No. _____

In The

Supreme Court of the United States

KEITH KULL,

Petitioner,

v.

KUTZTOWN UNIVERSITY OF PENNSYLVANIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD P. RUSSO
Counsel of Record for Petitioner
P.O. Box 1305
Bethlehem, PA 18016
(610) 954-8093
Russolaw35@gmail.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether or not the Third Circuit erred by not reversing the decision of the district court, based upon the fact that Rule 62.1 of the Federal Rules of Civil Procedure provides a mechanism for the Court to provide an indicative ruling where relief is otherwise barred by a pending appeal.

2. Whether or not the Third Circuit erred by not reversing the decision of the district court, based upon the fact that a Rule 60(b) motion may be entertained in the district court at any time within a year of judgment, regardless of the pendency or even the completion of an appeal.

3. Whether or not the Third Circuit erred by not reversing the district court's holding that it was divested of jurisdiction, given the fact that the district court's ruling only applied to Rule 59 post-trial motions, not to Rule 60(b) motions and/or Rule 62.1 motions.

4. Whether or not the Third Circuit erred as a matter of law in holding that the Petitioner needed "direct evidence," to proceed with a mixed motive instruction.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

PROCEDURAL RULES

TABLE OF AUTHORITIES – Continued

Page

OPINION BELOW

The Third Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at *Kull v. Kutztown Univ. of Pa.*, 2013 U.S. App. LEXIS 22189; 121 Fair Empl. Prac. Cas. (BNA) 520, October 29, 2013, submitted under Third Circuit LAR 34.1(a), October 31, 2013. The District Court did not publish an opinion in this case.

JURISDICTION

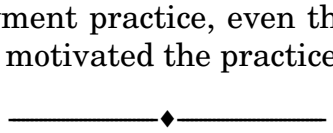
The Third Circuit filed its decision on October 31, 2013, and entered an order denying petitioner's motion for rehearing on November 27, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1991 added the following language, which is codified at 42 U.S.C. § 2000e-2(m), to Title VII:

> **(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices.** Except as otherwise provided in this title [42 U.S.C. § 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex,

or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.



STATEMENT OF FACTS

In July 2004, Petitioner Keith Kull ("Kull") was hired by Respondent Kutztown University of Pennsylvania ("Kutztown") in the position of Mathematics Educator. In his first three years of his employment, Kull received performance evaluations by the Professor's Evaluation and Tenure ("PET") Committee ranking his overall performance as "Good" on a scale of Excellent, Good, Fair Unsatisfactory. In his first three years of employment, Kull received performance evaluations by the Mathematics Department Chairperson ranking his overall performance as "Good" on a scale of Excellent, Good, Fair, Unsatisfactory. In Kull's fourth year of employment, the Evaluation Rating Form used by the PET Committee was changed to a rating scale of Excellent (4 points), Very Good (3 points), Good (2 points), Fair (1 point), Unsatisfactory (0 points), Abstain (not counted in the average). At this time, the manner in which the PET Committee performed its evaluation was also changed so that each tenured faculty member was allowed to cast a vote and to indicate whether the faculty member's contract being reviewed should be "renewed" or "not renewed." In the fourth year of his employment, the 2007-2008 school year, Kull received a "1.3" performance rating evaluation by the PET Committee

