

Chapter IV

FACULTY EMPLOYMENT DISCRIMINATION

I. Overview

Faculty evaluations are vital to institutional quality. Colleges and universities typically grant tenure after a professor completes a trial period of service, most often between six and seven years. Institutions will evaluate faculty members throughout this process, sometimes as much as annually, to determine whether it will renew that professor's contract for the next term. Good evaluations are candid, provide guidance for future reviews, and convey institutional expectations for performance. Poor evaluations could result in bitter legal battles.

In making a promotion or tenure decision, institutions typically evaluate professors on the basis of teaching, scholarship, and service to the university. In the usual promotion or tenure review, professors assemble a file describing their activities during their appointment. Various levels of the faculty and administration must then review the file. Depending on the complexity of the institution, these levels could include the professor's department chair, a tenure committee, the dean, the provost, the president, and the trustees.

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A professor may challenge an adverse promotion and tenure decision by alleging discrimination. In state institutions, professors can also allege violations of the First Amendment. For example, a professor may allege discrimination by claiming an adverse employment decision was pretext for race, age, gender, religion, or national origin discrimination by the university. If the university offers a nondiscriminatory reason for an adverse decision, a court may still find discrimination if the institution failed to adhere to its review policies, or if there is evidence that the university has a history of denying tenure to qualified members of a protected class, such as women, but granting tenure to less qualified members of an unprotected class, such as men.

Historically, courts have been reticent to intrude on university decisions regarding promotion and tenure. First, courts have realized they do not have the competence to make subjective professional judgments which evaluate aspects of academia like scholarship, teaching, and university policy. In addition, courts have been reluctant to intrude on the university's autonomy due to the long-held value placed on the university's academic freedom to choose its teachers.

While courts give deference to academic decisions, institutions of higher education are not exempt from liability. This chapter will analyze the legal theories used by professors to challenge non-renewal and denial of promotion and tenure decisions based on discrimination, and preventive measures colleges and universities can take to reduce exposure.

II. Application

LAWS PROHIBITING DISCRIMINATION

Within the higher education context, the three most recurrent areas of discrimination litigation encountered by college administrators are sex, race, and age discrimination. Claims of sex and

race discrimination are usually brought under Title VII of the Civil Rights Act of 1964. This Act prohibits discrimination in employment on the basis of race, religion, sex, or national origin. Congress originally exempted institutions of higher education from Title VII, but the Education Amendments of 1972 removed this exemption.

Claims of age discrimination are brought under the Age Discrimination in Employment Act (ADEA), which protects workers of age 40 or older from discrimination on the basis of age. In 1996, however, the Supreme Court held that a plaintiff need not necessarily show the replacement was under age 40. Rather, the court indicated satisfaction of this element required showing the replacement was substantially younger. (*O'Connor v. Consolidated Coin Caterers Corporation*, 1996)

When courts assess discrimination claims against employers, they look for evidences of disparate treatment; that an aggrieved employee was treated different because of membership in a protected class. Courts have analyzed disparate treatment under precedent established in *McDonnell Douglas v. Green* (1973). Under *McDonnell Douglas*, employees must first establish a *prima facie* case of employment discrimination. This is achieved if the employee: (1) is a member of a protected class (i.e., a minority); (2) applied for and was qualified for a position; (3) was rejected despite being qualified; and (4) after being rejected, the employer continued to seek applicants with similar qualifications. If the employee establishes *prima facie* discrimination, the employer must articulate a “legitimate, nondiscriminatory reason” to refute an otherwise discriminatory action, and show that the “nondiscriminatory reason” is not merely a pretext to hide illegal discrimination. An employee bears the ultimate burden to prove discrimination under *McDonnell Douglas*.

Sex Discrimination

Ford v. Nicks (1984) provides a good example of how the *McDonnell Douglas* disparate treatment test is applied in sex discrimination cases.

When William Ford received an associate professorship of business education at Middle Tennessee State University (MTSU), the department chairperson promised to help find a job at MTSU for Ford's wife, Lani Ford, who was working on a doctorate in secondary education.

