No. COA11-506

SUPREME COURT OF NORTH CAROLINA

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Terri Ginsberg, Plaintiff-Appellant, v. Board of Governors of the University of North Carolina, Defendant-Appellee.	)))))))))))	From Orange County Case No. 09-CVS-1789

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PETITION FOR DISCRETIONARY REVIEW
PURSUANT TO G.S. 7A-31

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PLAINTIFF-APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Appellant Terri Ginsberg ("Plaintiff") respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the North Carolina Court of Appeals, filed on 15 November 2011, which affirmed the trial court's Judgment granting the Motion for Summary Judgment of Defendant Board of Governors of the University of North Carolina ("Defendant" or "NCSU").

Plaintiff petitions this Court on the grounds that the decision of the Court of Appeals involves legal principles of major significance to the jurisprudence of this State as well as a subject matter of fundamental public interest. While Plaintiff recognizes it is rare for the Supreme Court to select cases for discretionary review,

Plaintiff submits that this matter warrants this Court's consideration because of the fact that the Court of Appeals' decision effectively eviscerates the constitutional right of freedom of speech in the employment context.

In support of this petition, Plaintiff submits the following:

STATEMENT OF THE CASE

Plaintiff-Petitioner Terri Ginsberg ("Dr. Ginsberg") filed this action on 8 October 2009 against Defendant-Respondent North Carolina State University, ("Defendant" or "NCSU") alleging a violation of Dr. Ginsberg's freedom of speech, rights of conscience and right to equal protection. Defendant filed a Motion for Summary Judgment on all of Dr. Ginsberg's claims on 8 September 2010. The Superior Court Judge dismissed all of Dr. Ginsberg's claims on summary judgment on 4 November 2010.

Dr. Ginsberg filed a Notice of Appeal on 1 December 2010 and filed her Appellate Brief on 24 June 2011 pursuant to N.C. Gen. Stat Sect. 7A-27(b). The Court of Appeals affirmed the trial court's Order and Judgment of 4 November 2010. The Court of Appeals mandate was issued on 5 December 2011. Plaintiff now respectfully files her Petition for Discretionary Review.

FACTUAL BACKGROUND

Petitioner Terri Ginsberg was a non-tenure track Teaching Assistant Professor ("TAP") at North Carolina State University ("NCSU") in the Film Studies Program during the 2007-2008 academic year. (R pp 21-22 ¶¶ 10-11). Several members of the English Department and Middle East film screening series committee at NCSU strongly and repeatedly encouraged Dr. Ginsberg to apply for a tenure-track position in Film Studies that was to begin in the 2008-2009 academic year. (R pp 144-45).

NCSU held a Middle East Film Screening series coordinated by the Film Studies Program and the Middle East Studies Program in the Fall of 2007, which Dr. Ginsberg was asked to curate. (Ginsberg Dep Vol. I, 106:6 – 107:10). During her introductory remarks to one of the films, *Ticket to Jerusalem*, which was about a Palestinian film director and his struggles to show film in Occupied East Jerusalem, Ginsberg thanked the audience for supporting the screening of alternative viewpoints such as the one in the film. (R pp 112-115, ¶¶ 4-10). A few faculty members became concerned that the audience might infer from the comments that their programs espoused particular political perspectives in relation to the conflict. (R pp 47 ¶¶10-11, 58 ¶ 12, 106-07 ¶ 6). The introduction bothered one individual on the search committee who reviewed Dr. Ginsberg's employment application, Dr. Marsha Orgeron, so much that she talked about it to several faculty members and persons involved in the non-hire decision, including at minimum Dr.

Khater, Dr. Devin Orgeron, and Dr. Pramaggiore, and Dr. Bigelow. (R pp 106-7 ¶¶ 4-6; 446:3-13).

Dr. Marsha Orgeron and Dr. Khater held a meeting with Ginsberg to reprimand her for her introduction, and Dr. Khater, even by Dr. Orgeron's account, spoke in a manner that was "forceful and showed frustration on his part . . . ." (R p 59, ¶ 17). Khater told Ginsberg explicitly during the November 9 meeting that because of her introduction to the *Ticket to Jerusalem* film, there would be no further collaboration in the future between the Film Studies and Middle East Studies Programs. (R p 115 ¶ 11; Ginsberg Dep 219:18-25). At the meeting, Khater also addressed concerns Ginsberg had raised about the bureaucratic obstacles to payment of their guest speaker, Fuad Sha'ban, who was of Syrian origin and nationality, and who was Muslim. (R pp 423:2 – 425:13, 426: 16 – 430:21). Khater was "highly offended" by the fact that he interpreted her e-mail as accusing him of discrimination. (R p 48 ¶ 14).

