully Xu Han will be denied tenure and gone in [the] Fall." A109, A474.

Three days after Han asked about teaching virtually and Kent called Han's condition "medical shit," Kent drafted a letter for the Fox School's head dean – Dean Ronald Anderson – recommending against tenure. A98. The draft Kent prepared stated "external reviewers note a slow pace and irregular consistency to Dr. Han's publications." A98. That comment did not appear "in any of the [external reviewers'] letters." A278. Dean Anderson signed a final letter recommending against tenure that retained Kent's fabrication about the external reviewers and omitted one of Han's articles that had recently been accepted for publication in a journal the Fox School listed in its "Top-tier Journal Lists," albeit at the "A-" level. A99-

A100, A107-A108, A232-A237. The letter concluded that Han's publication record "falls short of the articulated standards at Fox and those in the broader discipline." A219.

In short order, the remaining levels of reviewers – the University Tenure and Promotion Advisory Committee (University Committee), the Provost, and the President – all concurred with Dean Anderson and recommended against tenure. A72-A73, A213. These later reviewers received the earlier reviewers' recommendations, including Dean Anderson's. *See* A58-A60. The later reviewers were, however, aware of the recent publication Dean Anderson's letter omitted, and the University Committee noted "it was not possible to find" the negative comment Dean Anderson's letter attributed to external reviewers. A277-A278.

Nonetheless, the University Committee agreed with Dean Anderson that "the major issue concerns the quantity of Dr. Han's research." A280. Likewise, the Provost found there was "not sufficient quality and quantity combined to meet the standards for tenure and promotion," and "concur[red] with the dean and [the University Committee]." A283. Dean Anderson testified that "the provost typically tries to support the dean in

the decision.” A512. The Board of Trustees ultimately voted to deny Han tenure and notified Han of the decision in May 2022. A73, A285.

2. Evidence relating to Han’s Title VII claims.

Han also offered evidence regarding Temple’s hiring practices and internal discussions about replacing him.

Dean Anderson testified that during the relevant timeframe, the Fox School tried to hire “diverse” faculty, and he understood “diverse” to mean “women and minorities.” A88, A192-A193. Dean Anderson further testified that he “would always direct people to look for minority candidates.” A193. A Fox School professor who recommended faculty candidates to Dean Anderson said he believed “every university is always trying to hire minority candidates,” and that a “diverse candidate may be more appealing.” A87-A88.

A draft memo setting out the Fox School’s hiring strategy stated: “In replenishing and ultimately growing our faculty, we are committed to increasing both the number and types of diversity within our school. All searches are guided by this commitment, from purposive advertising, to committee processes, candidate screening/selection, *through to the ultimate hiring decision.*” A420 (emphasis added). The memo stated that over a two-

year period, the Fox School “made 10 faculty hires, with 9 of these coming from groups representing diversity (Female, African-American, Hispanic, and/or non-white/international).” A420. Dean Anderson agreed that the commitments expressed in the memo represented “what we wanted to do.” A90, A211.

In Temple’s view, Asian men did not count as “diverse.” Dean Anderson testified that “for Temple, we don’t consider Asians as a minority,” and that “Temple has a strange categorization when it comes to Asians” because “[t]hey’re considered white.” A90, A212. Dean Anderson further testified that “for good or bad, Temple considers [Han] white.” A212.

At several junctures, Dean Anderson was privy to conversations about replacing Han with candidates who would meet Temple’s definition of diversity. In February 2020, for instance, when it became clear Temple would not grant Han’s first tenure application, one professor emailed Dean Anderson and Kent to propose hiring a candidate who, the professor highlighted, was “Brazilian-born” and “of African American descent,” “since Xu Han is leaving us.” A86, A409. In another email, the professor noted the candidate “happens to be a double minority candidate.” A87,

A413. Kent responded that the Fox School likely would not be able to hire anyone for “financial reasons.” A86, A414. In March 2022, shortly before Temple denied Han’s second tenure application, the same professor again emailed Dean Anderson and Kent to propose hiring a candidate who would be a “minority/opportunity hire” given “Xu Han possibly departing.” A102, A416.