Lani Ford eventually accepted a one-year appointment as an assistant professor of education. Her supervisor rated her teaching as satisfactory but said he would be reluctant to hire someone full time with her qualifications. Lani Ford had a Ph.D. in secondary education and three and one-half years' experience in secondary school teaching.

Lani Ford's contract was not renewed, and she was not considered for two teaching openings. Instead, the openings were to be filled by newly hired faculty, consisting of seven men and one woman. The man who replaced Lani Ford did not have a Ph.D. but was working on his Ed.D.

Meanwhile, William Ford received satisfactory reviews, and his contract was renewed for the 1972-73 academic year. However, after making several suggestions to his department chairperson, including one to hire a female faculty member, the chairperson and the dean began to criticize William Ford's performance and even recommended that he begin to look for other work.

William Ford helped his wife file a grievance with the Equal Employment Opportunity Commission, causing more friction with the dean. At the end of the academic year, William Ford's contract was renewed, but he received one of the lowest raises in the department. Days after Ford had appealed his raise, he was told that the coming year's contract would be his last. William Ford then filed his own complaint with the EEOC.

The Fords' complaints eventually turned into a lawsuit in federal court. Lani Ford claimed that the university had discriminated against her because of her sex. William Ford claimed that his nonrenewal was in retaliation for his helping his wife pursue her discrimination claims. (Such retaliation also is a violation of Title VII.)

Following the *McDonnell Douglas* model, the federal district court held that the Fords had made a *prima facie* case of discrimination. At the second level, MTSU listed numerous reasons for its actions. At the third level, the Fords proved to the court that each of these reasons was a pretext. MTSU had criticized Lani Ford's qualifications, but she was better qualified and more experienced than her male replacement. MTSU had criticized Lani Ford's specialty, secondary education, claiming it to be a dying field, but the court noted that the university was expanding its offerings in secondary education and that new faculty members' specialties held little meaning at MTSU. The district court also ruled that William Ford's contract had not been renewed due to his advocacy of his wife's discrimination claims.

The trial court ordered MTSU to reinstate the Fords with tenure. It also awarded Lani Ford damages of \$136,342 and William Ford damages of \$86,432. Upon appeal, the federal appeals court noted that under Title VII, a discrimination victim is presumptively entitled to reinstatement with seniority and back pay. The appeals court also held that a trial court has great discretion to fashion other remedies to attempt to make the discrimination victim whole. The court, however, stated that such a drastic remedy as tenure should be awarded only in exceptional cases.

At the time William Ford would have been eligible for tenure, state colleges in Tennessee awarded tenure automatically to faculty members after five years. The appeals court found that Mr. Ford would have received tenure if not for the university's discriminatory retaliation against him. Thus, William Ford's tenure award was upheld.

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However, the automatic tenure law changed soon before Lani Ford would have been eligible for tenure. The new law required each tenure candidate to undergo an extensive evaluation and to be approved by the Board of Regents. Therefore, the court could not predict with confidence that Lani Ford would have obtained tenure if not for the discrimination. The appeals court stated that a tenure decision under the new rules should be left to academic professionals, not judges.

Ms. Ford's tenure award was reversed. She still was ordered reinstated with back pay, but she was required to qualify under the new tenure procedure.

While the Fords were successful in their sex discrimination lawsuit, many more have lost at both the appellate and trial court levels. These cases demonstrate the difficulty most faculty members face in proving that the college's stated reasons are merely a pretext for discrimination. For example, Diane Ghirardo, a professor at the University of Southern California ("USC"), was able to establish *prime facie* discrimination because her salary and annual raise were significantly lower than other male professors. (*Ghirardo v. University of Southern California*, 2005) However, the court concluded that the facts of the case did not show an inference of discrimination. USC was able to demonstrate that Ghirardo's low salary and raises were the result of a documented history of substandard performances, which included a finding by a grievance committee that she engaged in misconduct. Moreover, Ghirardo was unable to show that the reasons offered by USC for her lower salary and annual raises were pretext. Accordingly, her claim was dismissed by a federal district court and the dismissal affirmed by the court of appeals.

