
**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Dr. Subah Packer, Ph.D,)
)
 Plaintiff-Appellant,) Appeal from the United States
) District Court for the Southern
) District of Indiana, Indianapolis
v.) Division
)
 Trustees of Indiana) No. 1:12-cv-00008
 University/School of Medicine,)
) The Honorable
 Defendant-Appellee.) Tanya Walton Pratt
)

REPLY BRIEF OF APPELLANT

Christopher Keleher
KELEHER APPELLATE LAW GROUP
115 South LaSalle Street,
Suite 2600
Chicago, Illinois 60603
(312) 648-6164
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	4
INTRODUCTION	5
ARGUMENT	7
I. A <i>Prima Facie</i> Case of Gender Discrimination Exists.....	7
A. The Response Brief confirms material issues of fact.....	7
B. IUSM’s attacks on Dr. Packer’s evidence ignore the collective weight of the evidence.....	11
1. The witnesses testified to what they saw.....	11
2. The documentary evidence is admissible.....	14
C. Dr. Packer preserved her EEOC charges.....	16
D. Summation.....	17
II. The Unequal Pay Issue Presents An Issue of Fact.....	18
III. Dr. Packer’s Treatment Epitomizes Retaliation.....	19
IV. There Is a Question of Fact on IUSM’s Contract Breach....	22
V. In Arguing Its Statement of Facts Was Admitted, IUSM Asks The Court To Affirm a Phantom Ruling.....	22
A. Dr. Packer disputed the facts.....	22
B. IUSM’s reliance is distinguishable.....	24
VI. The Source of Dr. Packer’s Appellate Contentions Is The District Court Record.....	26
A. Dr. Packer is not raising new issues on appeal.....	26
B. Case law involving new issues on appeal is inapt....	27
CONCLUSION.....	29

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7).....30
CIRCUIT RULE 31(e)(1) CERTIFICATION.....31
PROOF OF SERVICE.....32

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Adams v. Wal-Mart Stores, Inc.</i> , 324 F.3d 935 (7th Cir. 2003).....	24
<i>Anderson v. Liberty Lobby</i> , 477 U.S. 242 (1986).....	25
<i>Boyers v. Texaco Refining</i> , 848 F.2d 809 (7th Cir. 1988).....	27, 28
<i>Culver v. Gorman & Co.</i> , 416 F.3d 540 (7th Cir. 2005).....	21
<i>Delapaz v. Richardson</i> , 634 F.3d 895 (7th Cir. 2011).....	24
<i>Fleishman v. Cont’l Cas. Co.</i> , 698 F.3d 598 (7th Cir. 2012).....	26
<i>Hess v. Bresney</i> , No. 14-1921 (7th Cir. May 4, 2015).....	28
<i>Keck Garrett & Assocs., Inc. v. Nextel Commc’ns, Inc.</i> , 517 F.3d 476 (7th Cir. 2008).....	27
<i>Lang v. Ill. Dep’t of Children & Family Serv.</i> , 361 F.3d 416 (7th Cir. 2004).....	21
<i>Lim v. Trustees of Indiana Univ.</i> , 297 F.3d 575 (7th Cir. 2002).....	10, 11
<i>O’Gorman v. City of Chicago</i> , 777 F.3d 885 (7th Cir. 2015)	26
<i>O’Regan v. Arbitration Forums, Inc.</i> , 246 F.3d 975 (7th Cir. 2001).....	14
<i>Patterson v. Indiana Newspapers, Inc.</i> , 589 F.3d 357 (7th Cir. 2009)....	24
<i>Puffer v. Allstate Ins. Co.</i> , 708 F.3d 709 (7th Cir. 2012).....	27
<i>Schomas v. Colvin</i> , 732 F.3d 702 (7th Cir. 2013).....	27
<i>Sojka v. Bovis Lend Lease, Inc.</i> , 686 F.3d 394 (7th Cir. 2012).....	25
<i>Swearnigen-El v. Cook County Sherriff’s Dep’t</i> , 602 F.3d 852 (7th Cir. 2010).....	17