Dr. Ginsberg applied for the tenure-track position in Film Studies in October of 2007. (R p 117 ¶ 19). The position vacancy notice called for applicants with "a primary concentration in at least one area of European Cinema, although additional areas of expertise are welcome (other national cinemas, digital media, theory, etc.)" and "an excellent research and teaching record in the area advertised." (R p 91). The first document from the search committee deliberations reveals that Ginsberg was listed on the committee's notes as the first of the "First Tier Candidates." (R pp 92-98). Within days of the November 9 meeting, however, Ginsberg fell out of favor

of the committee and was not listed in either the first or the second tier, but moved to the bottom of the "reject" tier, and was not even granted an interview for the position. (R pp 102-05; R 117 ¶19). The reason listed on the committee's November 29 notes was that Ginsberg was "now working with Palestinian/Israeli, rank issue." (R p 103). The "rank issue" referred to the questionable fact that "Dr. Ginsberg's experience and the quantity of her publications exceeded that which normally would be expected of a beginning assistant professor in our department . . . ." (R p 61 ¶ 28).

Included in the tier above her were candidates who did not even appear to be in the field of Film Studies, including a candidate about whom the notes said, "is he really film studies?" and another who was "really interesting, but musicologist." (R pp 103-05). The position was instead offered to a candidate, Dr. Ora Gelley, whose publication and teaching records were not nearly as strong as Ginsberg's, and although this candidate wrote about Holocaust film as well, that scholarship, unlike Dr. Ginsberg's, did not challenge Zionism or engage alternative Jewish perspectives. (R pp 116 ¶ 16; 149 ¶16(a)). Ginsberg's contract was not renewed for the next year. (R p 43 ¶ 14).

Ginsberg is an expert in European cinema, and other experts in the field described her anthology on German cinema as the most authoritative single-volume scholarly resource on German cinema ever published. (R pp 120 ¶ 5, 150-51). At the time of her application for the tenure-track position, the search committee knew she had published a book about Holocaust film, an anthology on German film, and was

continuing with a book-length work on German cinema (R p 52 ¶ 9; Ginsberg Dep Vol II, 64:12-15). The publication record of Dr. Gelley, who was hired for the position, was not as prolific in the area of European film; for example, she had not published any books. (R p 62-63 ¶ 32; 117 ¶ 20).

REASONS WHY CERTIFICATION SHOULD ISSUE

The decision of the Court of Appeals in this case involves legal principles of major significance to the jurisprudence of the State because it alters the standard of proof required to survive summary judgment in constitutional employment cases. The court's error is especially significant because the subject matter to which it relates has fundamental importance to the public interest and will likely have a chilling effect on academics and employees who publicly encourage the discussion of controversial political topics.

A. The decision of the Court of Appeals affects legal principles of major importance to this state.

The Court of Appeals held that where an employer in a constitutional free speech case states a reason for its employment action that is unrelated to the plaintiff's protected speech, that stated reason is sufficient to grant the employer summary judgment regardless of whether the plaintiff presents evidence that the reason is not genuine. In doing so, the court dismissed the case on summary judgment even though the core factual issue on which it focused was vigorously and materially disputed. Because this issue is relevant to every employment case in which the employer presents the defense that a non-discriminatory or non-retaliatory reason motivated the employment action, this decision will have a significant and long-lasting impact on North Carolina employees.

1. Employers must do more than assert a non-discriminatory reason for the employment action to achieve dismissal of the case on summary judgment.

At issue in the court below was whether there was a causal connection between Plaintiff's protected activity and her non-hire. The court did not seem to dispute that there was sufficient evidence to show that Dr. Ginsberg made remarks at a campus event that related to matters of public concern. It also acknowledged one piece of the circumstantial evidence mosaic that Plaintiff presented to the court, namely that several faculty members, including the chair of the search committee that declined to hire Dr. Ginsberg, did not like the substance of those remarks and that both the chair of the hiring committee and another influential faculty member expressed strong displeasure about her having made those remarks. (Opinion at pp. 2-3).