In June 2022, the month after Temple denied Han tenure, the professor proposed hiring a “minority (Latino)” candidate, noting “we were hoping to get a minority candidate approved.” A425. In response, Dean Anderson directed Kent to contact the applicant, stating “I’m alright preempting the market, especially for a diverse candidate.” A103, A424, A476. The email’s subject line listed three things about the candidate: “Princeton,” his then-current institution; “junior TT,” the junior tenure-track job he sought; and “minority,” a reference to his race. A424.

B. District Court’s Decision.

Han filed this action, asserting discrimination and retaliation claims under the ADA, and discrimination claims under Title VII (among others). A24. After discovery, the district court granted summary judgment to Temple. A39-41.

On the ADA claims, the district court rejected Han's "cat's paw" theory premised on Kent's biased evaluation. A26-A30. Initially, the court accepted a reasonable jury could find that Kent "harbored a discriminatory animus" given his comments about Han's "medical shit," that Kent hoped Temple would deny Han tenure, that Kent fabricated negative feedback about Han, and that "Dean Anderson relied on that misrepresentation when recommending against tenure." A27-A28. The court similarly accepted a reasonable jury could find that Han engaged in protected activity by requesting an accommodation, that Kent acted with a "retaliatory motive," and that there was "a causal connection between [Han's] request for an accommodation and Dean Anderson's recommendation to deny him tenure." A29-A30.

The court nonetheless concluded that Han's cat's paw theory failed because later reviewers did not rely on the misrepresentations Kent put in Dean Anderson's letter when they recommended against tenure. A28, A30. The court noted that later reviewers both knew external reviewers had not provided the negative feedback the letter attributed to them and were aware of the publication the letter omitted. A28-29.

On the Title VII claims, the district court acknowledged that “the Fox School took race, ethnicity, and sex into account when recruiting and hiring faculty members.” A13. But it reasoned that evidence concerning Temple’s hiring practices was irrelevant in assessing whether the university had discriminatorily denied Han tenure because hiring and tenure are different employment actions and Han did not assert a failure-to-hire claim. A35-A36. “[G]iven the unique nature of tenure and the tenure process itself,” the court said, “it would not be reasonable for a jury to look at the Fox School’s hiring policies for faculty, in general, and assume that those policies inform an entirely distinct tenure process[.]” A36. The court further reasoned that Han had not offered evidence to rebut Dean Anderson’s testimony that Temple gives “*no* consideration” to “ethnic or racial diversity” in making tenure decisions. A35-36.

This appeal followed. A42.

ARGUMENT

- I. **A reasonable jury could find that Temple denied Han tenure because of his disability or protected activity.**
 - A. **An employer may be liable under a cat's paw theory where a biased administrator proximately caused the employer to take an adverse action against an individual.**³

The ADA prohibits a covered entity from discriminating against a qualified individual on the basis of disability. 42 U.S.C. § 12112(a). The statute also prohibits any person from retaliating against an individual for engaging in activity protected by the statute. *Id.* § 12203(a). To prove disparate treatment, a plaintiff must show, among other things, that his employer took an adverse action against him because of his disability. *Fowler v. AT&T, Inc.*, 19 F.4th 292, 299 (3d Cir. 2021). Similarly, to prove retaliation, the plaintiff must establish a causal connection between his protected activity and an adverse action. *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir. 2003). Requesting reasonable accommodation constitutes protected activity. *Id.* at 191.

³ The district court discussed the cat's paw theory only within the context of Han's ADA claims. As we note below, however, the theory is potentially relevant to his Title VII claims as well. *See infra* at 28.