and received 6 votes for his renewal and 4 votes for his non-renewal. In the fourth year of his employment, the 2007-2008 school year, Petitioner received an overall Chair rating of "Fair," by the Mathematics Department Chairperson on a rating scale of Excellent, Good, Fair, Unsatisfactory. In the fifth year of his employment, the 2008-2009 school year, Kull applied for tenure. He was the first male with a Doctorate in Mathematics Education to apply for tenure in Respondent's Mathematics Department. Several other members of the Mathematics Department have their doctorate. However Respondent did not deny that Kull was the only male to have a Doctorate in "Mathematics Education." Kull's application for tenure was denied May 26, 2009. Kull's application for the position of Associate Professor was also denied. His tenure application was not supported by the Department PET or the Mathematics Department Chairperson. Kull alleged in his Amended Complaint that he was never given the opportunity to speak to the University Promotion Committee, despite responding to an invitation to speak before the University Promotion Committee. The final tenure denial decision included consideration of the Dean's Fifth Year Evaluation of Kull's performance. Notably, the parties agreed that the collective bargaining agreement does not specifically identify the Dean's role in the tenure process and therefore does not say whether information from the Dean regarding the applicant may be considered or disregarded. Kull alleged in his Amended Complaint that he was subjected to more stringent treatment in the tenure process than the

Collective Bargaining Agreement ("CBA") requires. The parties agreed that the CBA sets forth the tenure application process for faculty. Respondent admitted that Kutztown tenured Dr. Winnie Peterson as of May 19, 2006, that she is female, that generally she teaches the same courses that Petitioner did, and that she graduated from Temple University. Respondent claimed that Dr. Peterson was hired as a temporary faculty member by Kutztown from 1999 to 2001, and was then rehired by Kutztown in a tenure-track position in 2002. Id. In July 2006, Respondent promoted Dr. Winnie Peterson to the rank of Associate Professor. Respondent admitted that on May 19, 2006 it granted tenure to Dr. Lyn Phy (McQuaid), a female who had no published journal articles. Respondent admitted that in July 2008, it promoted Dr. Lyn Phy (McQuaid) to the rank of Associate Professor with only one publication. Respondent admitted that it tenured Mrs. Celine Przydzial on May 29, 2007, that she is female, that she is two years younger than Kull, and that her highest degree was a Master's Degree. Respondent admitted that on July 11, 2007 it promoted Mrs. Celine Przydzial to Assistant Professor. Respondent admitted that in the Summer of 2007, it hired Dr. Brad Slonaker, a male, as a Mathematics Educator in the Mathematics Department. Respondent further admitted that Dr. Slonaker taught a course load similar to that of Kull, Dr. Peterson, and Mrs. Przydzial. Respondent admitted that the Mathematics Department PET recommended that Dr. Brad Slonaker not have his contract renewed for the 2010-2011 school year. Kull alleged in his

Amended Complaint that by granting tenure and promotions to Dr. Peterson, Mrs. Przydzial, and Dr. Phy (McQuaid) and requiring these female applicants to meet fewer and less stringent criteria than were applied to him and Dr. Slonaker was due to gender discrimination.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD NOT ALLOW A PRO SE LITIGANT WHO ATTEMPTED TO FILE A POST-TRIAL MOTION TO BE PUT OUT OF COURT BECAUSE HE HAD ALREADY FILED AN APPEAL TO THE THIRD CIRCUIT COURT OF APPEALS, AND THIS COURT SHOULD REVERSE THE MANIFEST ERROR OF THE THIRD CIRCUIT COURT OF APPEALS IN HOLDING THAT KULL NEEDED "DIRECT EVIDENCE" TO PROCEED WITH A MIXED MOTIVE INSTRUCTION.

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), this court held that a plaintiff need not present "direct evidence" of discrimination in order to obtain a "mixed-motive" instruction under § 2000e-2(m), and that a court may give such an instruction where the plaintiff has presented "sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Desert Palace*, 539 U.S. at 101, 123 S.Ct. 2148, 2155,