The court held that because NCSU asserted reasons for Dr. Ginsberg's non-hire that were unrelated to her free speech, it was entitled to summary judgment. After acknowledging that agents of NCSU were troubled by Plaintiff's political remarks, the court wrote, "The committee articulated several specific reasons why plaintiff was not hired for the position, none of which concerned plaintiff's remarks." (Opinion at 6) (emphasis added). The court nearly suggests that anything short of NCSU's admission that it did not hire Dr. Ginsberg because of her free speech would render NSCU's offered reasons legitimate and nondiscriminatory. While the Court specifically identified the 'nondiscriminatory' reasons NCSU proffered, the court addressed none of the evidence Plaintiff presented refuting those reasons and

explaining why they were not the genuine reasons for her non-hire. (Opinion pp. 6-7). The import of this holding is therefore that if the stated reasons don't on their face "concern" the protected activity, then summary judgment is required.

In so holding, the Court changed the applicable legal standard. The question when assessing the employer's proffered reason for its action is not whether the employer admits to having been motivated by the plaintiff's speech in making its employment decision, but whether there is a "genuine issue of fact as to the legitimacy of the reason motivating their decision regarding plaintiff." *Lenzer v. Flaherty*, 106 N.C.App. 496, 510, 418 S.E.2d 276, 284-85 (N.C.App. 1992); *see also Employment Sec. Com'n of North Carolina v. Peace,* 128 N.C.App. 1, 10, 493 S.E.2d 466, 472 (N.C.App. 1997) (where the court held that an employer's stated reason for dismissal, which involved the employee taking coffee without permission and had nothing to do with his filing of an EEOC charge, could be regarded as pre-textual if the plaintiff could prove that the adverse action would not have occurred if there was no protected activity); *Vanderburg v. North Carolina Dept. of Revenue*, 168 N.C.App. 598, 611, 608 S.E.2d 831, 841 (N.C.App. 2005) (where an employer offered a nondiscriminatory reason for not hiring plaintiff ["unsatisfactory job performance"], the fact the employer's asserted reason had nothing to do with the plaintiff's protected religious expression did not mean the plaintiff could not show the employer's reason was pre-textual).

In this case, the court accepted without analysis NCSU's assertion that "1) that plaintiff's expertise was in a different area than the department desired for the

position and 2) that plaintiff was overqualified for the position." (Opinion p. 6). The court did not enter into any inquiry about whether those reasons were genuine or not. Plaintiff had argued at some length that a jury would not be compelled, based on the evidence in the record, to accept those reasons as genuine. (Appellant Br. pp. 37-43). The evidence Plaintiff presented included the fact that her expertise was exactly what the department had advertised, that she was more qualified than the candidate who was hired, that NCSU strongly encouraged her candidacy for the position up until the point when she engaged in protected speech, and finally that she was not in fact "overqualified" according to the university's own standards. *Id.* The court did not address whether this evidence presented a genuine issue of material fact because it held that the employer's mere assertion of a reason that does not relate to the protected speech is sufficient for summary judgment.

This failing in reasoning is of major significance to the jurisprudence of the state. To fail to subject employers' stated reasons to scrutiny risks eviscerating the employment laws and the employment-based constitutional protections of this state. The court of appeals essentially created a new defense by which employers could escape liability by simply asserting a non-discriminatory and non-retaliatory reason that is unrelated to the protected activity.

2. The court disregarded other evidence of NCSU's discriminatory motive.

The court of appeals' decision also rested in part on gross misapplication of the summary judgment standard. Summary judgment may only be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rules Civ. Proc., G.S. § 1A-1, Rule 56. As this Court has emphasized,

> Summary judgment is a drastic remedy. Its purpose is not to provide a quick and easy method for clearing the docket, but is to permit the disposition of cases in which there is no genuine controversy concerning any fact, material to issues raised by the pleadings, so that the litigation involves questions of law only.

First Federal Sav. & Loan Ass'n of New Bern v. Branch Banking & Trust Co., 282 N.C. 44, 51, 191 S.E.2d 683, 688 (N.C. 1972). The summary judgment rule "does not contemplate that the Court will decide an issue of fact, but rather will determine whether a real issue of fact exists. . . . If there is any question as to the weight of evidence, summary judgment should be denied." *Marcus Bros. Textiles, Inc. v. Price Waterhouse*, LLP 350 N.C. 214, 220, 513 S.E.2d 320, 325 (N.C. 1999) (citing *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (internal quotation marks removed).