Under a cat's paw theory, an employer may be liable for discrimination or retaliation where a biased administrator, acting with an improper motive, influences the employer to take an adverse action against an individual. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 420-21 (2011); *McKenna v. City of Phila.*, 649 F.3d 171, 178 (3d Cir. 2011). To prevail on such a theory, the plaintiff must show that the administrator's influence was a proximate cause of the adverse action. *See Staub*, 562 U.S. at 419-20; *see also Crosbie v. Highmark Inc.*, 47 F.4th 140, 145 (3d Cir. 2022) ("An employer can be liable on the cat's-paw theory only if a non-decisionmaker's act proximately caused the [adverse action]."). The plaintiff must show that: (1) the biased administrator was motivated by a desire to discriminate or retaliate; (2) the biased administrator communicated with the decisionmaker; and (3) the decisionmaker relied on the biased administrator's communication. *See Crosbie*, 47 F.4th at 146.

Temple does not dispute that the cat's paw theory is available under the ADA. Rightly so. Although *Staub*, *McKenna*, and other cases cited here arose under different statutes, the cat's paw principles they articulate apply in the ADA context. *See, e.g., Macknet v. Univ. of Pa.*, 738 F. App'x 52, 57 (3d Cir. 2018) (entertaining cat's paw theory for ADA claims); *Sellman v.*

Aviation Training Consulting, LLC, 155 F.4th 1215, 1222-23 (10th Cir. 2025) (same), *cert. denied*, No. 25-998, 2026 WL 1052040 (U.S. Apr. 20, 2026); *Brooks v. Avancez*, 39 F.4th 424, 439-40 (7th Cir. 2022) (same). Furthermore, although the ADA normally requires but-for causation, the showing of proximate causation required to establish cat's paw liability necessarily proves but-for causation as well. *See Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660, 675 (3d Cir. 2016) (“[A] proximate cause requirement is more demanding than a but-for cause requirement—meaning that allegations satisfying the former necessarily will satisfy the latter[.]”).

B. In the academic context, a biased evaluation at a single level of review may be a proximate cause of a tenure denial.

In the context of academic tenure, promotion, and retention decisions, a biased evaluation at a single level of review may be a proximate cause of tenure denial. In a recent unpublished decision, this Court held a jury could find that “discriminatory bias infecting [a lower-level] recommendation influenced the higher levels of review,” and that the biased recommendation was therefore a “proximate cause” of a college’s decision not to renew an instructor’s contract. *Sorokina v. Coll. of N.J.*, No. 24-1365, 2025 WL 1289148, at *6-7 (3d Cir. May 5, 2025).

That holding is consistent with a line of pre-*Staub* decisions reaching a similar conclusion, albeit without expressly applying a proximate-causation standard. In an earlier tenure-denial case, this Court held that “it plainly is permissible for a jury to conclude that an evaluation *at any level*, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.” *Roebuck v. Drexel Univ.*, 852 F.2d 715, 727 (3d Cir. 1988) (emphasis added);⁴ *see also Kant v. Seton Hall Univ.*, 279 F. App’x 152, 159-60 (3d Cir. 2008) (similar). Several other circuits have held likewise. *See, e.g., Lam v. Univ. of Haw.*, 40 F.3d 1551, 1560 (9th Cir. 1994) (“[D]iscrimination at any stage of the academic hiring or promotion process may infect the ultimate employment decision.”); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 450 (2d Cir. 1999) (“[T]he impermissible bias of a single individual at any stage of the promoting

⁴ Although *Roebuck* involved a post-verdict motion, such motions are subject to the same standards that govern summary judgment. *See Glenn Distribs. Corp. v. Carlisle Plastics, Inc.*, 297 F.3d 294, 299 (3d Cir. 2002); *Nadel v. Isaksson*, 321 F.3d 266, 272 (2d Cir. 2003). Additionally, although *Roebuck* does not use the term “cat’s paw,” its reasoning makes clear it applied the same theory. That omission is also unsurprising because Judge Posner coined the term in 1990 – two years after *Roebuck* was decided. *See Staub*, 562 U.S. at 415 n.1.

process may taint the ultimate employment decision[.]”). Although these decisions predate *Staub*, *Sorokina* confirms that their reasoning fits comfortably in the proximate-causation framework for tenure decisions.