156 L.Ed.2d 84, 95-96. Since a showing that Petitioner's gender was a motivating factor in Respondent's decision to discharge him would suffice to sustain a jury's finding of an "unlawful employment practice," such a showing will also be sufficient to charge the jury under Third Circuit Model Instruction, 5.1.1 Elements of a Title VII Claim – Disparate Treatment – Mixed-Motive. Petitioner produced sufficient evidence to convince a reasonable jury that his gender was either a *motivating* factor or a *determinative* factor in Respondent's decision to terminate his employment. *Desert Palace*, 539 U.S. at 101, 123 S.Ct. 2148, 2155, 156 L.Ed.2d 84, 95-96; *Watson v. Southeastern Pennsylvania Transportation Authority*, 207 F.3d 207, 220 (3d Cir. 2000). It is respectfully submitted that the Panel erred as a matter of law in holding that the Petitioner needed "direct evidence," to proceed with a mixed motive instruction. "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L.Ed.2d 225 (1982). Rule 62.1 of the Federal Rules of Civil Procedure, however, "provides a mechanism for the Court to provide an indicative ruling where relief is otherwise barred by a pending appeal." *Thomas v. City of New York*, 2013 U.S. Dist. LEXIS 78510, 2013 WL 2420815, at *4 n.4 (S.D.N.Y. June 4, 2013). Specifically, the Rule 62.1 provides that "[i]f a timely motion is made for relief that the court lacks authority to grant because of an

appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a) of the Federal Rule of Civil Procedure offers district courts several options for action when "a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1. Under Rule 62.1(a), a district court may defer consideration of or deny the motion, or it may indicate that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. Id. at 62.1(a). Rule 62.1 operates in conjunction with Federal Rule of Appellate Procedure 12.1, which provides that if the district court, pursuant to Rule 62.1(a)(3), states that it would either grant the motion on remand or that the motion raises a substantial issue the movant must notify the circuit clerk. Fed. R. App. P. 12.1. Rule 62.1 does not apply to the six motions identified in Federal Rule of Appellate Procedure 4(a)(4)(A) for which the appellate process is halted to allow the district court time to rule on the motion, as the district court is not divested of jurisdiction in these cases. Fed. R. App. P. 4(a)(4)(A). These motions include motions for judgment under Rule 50(b), motions to amend or make new factual findings under Rule 52, motions for attorney's fees under Rule 54, motions to alter or amend judgment under Rule 59, motions for a new trial under Rule 59, and motions for relief

under Rule 60. See, *Arlington Indus. v. Bridgeport Fittings, Inc.*, Civil Action No. 3:01-CV-0485, 2011 U.S. Dist. LEXIS 74147 (M.D. Pa. July 11, 2011), aff'd by *Arlington Indus. v. Bridgeport Fittings, Inc.*, 477 Fed. Appx. 740; 2012 U.S. App. LEXIS 18710 (Fed. Cir., Sept. 6, 2012). A motion under Fed. R. Civ. P. 60(b)(6) should be made within a reasonable time. "The general purpose of Rule 60(b) . . . is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Coltec Indus. v. Hobgood*, 280 F.3d 262, 271 (3d Cir. 2002), citing, *Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978). As to the effect of the appeal itself, normally the timely filing of a notice of the appeal divests this court of its power to do what Petitioner requested. But *Venen v. Sweet*, 758 F.2d 117, 124 (3d Cir. 1985) approved the following procedure:

> This court recently referred approvingly to the following procedure for dealing with motions brought in the district court after an appeal has been filed:
>
> When an appellant in a civil case wishes to make a [Rule 60(b)] motion . . . while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in this court for a remand of the case in order that the District Court may grant the motion. . . . *Main Line Federal Savings and Loan Association v. Tri-Kell*,