United States v. Thomas, No. 14-1421 (7th Cir. Jan. 23, 2015).....28

Vela v. Sauk Village, 218 F.3d 661 (7th Cir. 2000).....16

Waldrige v. Am. Hoechst Corp., 24 F.3d 918 (7th Cir. 1994).....25

Zerante v. DeLuca, 555 F.3d 582 (7th Cir. 2009).....23

RULES AND OTHER AUTHORITIES

Southern District of Indiana Local Rule 56-1.....*passim*

10A Wright, Miller & Kane § 2727.....25

INTRODUCTION

Steering the Court away from the merits of this appeal, IUSM devotes the first 13 pages of its argument to why Dr. Packer's Opening Brief should be disregarded. IUSM claims Dr. Packer "argues an entirely different case" on appeal. Response at 32. But while describing Dr. Packer's summary judgment arguments as "narrow," "cursory," and "skeletal," IUSM fails to reconcile that Dr. Packer's summary judgment response was 32 pages, attached 57 exhibits, and added an 8-page sur-reply. More importantly, every issue on appeal was addressed in the district court.

IUSM's "new evidence" mantra also fails as IUSM provides no examples of Dr. Packer citing evidence outside the record. While the summary judgment response did not reference every exhibit, they were properly attached and before the district court, and thus appropriate on appeal. Finally, IUSM's inexplicable claim that its facts control presumes the district court found Dr. Packer violated the Local Rules. It did not.

When IUSM finally reaches the merits, it buries the discrimination, retaliation, and unequal pay evidence in minutiae. Moreover, IUSM isolates pieces of evidence and never considers the collective weight of the testimony from Dr. Pavalko, Dr. Suzuki, Dr.

Schrader, Mr. Wenzel, Dr. Ward, Mr. Lounsbery, Dr. McAteer, and Dr. Rice. While individual testimony may not defeat summary judgment, when considered collectively reversal is warranted. Dr. Packer first addresses the merits of the appeal, and then IUSM's attempts to avoid them.

ARGUMENT

I. *A Prima Facie* Case of Gender Discrimination Exists.

A. The Response Brief confirms material issues of fact.

IUSM argues Dr. Packer was not meeting its legitimate expectations. However, its reading of the record warrants scrutiny. While the Response Brief is rife with questionable record cites, six examples capture this trend.

First, IUSM claims that “[t]o Dr. Sturek’s knowledge, Dr. Packer submitted no grant applications for external funding in 2005-2006 or 2006-2007.” Response at 6, citing Doc. 113-1 at 18, 33; Doc. 113-3 at 20; Supp. App. 16. But page 18 of Dr. Packer’s deposition merely contains Dr. Packer’s statements that “research funding is something that we all do apply for all of the time” and “all of my research has been funded by my own grants.” See Doc. 113-1 at 18. Page 33 is even less relevant as there is nothing concerning Dr. Packer’s grant applications for external funding in 2005-2006 or 2006-2007. See Doc. 113-1 at 33. Thus, the only

evidence supporting IUSM is Dr. Sturek's claims. And as set forth in the Opening Brief, Dr. Packer submitted grant applications every year. Appendix at A19.

Second, IUSM contends that in 2008-2009, Dr. Packer published zero research manuscripts. Response at 8, citing Supp. App. 17; Doc. 113-1 at 27-28; Doc. 113-5 at 2-31. But the excerpt from Dr. Packer's deposition makes no mention of 2008-2009; it states that Dr. Packer was working on eight research manuscripts and published four invited editorials and one original research paper in 2005-2006. Doc. 113-1 at 27-28. Dr. Packer's CV, also cited by IUSM, shows that Dr. Packer published one research paper in 2008. *See* Doc. 113-5 at 2-31. IUSM is once again relying on the contested claims of Dr. Sturek.

Third, IUSM asserts Dr. Packer did not meet the three-year publication requirement from 2005-2008. Response at 5. But only by refusing to credit Dr. Packer for her invited publications could Dr. Sturek find she fell short. Dr. Sturek refused to recognize these works despite IUSM's promotion standards which state "Invitations to contribute reviews, editorials, commentaries, or perspectives in significant journals or chapters . . . are recognition of an individual's stature and visibility in the field." Doc. 113-17 at 20-27. Additionally,

Dr. Packer's publications were listed in her Annual Summary Report reviewed by Dr. Sturek. Doc. 113-5 at 20-31.

Fourth, IUSM asserts that "[t]o Dr. Sturek's knowledge, Dr. Packer did not submit any grant applications receiving satisfactory scores." Response at 8, citing Doc. 113-1 at 49-50; Doc. 113-7 at 10-16; Supp. App. 17. The excerpt from Dr. Packer's deposition does not mention grant application submissions in 2008-2009 or any other year. See Doc. 113-1 at 49-50. IUSM again depends on Dr. Sturek. Further, the Annual Review cited shows that Dr. Sturek knew Dr. Packer submitted a \$12.5 million grant proposal in 2008-2009 but deemed it "not applicable" in his evaluation. Doc. 113-7 at 10-16.