The Court of Appeals failed to pay more than lip service to the summary judgment standard when it accepted the movant's assertions without considering the Plaintiff's evidence showing a dispute of material fact.

Plaintiffs are not limited to one type of evidence in proving a causal link between protected activity and allegedly discriminatory or retaliatory decisions. As the United States Supreme Court made clear in *Patterson*, the plaintiff must have the opportunity

> to demonstrate that respondent's proffered reasons for its decision were not its true reasons. In doing so, petitioner is not limited to presenting evidence of a certain type. . . . The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. Indeed, she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. The District Court erred, however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing. There are certainly other ways in which petitioner could seek to prove that respondent's reasons were pretextual. Thus, for example, petitioner could seek to persuade the jury that respondent had not offered the true reason for its promotion decision by presenting evidence of respondent's past treatment of petitioner, including the instances of the racial harassment which she alleges and respondent's failure to train her for an accounting position. See *supra,* at 2373. While we do not intend to say this evidence necessarily would be sufficient to carry the day, . . . [s]he may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual.

Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989) (superseded by statute on other grounds) (internal citations removed) (emphasis in original).

The Court held, however, that "the record does not show that plaintiff's remarks were a decisive factor in the committee's decision." *Id.* (emphasis added). In so holding the Court misstated the summary judgment standard. As argued *supra*,

at the summary judgment stage courts are not to decide issues of fact, but rather determine whether a real issue of fact exists. It is immaterial, therefore, whether the record convinces the court that plaintiff's remarks were a decisive factor in the decision. In determining whether there is an issue of fact as to whether the free speech caused an adverse employment action, an issue of fact exists where there is circumstantial evidence sufficient to permit a jury to find that protected activity motivated the decision, even where the employer asserts an allegedly non-discriminatory reason for its action.

The Court characterized Dr. Ginsberg's evidence as follows: "Here, plaintiff argues that following her remarks, she had several negative interactions with other members of the faculty. Based on these interactions, plaintiff believes that she was not considered for the tenure-track position as a result of her remarks." (Opinion at p. 6). This characterization of Plaintiff's evidence of a causal connection is insufficient for two reasons. First, it fails to consider that evidence in the context of the circumstantial evidence Plaintiff presented and thereby fails to give it appropriate weight, and second, it disregards entirely several additional categories of evidence that Plaintiff presented.

First, although Plaintiff did give evidence of negative reactions with other members of the faculty as a direct result of her protected speech, the Court failed to acknowledge that those negative reactions came from faculty members who had influence over the hiring decision. (Opinion p. 6). The Court also failed to acknowledge the timing of those negative reactions, which immediately preceded

the hiring decision and therefore make the faculty members' change in demeanor more significant. (Opinion pp. 6-7). Indeed, the meeting between Dr. Orgeron (the chair of the hiring committee), Dr. Khater and Dr. Ginsberg occurred just four days before Dr. Ginsberg suddenly went from being the favored candidate in the search to being characterized as not even falling within the desired area of expertise for the position. Finally, the Court ignored Plaintiff's evidence that Dr. Orgeron and Dr. Khater were not only uncomfortable with the remarks Dr. Ginsberg made during the film introduction, but grew increasingly uncomfortable with the political nature and spectrum of films Dr. Ginsberg sought to show on campus.[1] All of these factors also would have bearing on a jury's determination of whether Dr. Ginsberg's protected speech motivated NCSU's decision not to hire her for the tenure-track position. NCSU's stated reason for her non-hire should have been evaluated in light of all of that evidence.

B. The subject matter of the appeal has significant public interest.

The court's alteration of the causal nexus standard has special significance in the constitutional context, especially when the right to academic freedom of speech is at stake. Section 14 of Article I of the North Carolina Constitution provides, "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained. . . ." N.C. Const. art.I, § 14.

[1] The Court ignored entirely another asserted motivation for the non-hire—Dr. Khater's feelings of offense when he felt Dr. Ginsberg was accusing him of being complicit in discrimination against a guest speaker. The Court did not even attempt to address whether those strong feelings, combined with Dr. Khater's strong influence on the hiring committee's chair, caused Dr. Ginsberg's non-hire.

As the Constitution and state as well as federal case law make clear, the constitutional right to freedom of speech has special implications in the educational setting. Section 15 of the North Carolina Constitution provides, "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. Moreover, Article IX further emphasizes the importance of education, which reads, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. art IX, § 2.