This reasoning applies to tenure decisions in a way that it might not to disciplinary decisions that are commonly at issue in cat’s paw cases. In discipline cases, the relevant question is often whether the decisionmaker relied on a supervisor’s factual representation about the plaintiff’s conduct. *See, e.g., Staub*, 562 U.S. at 421 (employer potentially liable under cat’s paw theory where it “relies on facts provided by the biased supervisor”). In that scenario, it would make little sense for an unbiased decisionmaker to disbelieve the supervisor’s factual representation yet still impose discipline (absent a discovery of other misconduct warranting discipline).

But tenure decisions are different. In the tenure process, decisionmakers rely on reviewers not only for their factual representations about a candidate’s record of accomplishment, but also for the reviewers’ judgments about whether the candidate meets the university’s qualitative standards for tenure, which often involve subjective criteria. *Cf. EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 116 n.2 (3d Cir. 1985) (a university’s

decision to deny tenure is “not entitled to special treatment in [a] Title VII action[] merely because [it is] founded in part on subjective criteria”).

In this context, it is entirely possible for an unbiased decisionmaker to disagree with some part of a reviewer’s factual representation about the candidate’s body of work and yet still be swayed by the reviewer’s judgment about the candidate’s overall fitness for tenure. That is especially true where the reviewer is a high-ranking administrator, who a jury could reasonably infer “had a significant influence on the attitudes and procedures of the tenure decisionmakers.” *Roebuck*, 852 F.2d at 733. Where such an administrator both disfavored a candidate because of a protected trait and “played an outsized role in the tenure review process,” a reasonable jury “could find that [the administrator’s] negative stance on [the plaintiff’s] tenure application was a ‘proximate cause’ of the University’s ultimate decision to deny him tenure.” *Mawakana v. Bd. of Trs. of Univ. of D.C.*, 926 F.3d 859, 867 (D.C. Cir. 2019).

C. A reasonable jury could find that Kent’s biased evaluation was a proximate cause of Temple’s decision to deny Han tenure.

Here, a reasonable jury could find that Kent acted with a discriminatory or retaliatory motive when he negatively evaluated Han

and that Kent's biased evaluation was a proximate cause of Temple's decision to deny Han tenure.

First, a reasonable jury could find that Kent negatively evaluated Han based on a disability bias or retaliatory intent. As the district court itself explained, the record contains evidence that Kent harbored both "discriminatory animus" and a "retaliatory motive" based on his comments about Han's "medical shit," that Kent hoped Temple would deny Han tenure, and that Kent put false information in the draft letter he prepared for Dean Anderson. A27-A28, A30.

Next, a reasonable jury could find that Dean Anderson relied on Kent's biased evaluation in recommending against tenure. As the district court again explained, "[a] jury could also conclude that Dean Anderson relied on [Kent's] misrepresentation when recommending against tenure for Dr. Han, as he kept that inaccurate information in the final version of his letter." A28.

Finally, and perhaps most critically, a reasonable jury could find that later reviewers relied on or were influenced by Dean Anderson's recommendation. *See Crosbie*, 47 F.4th at 146. That remains true even if later reviewers did not rely on the misrepresentations Kent put in Dean

Anderson's letter. As a general matter, a jury could reasonably infer that a recommendation from the Fox School's head dean "had a significant influence on the attitudes and procedures of the tenure decisionmakers." *Roebuck*, 852 F.2d at 733. Dean Anderson appeared to confirm as much, testifying that "the provost typically tries to support the dean in the decision," A512, suggesting that later reviewers were generally inclined to ratify, or perhaps even defer to, the dean's preferred outcome.

The sequence of events here bolsters that inference. Before Dean Anderson's recommendation, Han's Department Chair and two committees (one by unanimous vote, one by split vote) recommended in favor of tenure. A70-A71. Dean Anderson himself said he was "mindful that the previous levels of review are supportive." A219. After Dean Anderson's recommendation, the remaining levels of reviewers all unanimously recommended against tenure. A72-A73, A213. That juxtaposition gives every appearance that Dean Anderson's recommendation altered the trajectory of Han's tenure application.