Fifth, IUSM emphasizes that the Faculty Board of Review "almost universally" rejected Dr. Packer's allegations. Response at 9. However, the Board found "evidence of occasional deficiencies according to safety surveys." Doc. 113-1 at 24. Additionally, lab safety surveys gave Dr. Packer's assigned space an "F" in 2005 and no remedies were ever implemented. Doc. 125-36. Dr. Sturek required Dr. Packer conduct her research program in an old conference room from January, 2005 until he evicted her in November, 2009, and moved her to a broom closet. Finally, IUSM ignores that the Board was "concerned about

[the] handling of laboratory safety issues in the School of Medicine.”

Doc. 113-4 at 24.

Sixth, IUSM stresses that OEO Director Kim Kirkland concluded Dr. Packer’s complaint was unsubstantiated. Response at 9. IUSM fails to mention that the OEO was supervised by administrators named in Dr. Packer’s complaints. Indeed, Dr. Packer’s OEO Complaint was dismissed by Dean Brater, who instructed Drs. Pavalko and Sturek to remove her. Doc. 125-27. IUSM also omits that Kirkland sought to transfer Dr. Packer to another school where “she could flourish.” Doc. 113-16 at 10. Finally, the Faculty Council Executive Committee investigated the handling of Dr. Packer’s OEO Complaints and found a lack of due process. Doc. 125-7 at 11.

These examples prove material issues of fact pervade the record. They also confirm that IUSM’s case rests on Dr. Sturek’s unsatisfactory ratings, the same individual who boasted in front of Mr. Wenzel that he would get rid of Dr. Packer, advised Dr. Rice not to work with her, expressed dismay when she won awards, and maligned her as a potential mass murderer. To claim Dr. Sturek’s ratings of Dr. Packer are the product of an objective, bias-free process defies reality.

Finally, IUSM invokes *Lim v. Trustees of Indiana University*, 297 F.3d 575 (7th Cir. 2002). In *Lim*, the Court held that a plaintiff who

failed to meet a University department's publication standards could not establish meeting her employer's legitimate expectations. *Id.* at 581. But in *Lim*, the departmental requirement included a first or last authorship criterion. *See id.* at 578. Here, Dr. Sturek did not require a first or last authored criterion but, rather, he required a first or senior authored criterion. Doc. 113-13 at 27. In cases of collaborative projects, there may be two or more senior authors, and much of Dr. Packer's research had collaborators. *Id.* at 33. Her research papers thus often had multiple senior authors. More importantly, *Lim* had a sliver of the discriminatory and retaliatory evidence here.

B. IUSM's attacks on Dr. Packer's evidence ignore the collective weight of the evidence.

Faced with numerous witnesses and incidents showing discrimination and retaliation, IUSM attempts to chisel away at the evidence. Some of these criticisms are generic, others petty, but none are effective.

1. The witnesses testified to what they saw.

IUSM dismisses Mr. Lounsbery as a mere "maintenance employee." Response at 38. Mr. Lounsbery was the Physiology Machine and Instrument Shop Operator and his job was to build unique laboratory research equipment. Doc. 125-44 at 1. Regardless, IUSM

provides no reason to doubt that Mr. Lounsbery observed first-hand the space, physical working conditions, and sharply disparate space allocations and infrastructure support provided by the Department. Doc. 125-44.

IUSM next deems the observations of Dr. Packer's student, Dr. Rice, "irrelevant." Response at 38. However, it does not say why the testimony of an individual working in the Department under Dr. Packer's guidance and in the broom closet is irrelevant. Indeed, Dr. Sturek elevated Dr. Rice's testimony when he discouraged her from working with Dr. Packer and, after Dr. Rice ignored his advice, made her "unwelcome in the Department." Doc. 125-32.

IUSM's efforts to discredit Dr. Ward also fail. As a Chancellor's Professor and a member of the Faculty Council Executive Committee, Dr. Ward knew University policies and faculty affairs. He also had insight into Dr. Packer's circumstances as he was a silent observer at the Faculty Board of Review of her Faculty Grievance, reviewed Dr. Packer's teaching as a member of the Faculty Colloquium on Excellence in Teaching Selection Committee, and served on the Conduct Characterization Committee. Doc. 125-55. IUSM supplies no reason to doubt the validity and objectivity of Dr. Ward's affidavit or letter of dissent other than disagreement with his denunciation of Dr. Packer's

removal process.