Academic freedom is also given special protection because of the central role education plays in advancing and protecting other freedoms. *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419, 417 S.E.2d 277, 283 (1992) (holding that the test for determining whether plaintiff's expression was of public concern is whether the matter is one "in which free and open debate is vital to informed decisionmaking by the electorate.") (internal quotation marks and citation removed). To deny freedom of inquiry and impose any "straight jacket on the intellectual leaders in our colleges and universities" would be to cause "our civilization [to] stagnate and die.'" (internal quotations omitted).

When the Court of Appeals interprets employers' defenses in constitutional cases in a manner that renders the rights at issue essentially unenforceable, Supreme Court review is warranted and necessary if the rights identified in the Constitution are to have any meaning. Plaintiff therefore respectfully requests that

this Honorable Court will exercise its discretion to accept the following issues for briefing:

ISSUES TO BE BRIEFED

1) Whether the Court of Appeals erred in holding that an employer can avoid summary judgment by asserting a non-retaliatory reason for its action that does not, on its face, implicate the protected activity asserted by the plaintiff, thereby seriously endangering the right to freedom of speech in the employment context, including academic freedom; and

2) Whether the Court of Appeals misapplied the summary judgment standard when it disregarded circumstantial evidence supporting a causal connection between the plaintiff's non-hire, including evidence that related to the genuineness of the employer's stated reason, the timing of the employment decision, the employer's change in behavior, the interference of a faculty member who was angry when he assumed he was being implicated in accusations of discrimination, and the employer's trepidation at exposing students to controversial speech.

Respectfully Submitted,

Kapitan Law Office, Ltd.

Electronically submitted
Rima Kapitan
Admitted *pro hac vice* to the Court of Appeals on 13 January 2011
Yusra Gomaa
(312) 566-9590
rima@kapitanlaw.net
ygomaa@kapitanlaw.net
407 S Dearborn Ave
Suite 1200A
Chicago, IL 60605

N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

Marty Rosenbluth
(919) 251-5078
marty@immigrantrightsproject.org
Executive Director
NC Immigrant Rights Project
NC State Bar No. 38467
PO Box 926
Durham, NC 27702

CERTIFICATE OF SERVICE

This is to certify that the foregoing Petition for Discretionary Review was duly served upon Respondent-Appellants by electronic mail, addressed to the counsel of record below on 20 December 2011 at the following address:

Gary Govert
ggovert@ncodoj.gov.

s/ Rima Kapitan

NO. COA11-506

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

Terri Ginsberg,
Plaintiff,

v. Orange County
No. 09 CVS 1789

Board of Governors of the
University of North Carolina,
Defendant.

Appeal by plaintiff from order entered 4 November 2010 by Judge Shannon R. Joseph in Orange County Superior Court. Heard in the Court of Appeals 26 October 2011.

Rima N. Kapitan and Marty Rosenbluth, attorneys for plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert, for defendant.

ELMORE, Judge.

Terri Ginsberg (plaintiff) appeals an order entered 4 November 2010 granting summary judgment in favor of the Board of Governors of the University of North Carolina (defendant). We affirm.

In December 2006, plaintiff interviewed with the Film Studies Department of North Carolina State University for a position as a Teaching Assistant Professor (TAP). The TAP position was for the term of one year, with the possibility of

renewal. During the interview, plaintiff was informed that the department would later be seeking to hire a tenure-track Assistant Professor in film studies, to begin in the fall semester of 2008. Plaintiff was then offered the TAP position. On 16 August 2007, plaintiff began her TAP employment. Around this time, Dr. Akram Khater, Director of the Middle East Studies Program, encouraged plaintiff to apply for the tenure-track position of Assistant Professor in film studies.

Later that fall, plaintiff was asked to be a member of a committee to select films to be shown at the university's annual Middle Eastern Film Series. On 24 October 2007, the film "Ticket to Jerusalem" was shown as part of that series. Plaintiff introduced the film by welcoming the audience on behalf of the Film Studies and Middle East Studies programs. Plaintiff concluded her introduction by stating that she was proud to be able to present the film to the audience, because the audience's presence "showed support for the airing of Palestinian cultural perspectives, especially those which promote Palestinian liberation." Other members of the committee felt as though plaintiff's statement conveyed the message to the audience that plaintiff believed that the audience's presence was a sign of their support of the Palestinian side of the

Israeli-Palestinian political conflict. Dr. Marsha Orgeron, director of the Film Studies Program, felt as though plaintiff's statements were "counterproductive and potentially quite alienating." On 9 November 2007, Orgeron and Khater met with plaintiff. During that meeting, Khater expressed his concerns to plaintiff about her introductory statements. Khater explained that he was concerned about the effect her statements could have on the program and the purpose of the film series.