In short, taken together and viewed in the light most favorable to Han, the record establishes a causal chain between Kent's biased evaluation and Temple's decision to deny Han tenure. A reasonable jury

could therefore conclude that Kent's biased evaluation was a proximate cause. *See Sorokina*, 2025 WL 1289148, at *6-7; *Roebuck*, 852 F.2d at 727.

D. The district court misapplied the cat's paw theory.

The district court reasoned that Han's cat's paw theory failed because later reviewers did not rely on the misrepresentations Kent put in Dean Anderson's recommendation letter. A28, A30. As the court pointed out, later reviewers knew external reviewers had not provided the negative feedback the letter falsely attributed to them and were aware of the publication the letter omitted. A28-A29.

But these facts do not necessarily defeat Han's cat's paw theory. As explained above, it was possible for later reviewers to rely on or be influenced by Dean Anderson's recommendation (i.e., his judgment about Han's overall fitness for tenure) without relying on all of the factual predicates underlying that recommendation (i.e., his representations about the precise number of articles Han published). That link would complete the causal chain between Kent's biased evaluation and the tenure denial. That is, a reasonable jury could find *both* that Dean Anderson would not have recommended against tenure but for Kent's biased evaluation

(including but not limited to the misrepresentations) *and* that Temple would not have denied tenure but for Dean Anderson's recommendation.

Accordingly, the fact that later reviewers purported to independently assess Han's application does not preclude a finding that Kent's biased evaluation was a proximate cause. *See Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 330-31 (3d Cir. 2015) ("The *Staub* Court declined to adopt a 'hard-and-fast rule' that an employer's intervening exercise of independent judgment ... precludes a finding of proximate cause." (citing *Staub*, 562 U.S. at 420)), *abrogated in part on other grounds by Muldrow v. City of St. Louis*, 601 U.S. 346 (2024).

II. A reasonable jury could find that Temple denied Han tenure because of his race, sex, or national origin.

A. Evidence that an employer discriminated in one employment context may be relevant in assessing whether the employer discriminated in other employment contexts, such as tenure denial.

Title VII prohibits an employer from "discriminat[ing] against any individual" with respect to his terms or conditions of employment because of his race, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). To make out a *prima facie* case of disparate treatment, a plaintiff must show, among other things, that his employer took an adverse action against him "under

circumstances that could give rise to an inference of intentional discrimination.” *Qin v. Vertex, Inc.*, 100 F.4th 458, 473 (3d Cir. 2024) (emphasis and citation omitted).

Whether a plaintiff is a member of a “minority” group does not affect the analysis because “Title VII’s disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs.” *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 309 (2025). The Supreme Court has long recognized that “[d]iscriminatory preference for any group, *minority or majority*, is precisely and only what Congress has proscribed,” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (emphasis added), and that the “same standards” govern regardless, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976). Thus, “the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group.” *Ames*, 605 U.S. at 310.

Applying those standards, it is well settled that a Title VII plaintiff may use circumstantial evidence to show his employer took an employment-related action because of a protected trait. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). What constitutes

relevant circumstantial evidence, however, can vary. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973). As this Court has recognized, the prima facie method “remains flexible and must be tailored to fit the specific context in which it is applied,” and “[t]he facts necessary to establish a prima facie case of discrimination ... vary depending on the particular circumstances of each case.” *Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 797-98 & n.7 (3d Cir. 2003) (italics and citations omitted); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). Additionally, even when a plaintiff does not proceed under the prima facie case framework, he may still prove discrimination through a “‘convincing mosaic’ of circumstantial evidence.” *Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340, 349 (3d Cir. 2022) (citation omitted); *see also Sorokina*, 2025 WL 1289148, at *7 (applying “convincing mosaic” approach).