IUSM is also mistaken in stating that Dr. Suzuki's testimony is just the "feeling" of a retired faculty member (who never worked in the Physiology department)." Response at 36. Dr. Suzuki did indeed work in the Physiology Department and was qualified to discuss the discriminatory treatment of faculty in his capacity as University Director of the Equity Institute on Race, Culture & Transformative Action. Doc. 125-48. Moreover, Dr. Suzuki witnessed IUSM's treatment of Dr. Packer on numerous occasions. IUSM seizes on the word "feeling" in an attempt to discredit Dr. Suzuki's testimony, but consider the context: "I was an observer at one of Dr. Sturek's annual review meetings with Dr. Packer. I can remember leaving the meeting with the feeling that Dr. Sturek was biased against Dr. Packer and intent upon seeing her fail." Doc. 125-48 at 2.

Finally, IUSM's dismissive treatment of Dr. Schrader fails. Dr. Schrader was not just "another nondepartmental faculty member (primary to the School of Dentistry) [who] 'cannot honestly speculate.'" Response at 36-37. Dr. Schrader holds an appointment in the Department of Family Medicine at IUSM. Doc. 125-47. He conducted peer reviews of Dr. Packer's teaching and observed Dr. Sturek's behavior towards Dr. Packer as a silent observer at an annual review

meeting. Dr. Schrader watched “Dr. Sturek’s persistent and relentless behavior in pursuing every chance he can to try and criticize and evenly publicly berate Dr. Packer [which] has led to a truly hostile work environment.” Doc. 125-47 at 5.

IUSM cites *O’Regan v. Arbitration Forums, Inc.*, for the proposition that a non-decision-maker’s speculation as to the thoughts of the decision-maker are irrelevant. 246 F.3d 975, 986 (7th Cir. 2001). While Dr. Schrader used the word “speculation” in his affidavit, he had personal knowledge of the mistreatment of Dr. Packer that he witnessed firsthand. And even if Dr. Schrader’s comment about gender discrimination is disregarded, his testimony about how Dr. Sturek mistreated Dr. Packer is still salient, and untouched by IUSM.

2. The documentary evidence is admissible.

IUSM attacks Dr. Packer’s statement that Dr. Sturek hired no female faculty as “devoid of context.” Response at 25. In fact, the salary charts submitted by Dr. Packer show that Dr. Sturek hired no female faculty during his term as Chair and that all new hires and promotions were male. Doc. 125-18; Doc. 125-19; Doc. 125-22 at 13-17. Moreover, in his affidavit, Dr. Sturek admits that all his new hires were men. Doc. 113-13 at 14, 16-17.

IUSM also seeks to dismiss Dr. Packer’s invocation of her “various unexplained awards” because they are “not a license to ignore departmental guidelines persistently over nearly a decade.” Response at 40. The awards are hardly unexplained as they were attached as exhibits to the summary judgment response. Nor are they presented as an excuse to ignore departmental guidelines. They instead show Dr. Sturek’s departmental guidelines were a sham and undermine his credibility. As set forth in the Opening Brief and evaded in the Response Brief, there is something odd when multiple entities—inside the University and out—extoll Dr. Packer’s abilities while one man derides her as a potential mass murderer.

IUSM asserts Dr. Packer presented no evidence of pretext, arguing there was no evidence indicating Dr. Sturek was ordered to get rid of her because of her gender. Response at 27. Dr. Packer not only cited evidence (Doc. 125-2 at 12-13; Doc. 125-9) that Dean Brater instructed Drs. Pavalko and Sturek to get rid of Dr. Packer but also quoted excerpts of Dr. Pavalko’s deposition in her summary judgment response and sur-reply. *See* Doc. 125 at 11; Doc. 128 at 2-3. And while Dean Brater did not explicitly say “Dr. Packer should be removed because she is a woman,” the inference is undeniable that Dr. Packer angered Dean Brater by filing unequal pay grievances regarding her

tenure denial. Doc. 113-4 at 4-5. The downward spiral would continue from there. In glossing over the dynamic of an “assertive” woman in a male entrenched environment, IUSM ignores the obvious inferences and instead demands Dr. Packer supply a smoking gun. Because there is evidence inferring IUSM took adverse action against Dr. Packer due to her gender, reversal is proper.