Also around this time, Orgeron served as the chair of a search committee for the tenure-track Assistant Professor position. The committee members were Orgeron, her husband Dr. Devin Orgeron, Dr. Jon Thompson, and Dr. Barbara Bennett. Plaintiff was initially on the list of applicants who would be considered for an interview. Plaintiff remained on the "first tier" list through November 2007. However, plaintiff was then moved further down the list, and eventually she was not included on the list of candidates who were screened for interviews. Orgeron explained that plaintiff was not screened for an interview because 1) plaintiff's area of research and interest in middle eastern film was not consistent with the area of focus desired by the department for the position, 2) plaintiff's experience and the quantity of her publications exceeded the

scope of what would normally be expected of a beginning assistant professor in the department, and 3) the committee was concerned about the quality of the press of one of plaintiff's monographs. Ultimately, ten applicants were interviewed for the position. From those ten applicants, two candidates were brought to the university for an on-campus interview, and one of the candidates was hired.

On 8 October 2009, plaintiff filed suit against defendant alleging a violation of her rights to freedom of speech, religious liberty, and equal protection. On 10 September 2010, defendant filed a motion for summary judgment. On 4 November 2010, the trial court entered an order granting defendant's motion for summary judgment. Plaintiff now appeals.

Plaintiff contends that the trial court erred in dismissing her speech claim by granting summary judgment in favor of defendant. "We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, th[is] court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and quotations omitted). "Summary judgment is proper when the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court must consider the evidence in the light most favorable to the non-moving party." *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quotations and citations omitted).

Plaintiff argues that there are questions of material fact regarding whether her constitutional right to freedom of speech was violated. We disagree. The core issue for this Court to review on appeal is whether there is any genuine issue of material fact that plaintiff's remarks were the cause of the university's decision to not hire plaintiff for the tenure-track position.

> In challenging an adverse employment decision for violation of constitutional rights, an employee establishes a prima facie case by showing that [the] protected activity was a substantial or motivating factor in the employer's decision. This prima facie showing shifts the burden to the employer to show, by a preponderance of the evidence, that the adverse decision would have been made in the absence of the protected activity.

Lenzer v. Flaherty, 106 N.C. App. 496, 509, 418 S.E.2d 276, 284 (1992) (citations omitted). "Although evidence of retaliation in a case such as this one may often be completely

circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Id.* at 510, 418 S.E.2d at 284 (citation omitted).

Here, plaintiff argues that following her remarks, she had several negative interactions with other members of the faculty. Based on these interactions, plaintiff believes that she was not considered for the tenure-track position as a result of her remarks. However, plaintiff fails to establish any causal connection beyond mere speculation between these interactions and the decision of the university to not hire her for the tenure-track position. In fact, the record does not show that plaintiff's remarks were a decisive factor in the committee's decision. The committee articulated several specific reasons why plaintiff was not hired for the position, none of which concerned plaintiff's remarks. Those reasons established in sum 1) that plaintiff's expertise was in a different area than the department desired for the position and 2) that plaintiff was overqualified for the position. Also, plaintiff remained on the "first tier" list of applicants through November 2007, weeks after her remarks were made. Furthermore, assuming *arguendo* that plaintiff was able to establish a prima facie case, it is apparent from the record that defendant has met its burden by

showing that the adverse decision would have been made in the absence of the protected activity. Here, the university conducted an extensive and thorough search for the best candidate to fill the tenure-track position. Over the course of several weeks, the university narrowed the field of applicants to ten individuals. The university then conducted ten off-campus interviews, two on-campus interviews, and ultimately hired a candidate with different qualifications than plaintiff.

In sum, we conclude that plaintiff has failed to establish beyond mere speculation that her statements were the motivating factor in the university's decision to not hire her for a tenure-track position. Accordingly, we affirm the decision of the trial court.

Affirmed.

Judges BRYANT and STEPHENS concur.