This Court should apply these flexible approaches to this tenure-denial case and hold that circumstantial evidence concerning an employer’s general employment policies, patterns, or practices may be relevant to prove discrimination in an individual case, as courts have recognized in other contexts. *See McDonnell Douglas*, 411 U.S. at 804-05; *see also Lieberman v. Gant*, 630 F.2d 60, 68 (2d Cir. 1980) (“Evidence of general

patterns of discrimination by an employer is relevant even in an individual disparate treatment case.”). That is, evidence that an employer engaged in a pattern of discrimination against other employees or applicants based on a protected trait may, under appropriate circumstances, support an inference that the employer discriminated against an individual plaintiff on the same basis. *See Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir. 1990) (“Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer’s offered explanation for an employment decision regarding a particular individual masks a discriminatory motive.”); *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 755 (9th Cir. 1991) (“Evidence of past business practices may reveal that the unlawful conduct was part of a larger pattern of discrimination.”).

By the same token, evidence that an employer engaged in a practice of discrimination based on a protected trait in one employment context (such as hiring) may sometimes be relevant in assessing whether the employer discriminated on the same basis in other employment contexts (such as retention, promotion, or firing). *See EEOC v. Ferrellgas, L.P.*, 97 F.4th 338, 349 (6th Cir. 2024) (in subpoena-enforcement context, evidence

that employer discriminated against applicants based on sex or race in hiring “might illuminate whether [the employer] discriminated against [an individual] on those same bases but in other employment contexts — i.e., her pay and termination”).

In a sex-discrimination case, for example, evidence of employment practices reflecting a preference for male employees might provide circumstantial evidence that an employer fired an individual plaintiff because of her sex. *See, e.g., Button v. Dakota, Minn. & E. R.R. Corp.*, 963 F.3d 824, 832 (8th Cir. 2020). Likewise, in an age-discrimination case, evidence that an employer’s management openly expressed a preference for hiring younger employees might provide circumstantial evidence that the employer fired or declined to retain older employees because of their age. *See, e.g., Morse v. S. Union Co.*, 174 F.3d 917, 920, 923 (8th Cir. 1999). Indeed, as this Court has explained, “[w]hen a major company executive speaks, ‘everybody listens’ in the corporate hierarchy.” *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989), *abrogated in part on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

To be clear, evidence of discrimination in one employment context is not categorically relevant to prove discrimination in other contexts. Rather,

when a plaintiff relies on evidence of discrimination from one employment context to support an inference of discrimination in another context, the plausibility and strength of that inference should turn on various factors, including whether and to what extent the contexts are reasonably related or whether decisionmakers (or those influencing the decisionmakers) viewed the contexts as related. Evidence of discriminatory pay-setting, for example, may often be of little to no help in supporting a sexual harassment claim (absent evidence linking the two together). By contrast, evidence of discriminatory hiring practices will often be helpful in assessing promotion and retention decisions. After all, qualities that make a candidate suitable for hire often overlap with those that make him suitable for promotion or retention, and vice versa. To the extent an employer's hiring practices reflect a general preference for certain kinds of employees, a reasonable jury could conclude in some circumstances that the same preferences informed who the employer chooses to promote or retain.⁵

⁵ Because Han presented evidence showing how Temple's hiring practices may have influenced its tenure decision, the court need not address whether a discriminatory hiring policy, standing alone, could support an inference of discrimination in other employment contexts. *Cf. Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1403-04 (7th Cir. 1996) (although evidence showed "age may have played a significant role" in employer's

B. Han's evidence concerning Temple's hiring practices was relevant in assessing whether the University discriminatorily denied Han tenure.

Under the circumstances here, Han's evidence concerning Temple's hiring practices was relevant for purposes of assessing his Title VII claims and, in combination with other evidence, could persuade a reasonable jury that Temple denied Han tenure because of his race, sex, or national origin.

See Duvall v. Novant Health, Inc., 95 F.4th 778, 788-90 (4th Cir. 2024)

(considering evidence about employer's efforts to "increase diversity" in assessing discriminatory termination claim).