C. Dr. Packer preserved her EEOC charges.

IUSM incorrectly claims that because Dr. Packer neither marked the box indicating her charge related to gender discrimination nor referenced it in her EEOC narrative, her second EEOC charge did not preserve a discriminatory discharge claim. Response at 33.

A Title VII plaintiff cannot bring claims in a lawsuit that are not included in the EEOC charge. *Vela v. Sauk Village*, 218 F.3d 661, 665 (7th Cir. 2000). Further, there must be a reasonable relationship between the allegations in the charge and the claims in the complaint. *Id.* These principles were not violated here. Dr. Packer’s second EEOC complaint concerned the retaliation that followed the filing of her first EEOC complaint. In the first EEOC complaint, Dr. Packer alleged gender discrimination was still in progress when she checked the box for “continuing action.” Doc. 113-11 at 23; Doc. 113-3 at 13; Doc. 125-22. Moreover, IUSM knew of the two EEOC complaints, both in progress

simultaneously, when she amended her federal suit. The second EEOC complaint thus stated an additional claim to the first EEOC complaint that asserted “continuing action.” Doc. 113-11 at 23; Doc. 113-3 at 13; Doc. 125-22. To claim IUSM was not on notice when Dr. Packer’s federal lawsuit for gender discrimination was ongoing is disingenuous.

IUSM mistakenly relies on *Swearnigen-El v. Cook County Sherriff’s Department*, 602 F.3d 852 (7th Cir. 2010). *Swearnigen* is distinguishable because there the plaintiff’s one EEOC charge only alleged discrimination based on race and gender. *Id.* at 864-85. He later claimed retaliation. The Court held that “retaliation and discrimination charges are not considered ‘like or reasonably related.’” *Id.* While only a single EEOC charge was filed in *Swearnigen*, Dr. Packer filed two EEOC complaints, the second while the first was still pending. Her claims were preserved.

D. Summation.

While the Response Brief challenges some of Dr. Packer’s evidence, there is a considerable amount it either downplays or ignores:

- Dr. Sturek “misused” the Academic Handbook to “frame” Dr. Packer. Doc. 125-55 at 1.
- There was “insufficient infrastructure” for Dr. Packer to do her work. Doc. 125-32 at 8.

- Female faculty were a novelty in the Department. Doc. 125-18.
- Dr. Sturek sabotaged Dr. Packer’s attempt to get a grant. Doc. 125 at 30.
- The disconnect between Dr. Sturek and virtually everyone else who assessed Dr. Packer’s teaching abilities.
- Dr. Packer carried the heaviest teaching load in the Department. Doc. 125 at 17.
- Dr. Sturek painted Dr. Packer as unhinged to the Promotion & Tenure Committee. Doc. 113-14 at 27.
- The incongruity of a “willful persistent neglect of duties” while teaching 4 to 6 courses a year.
- Using anonymous student evaluations from one class out of 55 semesters of teaching.

The Response Brief’s inability to address these points demonstrates its frailty. Reviewed *de novo*, the Court should reverse.

II. The Unequal Pay Issue Presents An Issue of Fact.

IUSM’s claim that Dr. Packer presented no evidence that Drs. Tanner, Kempson, and Hui failed to comply with departmental requirements is belied by the record. By their own admissions, Drs. Kempson and Hui failed to comply with funding requirements but were not penalized for their failure. *See* Doc. 125-23 at 1-14; Doc. 125-24. More specifically, Dr. Hui admitted that he, along with Drs. Kempson, Tanner and Packer, lacked the grant funding desired by Dr. Sturek but

that he was not penalized like Dr. Packer. Doc. 125-24. Dr. Hui stated, “I remained in my lab, MS 318, until my retirement in July, 2006.” Doc. 125-24 at 2. Furthermore, unlike the terminated Dr. Packer, Dr. Hui was awarded the title of Professor Emeritus. Doc. 125-24 at 1. Finally, Dr. Kempson admitted there were years when he had no research funding at all, but was not rated unsatisfactory. Doc. 125-23 at 2, 8.

From the beginning of her IUSM career to the end, Dr. Packer was \$20,000 to \$30,000 below the mean salary. Doc. 125-18; Doc. 125-19. She was denied a salary increase every year from 2007 through 2013 and her pay was eventually cut 10%. Doc. 125-19. Doc. 125-7 at ¶ 61. To that end, the salary-related exhibits were clear. *See* Doc. 125-18; Doc. 125-19. They compared male and female associate professor teaching load data as well as salary data not only for 2011-2012 but also 1995-2012. At 66% of the mean for male associate professors, Dr. Packer’s equal pay claim survives summary judgment.