721 F.2d 904, 906 (3d Cir. 1983) quoting from *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952).

"[T]he rule which requires a trial judge to divest himself of a case once a party has filed a notice of appeal 'should not be employed to defeat its purpose or to induce unnecessary paper shuffling.'" *RCA Corp. v. Local 241*, 700 F.2d 921, 924 (3d Cir. 1983) (quoting *United States v. Leppo*, 634 F.2d 101, 104 (3d Cir. 1980)). "A district court . . . retains such jurisdiction as is necessary to aid the higher court in consideration of the appeal." *Main Line Federal Savings and Loan Ass'n v. Tri-Kell, Inc.*, 721 F.2d 904, 906 (3d Cir. 1983). A district court may entertain, or even grant, a Rule 60(b) motion regardless of a pending appeal. See *Stone v. INS*, 514 U.S. 386, 115 S.Ct. 1537, 1547, 131 L.Ed.2d 465 (1995) ("[T]he pendency of an appeal does not affect the district court's power to grant Rule 60 relief."); *Ingraham v. United States*, 808 F.2d 1075, 1080-81 (5th Cir. 1987) ("[A] Rule 60(b) motion may be entertained in the district court at any time within a year of judgment, regardless of the pendency or even the completion of an appeal."); *Ames v. Miller*, 184 F.Supp.2d 566, 575 (N.D. Tex. 2002) ("The fact that the judgment sought to be set aside had been affirmed on appeal does not impair the trial court's ability to grant Rule 60(b) relief."). See also, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) ("the District Court may entertain a Rule 60(b) motion without leave by this Court."). The proper procedure

to seek Rule 60(b) relief during the pendency of an appeal is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move the appellate court, if appropriate, for remand of the case. *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984). Petitioner's letter of March 7, 2013 stated, inter alia: "I am interested in filing an Appeal of this case." The Petitioner referenced a need to file a Motion for a New Trial. However, the district court (as per handwritten inscription on the Petitioner's letter), directed the Clerk to docket the Petitioner's letter as a: "Motion for Extension of Time to File Motion for New Trial." As of March 11, 2013, the Petitioner was within the time frame established by Federal Rule of Appellate Procedure 4(a)(5)(A). Said Rule permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause. Instead of setting a hearing date or taking some action that would have allowed the Petitioner to present a petition under Fed. R. Civ. P. No. 60(b) and/or under Fed. R. Civ. P.

No. 62.1, the district court instead denied the Petitioner's "motion" on March 12, 2013 – the very next day. Prior to March 30, 2013, the Petitioner could have abandoned his appeal, filed a request for an extension of his appeal date, and then filed for the appropriate relief. Moreover, the district court's argument that it was divested of jurisdiction was correct, but only as to Rule 59 post-trial motions. A Rule 60(b) motion and/or a Rule 62.1 motion could have been considered by the district court, within the confines of the applicable case law cited hereinabove. In sum, it is respectfully submitted that the Petitioner, who was acting pro se at the time, was not at all dilatory, and in fact was acting within a time frame that would have allowed him to take advantage of his procedural right to defer a notice of appeal. Had the Petitioner's request for relief been considered by the district court with a view toward the other options available to the Petitioner, the Petitioner's rights would be preserved.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

DONALD P. RUSSO
Counsel of Record for Petitioner
P.O. Box 1305
Bethlehem, PA 18016
(610) 954-8093
Russolaw35@gmail.com

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1600

KEITH R. KULL, ED.D.,

Appellant

v.

KUTZTOWN UNIVERSITY OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-11-cv-06512)
District Judge: Honorable Berle M. Schiller

Submitted Under Third Circuit LAR 34.1(a)
October 29, 2013

Before: FISHER, JORDAN, and SLOVITER,
Circuit Judges

(Filed: October 31, 2013)

OPINION

SLOVITER, *Circuit Judge.*

Dr. Keith R. Kull ("Kull"), appellant, was employed as an Assistant Professor in the Mathematics Department at Kutztown University of Pennsylvania ("the University"). The University denied Kull tenure and terminated him after six years of employment with the University. Kull sued the University, alleging that the University denied him tenure and terminated him on the basis of his gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

After a jury verdict in favor of the University, the District Court entered judgment accordingly. Kull filed a timely appeal. He then also filed, pro se, a "Motion for Extension of Time to File a Motion for New Trial." The District Court denied the motion on the ground that the notice of appeal divested it of jurisdiction. Kull appeals the District Court's denial of his pro se motion, its decision to give the jury a Title VII "pretext" instruction as distinguished from a "mixed-motives" instruction, and its failure to grant him a new trial. For the reasons that follow, we will affirm.[1]

---

[1] The District Court had subject matter jurisdiction over Kull's Title VII claim pursuant to 28 U.S.C. § 1331. This court has jurisdiction over the final order of the District Court pursuant to 28 U.S.C. § 1291. As explained below, Kull's attempts at post-trial relief do not divest this court of appellate jurisdiction.