To start, Han's evidence indicated that Temple's hiring practices reflected a preference for faculty candidates who were women or members of certain racial or ethnic minority groups. Dean Anderson confirmed that the Fox School tried to hire "diverse" faculty, and he defined "diverse" to mean "women and minorities." A88, A192-A193. That goal was not merely aspirational. The Fox School's hiring-strategy memo showed that nine of ten faculty hires over a two-year period came "from groups representing diversity." A89-A90, A420. Furthermore, Asian men did not match

"hiring decision[s]," plaintiff failed to show that that "a similar age bias affected management's treating of existing" employees).

Temple's definition of "diversity." To the contrary, Dean Anderson admitted that Temple did not "consider Asians as a minority," but instead considered them "white." A90, A212.

Han's evidence also indicated that Dean Anderson's understanding of Temple's preference for "diverse" faculty candidates in the hiring context may have influenced his assessment of Han's tenure application. At several junctures, a Fox School professor emailed Dean Anderson or Kent to propose replacing Han with candidates who, the professor highlighted, were "diverse" or "minority" applicants. A86-A87, A102, A409, A413, A416, A425. Although Dean Anderson did not initiate these discussions, he too later appeared to accord considerable weight to one candidate's race, stating, "I'm alright preempting the market, especially for a diverse candidate." A103, A424, A476.

Drawing all reasonable inferences in Han's favor, these discussions suggest Dean Anderson held what he considered to be Han's lack of "diversity" against him and believed denying tenure would create an opportunity to replace Han with someone Temple would consider "diverse." Contrary to the district court's reasoning, the fact that Temple

did not ultimately hire any of these individuals to replace Han does not render these discussions irrelevant.

Importantly, Han also pursues a “sex-plus/race-plus theory” of discrimination based on a combination of his race, sex, and national origin. *See* ECF No. 43 at 28-31. That is, Han maintains that Temple and Dean Anderson did not consider him “diverse” because he was both Chinese and a man.

That is a viable theory under Title VII. The statute “prohibits discrimination based on a combination of protected characteristics, such as ‘sex-plus-race’ discrimination.” *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1045 (10th Cir. 2020). Under this theory, the relevant inquiry is “whether [Temple] discriminate[d] on the basis of that *combination* of factors, not just whether it discriminate[d] against people of the same race or of the same sex.” *Lam*, 40 F.3d at 1562. This theory is rooted in Title VII’s text. The statute prohibits discrimination because of “race, color, religion, sex, *or* national origin,” 42 U.S.C. § 2000e-2(a)(1) (emphasis added), and “[t]he use of the word ‘or’ evidences Congress’ intent to prohibit employment discrimination based on any or all of the listed characteristics,” *Shazor v. Pro. Transit Mgmt., Ltd.*, 744 F.3d 948, 958 (6th Cir.

2014) (quoting *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980)).

In short, taken together and construed in the light most favorable to Han, the foregoing evidence could allow a reasonable jury to infer that Dean Anderson's understanding that Temple preferred women or "minority" faculty candidates, combined with his belief that Temple did not "consider Asians as a minority," influenced his decision to recommend against tenure. And as explained above, a biased tenure recommendation at a single level of review could allow a jury to infer discrimination in appropriate circumstances. *See supra* at Part I.B. Accordingly, a reasonable jury could find that Temple denied Han tenure because of his race, sex, or national origin, or a combination thereof.

C. The district court erred in several key respects.

Despite acknowledging that "the Fox School took race, ethnicity, and sex into account when recruiting *and hiring* faculty members," A13 (emphasis added), the district court rejected evidence about Temple's hiring practices as irrelevant because hiring and tenure are different employment actions and Han did not assert a failure-to-hire claim, A35-A36. As explained above, however, evidence that an employer

discriminated in one context (such as hiring) may well inform whether the employer discriminated on the same basis in other contexts in appropriate cases. *See Ferrellgas*, 97 F.4th at 349. The court's rejection of evidence from a different employment context here is inconsistent with the flexible and tailored approach that precedent demands. *See Swierkiewicz*, 534 U.S. at 512; *Sarullo*, 352 F.3d at 797-98 & n.7; *Canada*, 49 F.4th at 349.