III. Dr. Packer’s Treatment Epitomizes Retaliation.

IUSM frames Dr. Packer’s retaliation in false terms, that she relies “entirely” on temporal proximity. Response at 42. While suspicious timing is a critical component of Dr. Packer’s position, this case at its core is about being targeted for objecting to unequal

treatment. The retaliation transcends the suspicious timing as it continued virtually unabated from 2000.

IUSM claims Dr. Sturek's retaliatory actions were removed from Dr. Packer's triggering activity by two months. Response at 43. Evidence shows that Dr. Sturek interfered with Dr. Packer's grant submission and sent emails maligning her five weeks after Dr. Packer submitted her Faculty Grievance and OEO Complaint. Doc. 125-41; Doc. 113-4 at 2. Moreover, Dr. Sturek accelerated his retaliatory actions as the investigations of Dr. Packer's complaints against him continued. Dr. Sturek made a false referral about Dr. Packer as "a person of concerning behavior" to the Behavioral Consulting Team days before the Faculty Grievance hearing. Doc. 113-2 at 19.

Additionally, IUSM's citations of Dr. Packer's 2010 Faculty Grievance, Doc. 113-4 at 2-19, and 2011 and 2013 EEOC Complaints, Doc. 113-3 at 13-16, hardly support its assertion that "Dr. Packer's only additional 'evidence' of retaliation was her claim that Dean Brater wanted her 'out of his school'—supposedly because she was awarded tenure over his objection." Response at 28. Dr. Packer's 2010 Faculty Grievance is a detailed account of IUSM's harmful actions against Dr. Packer over ten years from the time that Dr. Brater lost in his attempt to deny Dr. Packer tenure. Doc. 113-4 at 2-9.

The photograph and affidavits challenged by IUSM are evidence that Dr. Sturek moved Dr. Packer into office space that was not only lesser space than that of her male colleagues but unsafe. Doc. 125-5; Doc. 125-33; Doc. 125-44. Clearly, the broom closet assignment was not a promotion. Thus, his motivations, whether they stem from gender or retaliatory animus remain at issue. Moreover, Dr. Sturek's timing coincided with two events which infer retaliation: the announcement of Dr. Packer's invited Guyton Award paper on gender discrimination in science, and her communications with IUSM that she was initiating legal action via a Faculty Grievance and OEO Complaint against Dr. Sturek. Doc. 113-4 at 16; Doc. 113-2 at 18-19.

Finally, IUSM declares Dr. Packer's "own authorities undermine her argument." Response at 45. To the contrary. In *Lang v. Illinois Department of Children & Family Services*, the timing of plaintiff's discipline was "extremely suspicious" because the plaintiff had never been criticized during the five previous years. 361 F.3d 416, 420 (7th Cir. 2004). Setting aside Dr. Sturek's agenda driven ratings, Dr. Packer had gone 55 semesters without having her student evaluations being used against her or her teaching credentials questioned. *Culver v. Gorman & Co.*, is relevant because three days elapsed between plaintiff's initial complaint of discrimination and her

termination. 416 F.3d 540, 546 (7th Cir. 2005). The four-day lapse between service of this lawsuit and pulling a tenured professor from a class under the pretense of anonymous student evaluations confirms a causal connection. In sum, the retaliation evidence warrants reversal.

IV. There Is a Question of Fact on IUSM's Contract Breach.

IUSM contends the absence of an employment contract with Dr. Packer precludes a covenant of good faith and fair dealing. Response at 50. Yet IUSM produced Dr. Packer's tenure track contract letter to the district court and has never denied it awarded Dr. Packer tenure. Doc. 113-3 at 7-8. An enforceable contract thus exists.

Further, IUSM did not act in good faith towards Dr. Packer. There were deliberate efforts "to intentionally hinder Dr. Packer's ability to conduct research" which included inadequate lab facilities and moving her to a closet. Doc. 125-48 at ¶¶ 1, 2. Doc. 125-44 at 1; Doc. 125-7 at ¶ 18; Doc. 125-44. Such interference with Dr. Packer's work was the antithesis of good faith.

V. In Arguing Its Statement of Facts Was Admitted, IUSM Asks The Court To Affirm a Phantom Ruling.

A. Dr. Packer disputed the facts.

IUSM makes the curious claim that its facts were admitted at summary judgment. Response at 21. This argument is misleading on

three levels.