I.

Because we write for the benefit of the parties, we will recount only the essential facts. The University hired Kull as a tenure-track Assistant Professor in the Mathematics Department, and he started teaching in the fall semester of 2004. Under the applicable Collective Bargaining Agreement ("CBA"), tenure-track faculty members serve for five years on probationary status, during which time their contract is subject to annual renewal. After five years, the faculty members may apply for tenure and promotion. If a tenure-track faculty member is denied tenure, his or her contract is terminated at the end of the following year.

The President of the University, or his or her designee, makes the ultimate decisions as to contract renewal, tenure, and promotion. Tenure decisions are based on recommendations by the University Tenure Committee.

The CBA specifies three broad categories for evaluating faculty member performance: effective teaching and fulfillment of professional responsibilities, continuing scholarly growth, and service to the University and community. In the first three years of his employment, Kull received an overall rating of "Good" (on a scale of "Excellent," "Good," "Fair," and "Unsatisfactory") from both the Promotion, Evaluation, and Tenure ("PET") committee and the department chair. In his fourth year, Kull received individual ratings of "Good" from four members of the

PET committee, ratings of "Fair" from five members, and a rating of "Unsatisfactory" from one member. Four members of the PET committee voted against recommending his renewal that year. The department chair voted in favor of his renewal. The department dean recommended his renewal "with serious reservation." In his fifth year, Kull received one rating of "Good," five ratings of "Fair," and five ratings of "Unsatisfactory." The department chair gave him a rating of "Good."

Kull applied for tenure in his fifth year. The PET committee, composed of six women and five men, voted against recommending tenure 9-2. At least one of the votes in favor of tenure was cast by a woman. The committee, in a memorandum explaining its decision, cited persistent concerns with Kull's interpersonal skills and professionalism in the classroom, his tendency to make mistakes in class, his scholarly progress, and his student evaluations. The department chair, also a man, recommended against tenure, though he considered Kull's scholarly progress sufficient. Based on these recommendations, the President's designee denied Kull's application for tenure. In light of the denial of tenure and pursuant to the CBA, the University terminated Kull's employment at the end of his sixth year.

Kull then filed suit, alleging that the University had denied him tenure because of his gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. In support of his claim, Kull pointed to the University's decisions to grant tenure

to three women he claimed were less qualified than he was, and its decision not to renew the contract of Dr. Brad Slonaker, a man. He alleged that these actions showed that the University held women to "fewer and less stringent criteria" than men.

At trial, Kull highlighted his receipt of a Doctorate in Education, seven publications, numerous conference presentations, and work in developing a new course. He contrasted these accomplishments with the pre-tenure records of women professors who had been granted tenure, such as Dr. Anke Waltz, whose only publication was a book she translated from German to English, and Dr. Lyn Phy, who had no publications.

The District Court gave the jury an instruction, modeled on Third Circuit Model Jury Instructions 5.1.2 (Elements of a Title VII Claim – Disparate Treatment – Pretext), stating that Kull had the burden of proving that "his gender was a determinative factor in Kutztown University's decision to not grant him tenure."

The jury found in favor of the University. The District Court entered judgment accordingly on January 31, 2013. Kull filed a notice of appeal on March 1, 2013. On March 11, 2013, he also filed, pro se, a motion that the District Court construed as requesting a thirty-day extension to file a motion for new trial. In his motion, Kull explained his understanding that he had "to file a Motion for a New Trial in order to 'preserve' certain issues for the appeals

court to review." The District Court denied the motion, citing Fed. R. Civ. P. 59(b), according to which the deadline for Kull to file a motion for new trial expired on February 28, 2013, as well as Fed. R. Civ. P. 6(b)(2) which prohibited extensions of that deadline. The District Court also held that it was without jurisdiction to grant the motion as a result of Kull's timely notice of appeal.