This Court's decision in *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999), on which the district court relied, does not compel a different result. There, this Court cautioned that a "diversity memo," which encouraged managers to consider "the issue of diversity" in hiring, was "not, in and of itself, sufficient to establish a prima facie case of illegal discrimination." *Id.* at 155, 164. But this Court still treated the memo as relevant circumstantial evidence, stating "we must view the[] circumstances *in light of* [the] diversity memo." *Id.* at 164 (emphasis added); *see also Duvall*, 95 F.4th at 788-90 (considering termination decision against "backdrop" of employer's diversity hiring practices). Here too, this Court should view the circumstances of Han's tenure denial in light of Temple's hiring preferences. Moreover, Han does not rely on the mere existence of a discriminatory hiring policy but also points to Temple's actual hiring

patterns and discussions about replacing him with candidates of different races, ethnicities, or national origins. *See supra* at 24 n.5.

The district court likewise failed to view the record in the light most favorable to Han and improperly drew inferences in Temple's favor. For instance, the court credited Dean Anderson's testimony that Temple gives "no consideration" to race or ethnicity in making tenure decisions. A35-A36. Contrary to the court's findings, however, Han did not offer mere "speculation" to rebut Dean Anderson's testimony — Han offered the circumstantial evidence catalogued above. And of course, at summary judgment "a district court may not make credibility determinations or engage in any weighing of the evidence." *Lauria v. Lieb*, 152 F.4th 549, 553 (3d Cir. 2025) (citation omitted).

The court found that the discussions about hiring "minority" candidates to replace Han showed "[a]t most" that Temple "sought to increase diversity among its faculty," which "does not equate to discrimination against Dr. Han." A37. As explained above, a reasonable jury could well interpret those discussions differently. *Supra* at 26-27. Viewed in the light most favorable to Han, those discussions suggest Dean

Anderson favored candidates who would meet Temple's definition of "diversity," and thus disfavored Han because he did not.

Finally, the court suggested Temple may have considered Han "diverse" because "the Fox School's hiring policy characterizes international faculty as diverse" and "Dean Anderson testified that Temple considers [Han] to be international." A36 n.10. The record is far from unequivocal on that front. The Fox School's hiring-strategy memo does list "non-white/international" as a separate category of "groups representing diversity." A420. But the memo does not say whether that category encompasses individuals who are "*either* non-white *or* international" or, instead, only individuals who are "*both* non-white *and* international."

Dean Anderson's testimony makes clear that, in Temple's view, Han did not fit the latter definition. Although Dean Anderson initially agreed that Han fell within the "[n]on-white international" category, he almost immediately retreated from that claim, saying: "Hold on. So for Temple, we don't consider Asians as a minority ... specifically. So would he -- would he have fallen into the non-white, no. He would be considered -- for good or bad, Temple considered him white, he -- he would have been international, yes." A211-A212. At best for Temple, the memo and Dean

Anderson's testimony are ambiguous. Han's evidence is sufficient to let a jury decide.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment on Han's ADA and Title VII claims.

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May 11, 2026

CERTIFICATE OF COMPLIANCE

Pursuant to 3d Cir. L.A.R. 28.3(d) & 46.1(e), I certify that, as an attorney representing an agency of the United States, I am not required to be admitted to the bar of this Court. *See* 3d Cir. L.A.R. 28.3, comm. cmt. I also certify that all other attorneys whose names appear on this brief likewise represent the United State or an agency of the United States and are also not required to be admitted to the bar of this Court. *See id.*

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,075 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Book Antiqua 14 point.

Pursuant to 3d Cir. L.A.R. 31.1(c), I certify that the text of the electronically filed version of this brief is identical to the text of the hard copies of the brief that will be filed with the Court. I further certify pursuant to 3d Cir. L.A.R. 31.1(c) that, prior to electronic filing with this

Court, I performed a virus check on the electronic version of this brief using Microsoft Windows Defender, and that no virus was detected.

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CERTIFICATE OF SERVICE

I certify that on May 11, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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