First, it implies the district court held that Dr. Packer violated Southern District of Indiana Local Rule 56-1. The district court never cited or discussed Local Rule 56-1. It thus found no violation of Local Rule 56-1, instead noting “the following facts are not in dispute and are viewed in the light most favorable to Dr. Packer as the non-moving party.” Doc. 135 at 1. The court later reaffirmed this point, noting it “reviews the record in the light most favorable to the non-moving party.” *Id.* at 6, quoting *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009). If the district court had found Dr. Packer did not comply with Local Rule 56-1, it would have said so. Since it did not, IUSM is asking the Court to adopt a position never articulated by the district court.

Second, IUSM’s portrayal of events keeps the Court in the dark. After IUSM’s summary judgment reply argued that Dr. Packer violated Local Rule 56-1, Dr. Packer filed a sur-reply. Doc. 128. Five pages of the sur-reply addressed how Dr. Packer’s summary judgment response disputed IUSM’s facts, and an additional three pages asserted why her evidence was admissible. Doc. 128. But the Response Brief omits the sur-reply. The sur-reply eviscerated any notion that Dr. Packer was not disputing IUSM’s facts.

Third, IUSM’s position undercuts the purpose of Local Rule 56-1.

The rule requires the non-movant to identify “the potentially determinative facts and factual disputes that the party contends demonstrate a dispute of fact.” S.D. Ind. L.R. 56-1(b). Dr. Packer did just that. Her summary judgment response contained a section titled “Material Facts in Dispute.” Doc. 125 at 8. For ten pages, Dr. Packer explained the facts in dispute. Still, IUSM ignores these pages and argues that “by failing to identify specific factual disputes” Dr. Packer left the court to “guess at how her arguments might match up.” Response at 22. But Local Rule 56-1 simply requires Dr. Packer “specifically controvert” IUSM’s material facts. *See* S.D. Ind. L.R. 56-1(f). Because her response set forth (and sur-reply highlighted) the facts disputed, the rule’s purpose was furthered.

B. IUSM’s reliance is distinguishable.

In arguing its statement of facts were admitted, IUSM cites inapplicable case law. Response at 21-22. First, in *Patterson v. Indiana Newspapers, Inc.*, the district court specifically held the plaintiffs failed to comply with Local Rule 56.1(b) and accepted the defendant’s facts. 589 F.3d 357, 359-60 (7th Cir. 2009). No such ruling was made here. Second, in *Adams v. Wal-Mart Stores, Inc.*, the plaintiff failed to respond to defendant’s statement of material facts, and the district court held the plaintiff admitted defendant’s facts. 324 F.3d 935, 937

(7th Cir. 2003). Again, no such finding by the district court exists here. Third, in *Delapaz v. Richardson*, the plaintiffs made an explicit admission in their Local Rule 56.1 response which the district court relied on to find against them. 634 F.3d 895, 899 (7th Cir. 2011). Dr. Packer made no such admission here.

Further undermining IUSM is *Sojka v. Bovis Lend Lease, Inc.*, 686 F.3d 394 (7th Cir. 2012). After the defendant was granted summary judgment, the plaintiff moved to reconsider, challenging the district court's holding that plaintiff violated Local Rule 56.1. The plaintiff unsuccessfully argued his Rule 56.1 statement contained facts supporting additional theories. 686 F.3d at 398. On appeal, the Court found the district court's refusal to consider plaintiff's facts "when they were explicitly brought to its attention" an abuse of discretion. *Id.*

IUSM's position also falters because summary judgment is not a vehicle for resolving factual disputes. *See Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Nor is the burden on the non-movant onerous. 10A Wright, Miller & Kane § 2727, at 148. Dr. Packer need not tender evidence in a form that would be admissible at trial; she could rely on affidavits or any other materials of the kind identified in Rule 56(c). *See Waldridge*, 24 F.3d at 920-21. "Moreover, the non-movant need not match the movant witness for witness, nor persuade

the court that her case is convincing.” *Id.*, citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986). Because Dr. Packer met her burden under the federal and local version of Rule 56, the district court did not deem IUSM’s facts admitted. IUSM’s implication that the court did is thus wrong.