II.

Kull first argues that the District Court erred in denying his pro se motion which the District Court construed as a motion for an extension of time to file a motion for a new trial – the filing itself contains no specific heading.

If construed as a request for an extension of time to file a post-trial motion, Kull concedes that the District Court could not grant his motion. "A court must not extend the time to act under Rules . . . 59(b) . . . and 60(b)." Fed. R. Civ. P. 6(b)(2). Thus, whether the District Court construed Kull's motion as a Rule 60(b) motion for relief from judgment or a Rule 59(b) motion for a new trial, the District Court could not have granted an extension. Moreover, if Kull's pro se motion were construed as a Rule 59(b) motion, it could not be granted because such motions must be made within 28 days of entry of judgment. Thus, Kull had to file a Rule 59(b) motion by February 28, 2013, and his pro se motion filed on March 11, 2013 would have been untimely.

Kull argues instead that the District Court should have construed his motion as a Rule 60(b) motion for relief from a final judgment. However, as mentioned above, this argument too must fail. Federal Rule of Civil Procedure 6(b)(2) also bars courts from extending the time to act under a Rule 60(b) motion. Moreover, as the District Court pointed out, it no longer retained jurisdiction over the case after Kull filed a timely notice of appeal. Generally, a notice of appeal divests the District Court of jurisdiction "over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

Although certain post-trial motions preserve jurisdiction in the District Court for the purposes of disposing of the motion, that is not the case under a Rule 60(b) motion. A Rule 60(b) motion preserves jurisdiction in the District Court only if filed no later than 28 days after judgment is entered. Fed. R. App. P. 4(a)(4)(A)(vi). Because Kull's motion was not filed within that time, the District Court lacked jurisdiction to grant Kull's pro se motion even if it had treated it as a Rule 60(b) motion.

Finally, Kull urges that, nonetheless, the District Court could have proceeded under Rule 62.1 – by providing an indicative ruling on a motion for relief that is barred by a pending appeal. *See* Fed. R. Civ. P. 62.1(a)(3). Kull argues that the District Court could have entered an order indicating to this court that it was inclined to grant the motion for a new trial, and would act on it if we remanded for that purpose.

However, under Rule 62.1(a)(2), the District Court had discretion to deny the motion.

Although there is not binding precedent, the standard applied in such circumstances is abuse of discretion. We will apply that standard here. The District Court did not abuse its discretion in treating Kull's pro se motion as a request for an extension of time to file a motion for a new trial because that is the relief Kull requested. Further, we note that Kull was without counsel for only a short time. His attorney filed an appearance in this appeal just eleven days after Kull filed his pro se motion. Kull could have filed an appropriate Rule 62.1 motion at that time, but did not.

III.

Kull next argues that the District Court erred in giving the jury a Title VII "pretext" instruction, when a "mixed motives" instruction was allegedly appropriate. Because Kull did not object to the jury instructions at trial, we will review the District Court's decision for plain error. Fed. R. Civ. P. 51(d)(2). Under the plain error standard, this court considers "the obviousness of the error, the significance of the interest involved, and the reputation of judicial proceedings if the error stands uncorrected." *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 340-41 (3d Cir. 2005) (quotations and citation omitted).

"Whether a case is a pretext case or mixed-motives case is a question for the court once all the evidence has been received." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1098 (3d Cir. 1995) (citation omitted). In a pretext case, the plaintiff must show that gender was a "determinative factor" in an adverse employment decision, while in a mixed-motives case, the plaintiff need only show that gender was a "substantial motivating factor." *See Watson v. SEPTA*, 207 F.3d 207, 215 (3d Cir. 2000). A plaintiff must demonstrate with "sufficiently direct" evidence that gender was a motivating factor in the employer's decision to warrant a mixed-motives instruction. *See id.*

The District Court did not commit plain error in treating this as a pretext case and instructing the jury accordingly. Kull did not present "sufficiently direct" evidence that gender played a role in the University's decision. The evidence Kull presented was circumstantial. He testified that certain women had been tenured despite having fewer publications, while a man's contract had not been renewed. From this circumstantial evidence, the jury was to conclude that the University applied less stringent criteria to women. It is not "sufficiently direct" evidence to justify a mixed-motives instruction under *Watson.* Moreover, Kull represented in his proposed jury instructions that his claim was one of "Disparate Treatment – Pretext." Therefore, the District Court did not err in treating this as a pretext case rather

than a mixed-motives case and instructing the jury accordingly.

IV.

Kull lastly argues that the District Court erred in refusing to grant him a new trial, on the ground that the jury verdict in the case is against the weight of the evidence. This argument cannot be entertained because Kull did not timely move for a new trial. "[N]ew trials because the verdict is against the weight of the evidence are proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991) (citation omitted). The record shows that between 2003 and 2012 the University granted tenure to every faculty member in the Mathematics Department who applied, four men and four women, except Kull. It also shows that evaluators were consistently worried about Kull's interpersonal skills and behavior in class, and that the women professors who were granted tenure with fewer publications had compensating strengths, like exceptional student evaluations. The jury heard this evidence and concluded that the University's stated reasons for denying Kull tenure were not pretextual. On the record before us, we cannot say that the jury's verdict shocks the conscience or "cries out to be overturned." *Williamson*, 926 F.2d at 1353.

V.

For the aforementioned reasons we will affirm the District Court's denial of Kull's March 11, 2013 motion and its order entering judgment in favor of the University.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEITH R. KULL, Plaintiff,	:	
v.	:	CIVIL ACTION
KUTZTOWN UNIVERSITY OF PENNSYLVANIA, Defendant.	:	No. 11-6512

ORDER

(Mar. 12, 2013)

AND NOW, this **12th** day of **March, 2013**, upon consideration of Plaintiff's request for an extension of time to file a motion for new trial, it is hereby **ORDERED** that the motion (Document No. 27) is **DENIED**:[1]

---

[1] "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (citations omitted); *see also Venen v. Sweet*, 758 F.2d 117, 120-21 (3d Cir. 1985). Although a district court retains jurisdiction even after the filing of a notice of appeal if a *timely* motion for a new trial under Federal Rule of Civil Procedure 59 is filed, *see United States v. Rogers Transp., Inc.*, 751 F.2d 635, 636 (3d Cir. 1985), the time for Kull to move for a new trial expired on February 28, 2013, *see* Fed. R. Civ. P. 59(b). Moreover, the Court has no discretion to extend the time to move for a new trial. *See id.* 6(b)(2). Because Kull filed a timely notice of appeal on March 1, 2013 and did not file a

(Continued on following page)

BY THE COURT:

/s/ Berle M. Schiller, J.
Berle M. Schiller, J.

---

timely motion for a new trial, this Court has no jurisdiction to consider Kull's motion to extend the time to move for a new trial.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13-1600

KEITH R. KULL, ED.D.,

Appellant

v.

KUTZTOWN UNIVERSITY OF PENNSYLVANIA

(D.C. No. 5-11-cv-06512

SUR PETITION FOR REHEARING

(Filed: Nov. 27, 2013)

Present: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, and SLOVITER*, *Circuit Judges*

The petition for rehearing filed by Appellants in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

---

* Judge Sloviter's vote is limited to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ DOLORES K. SLOVITER
Circuit Judge

Dated: November 27, 2013
tmk/cc: Donald P. Russo, Esq.
Claudia M. Tesoro, Esq.