VI. The Source of Dr. Packer’s Appellate Contentions Is The District Court Record.

A. Dr. Packer is not raising new issues on appeal.

IUSM asks the Court to discard the Opening Brief because Dr. Packer’s appellate arguments were not raised in the district court. IUSM distorts the record. Dr. Packer filed a 32-page summary judgment response arguing gender discrimination under the direct and indirect method. Doc. 125 at 21-22. She pointed to the favorable treatment of male faculty members. *Id.* (citing deposition in the record). She also highlighted that no female had been hired in the department since Dr. Sturek became chair. *Id.* (citing deposition in the record). The district court’s opinion follows these arguments (see Appendix at A8-9), as does the Opening Brief. Dr. Packer also preserved her Title VII retaliation claim. Doc. 125 at 19-21. Finally, Dr. Packer argued that under the Equal Pay Act, she established a *prima facie* case—that higher wages were paid to her male colleagues for the same work. Doc.

125 at 9, 23.

B. Case law involving new issues on appeal is inapt.

The authority relied upon by IUSM proves nothing, as it almost entirely involves appellants introducing a new issue on appeal. *See, e.g., O’Gorman v. City of Chicago*, 777 F.3d 885, 890 (7th Cir. 2015) (plaintiff “abandoned” arguments raised below and raised new argument); *Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012) (plaintiff asserted new theory of discrimination on appeal); *Keck Garrett & Assocs., Inc. v. Nextel Commc’ns, Inc.*, 517 F.3d 476, 487 (7th Cir. 2008) (plaintiff failed to address an argument in his summary judgment reply); *Boyers v. Texaco Refining and Marketing, Inc.*, 848 F.2d 809 (7th Cir. 1988) (plaintiff argued “for the first time” that his cause of action arose under a certain statute). *See also Schomas v. Colvin*, 732 F.3d 702, 708 (7th Cir. 2013) (plaintiff cited generally to a statute but did not point to any specific factors challenging ALJ’s credibility determination). These cases are thus unhelpful. Dr. Packer’s arguments on appeal are neither novel nor deviate from those in the district court.

Additionally, IUSM highlights as “instructive” *Puffer v. Allstate Ins. Co.*, 708 F.3d 709 (7th Cir. 2012). In *Puffer*, the Court affirmed the denial of a class certification based on the disparate impact theory of

liability where the plaintiff failed to raise the issue in the district court. *Id.* at 718. The plaintiff “repeatedly and almost exclusively” argued in the district court for class certification based on “pattern or practice” and did not raise disparate impact. *Id.* at 718-19. *Puffer* is far removed from the instant case. Dr. Packer raised her Title VII and Equal Pay claims in the district court. Those same contentions are pressed on appeal. Moreover, the Court has cited *Puffer* for the principle that waiver applies where the party fails to raise a particular issue in the district court. *See, e.g., Hess v. Bresney*, No. 14-1921, at *14 (7th Cir. May 4, 2015); *United States v. Thomas*, No. 14-1421, at *3 (7th Cir. Jan. 23, 2015). *Puffer* is inapt.

Ultimately, IUSM overstates the rule of law set forth in its reliance. This is hardly an instance where, if Dr. Packer proceeded with her arguments on appeal, it would affect the “efficiency, fairness and integrity of the judicial system” that waiver was designed to protect. *See Boyers*, 848 F.2d at 811-12. The district court, as well as IUSM, knew of and addressed the issues pending on appeal and therefore waiver is inapplicable. IUSM thus advances a hyper-technical approach to waiver. That Dr. Packer’s summary judgment arguments do not mirror those on appeal does not preclude her appellate arguments. In

fact, tethering parties to their district court contentions would negate the need for appellate briefs.

CONCLUSION

Reviewed *de novo* and setting the evidence in a light most favorable to Dr. Packer, reversal is proper.

Respectfully submitted,

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
(312) 648-6164
ckeleher@appellatelawgroup.com

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a monospaced font. The length of this brief is 4,936 words according to the Microsoft word count function.

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
(312) 648-6164
ckeleher@appellatelawgroup.com

CIRCUIT RULE 31(e)(1) CERTIFICATION

I, Christopher Keleher, hereby certify that fifteen paper copies of the Appellant's Reply Brief were sent within 7 days of filing on the Court's ECF system via hand delivery to:

United States Court of Appeals for the
Seventh Circuit
219 S. Dearborn, Room 2722
Chicago, Illinois 60604

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
(312) 648-6164
ckeleher@appellatelawgroup.com

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the Appellant's Reply Brief upon the party listed herein, by May 14, 2015 to:

Donald Morgan
Ellen Boshkoff
300 N. Meridian St., Suite 2700
Indianapolis, IN 46240

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
(312) 648-6164
ckeleher@appellatelawgroup.com