In *Okruhlic v. University of Arkansas*, 2005, Gwenn Okruhlic, a tenure track political science professor, claimed the university discriminated against her by creating a hostile work environment. Okruhlic complained she was marginalized by the male faculty in her department from making decision regarding the development of a new Middle East Studies program funded

by a \$20 million grant. She and three other faculty members (two women and a man) expressed concerns about the management of the program to the dean of the political science department, which resulted in an investigation by a special committee. The special committee developed a report that formed the basis for restructuring the program based in part on Okruhlic's concerns.

After the changes were made to the Middle East Study Program, the men in her department began to engage in offensive conversations near her office, which included dirty jokes and negative comments about her, deriding her work and expressing a desire to get rid of her. This continued for several months. After the offensive conversations had ceased, she complained to vice chancellor of academic affairs, who immediately took her to the Office of Affirmative Action.

Okruhlic eventually filed an EEOC complaint alleging hostile work environment and harassment by a number of professors involved in the Middle East Studies Program, and filed a lawsuit against USC a year later. The court noted that an employer can refute a hostile work environment claim by: (1) demonstrating it exercised reasonable care to promptly correct sexually harassing behavior; and (2) showing the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. The court concluded that although Okruhlic experienced conflict with colleagues within her department, the university promptly responded to her harassment concerns as soon as they came to light. Moreover, Okruhlic's could have put USC on notice earlier by initiating a grievance through the university's office of affirmative action, however, she choose to notify the university after the alleged harassment had ended. Accordingly, the court concluded that USC had acted promptly to curb the alleged discrimination and that Okruhlic had failed to utilize resources available at USC to address discrimination sooner, therefore, her hostile work environment claim was dismissed.

Race Discrimination

James Roebuck, an African-American, was hired in 1970 as a lecturer in history and politics by Drexel University, a predominantly white institution situated in a largely black area of Philadelphia. The History-Politics Department faculty committee said that they had found a “role model and valued resource,” a man whose participation in the West Philadelphia community “enhanced the reputation” of Drexel. When Roebuck completed his Ph. D. in 1977, he was promoted to Assistant Professor and automatically began a six-year probationary period for tenure, as did all other newly appointed faculty. In 1983, after his credentials had been reviewed by faculty, deans, and administrators, Roebuck was denied tenure.

Drexel’s tenure review process operated at multi-levels, and the university published detailed criteria for granting tenure. At each level of the process, Roebuck’s credentials were reviewed in three areas: service, teaching, and scholarship. To receive tenure, a candidate must receive a rating of “outstanding” in at least one area, and at least “satisfactory” in the other areas.

The History-Politics Department met in the Fall of 1982 to address Roebuck’s tenure application. The committee unanimously agreed that Roebuck should be granted tenure and promoted from assistant to associate professor. The departmental committee rated Roebuck’s service and teaching as “outstanding” and his scholarship “satisfactory.” Regarding his service, the committee reported that his contributions were “numerous and excellent,” as well as vital to the university’s mission of attaining a better reputation in the West Philadelphia community. The departmental committee was equally impressed with Roebuck’s teaching, rating his performance as “outstanding.” Student evaluations, an impressive variety of courses taught, fair grading policies, and a willingness to assist other teachers all were cited as reasons leading to that favorable conclusion.

The scholarship criteria gave the departmental committee greater difficulty, but it finally reached a decision to award a

satisfactory rating. Although external reviewers differed in their assessments, the committee qualified any criticism of Roebuck's work by stating that Roebuck's writing activity indicated "a step in a desired departmental direction."

The department chairman, who is the next evaluator in Drexel's tenure review process, formulated an opinion differing in every aspect with the committee's report. He found Roebuck's service merely "satisfactory," not "outstanding," because it lacked service in the "professional sphere," which the chair found more relevant to the decision than community service. Further, he found Roebuck's teaching only "satisfactory," noting a failure to win any teaching awards that would manifest recognized excellence. His assessment of Roebuck's scholarship was even more caustic. He judged it "unsatisfactory" and found "no promise of significantly improved productivity in the future."

After the dean of the college and the vice-president for academic affairs voted to deny tenure, largely echoing the department chair's conclusions, Roebuck appealed directly to the university president, who subsequently denied tenure. The president found his teaching to be only "satisfactory." While recognizing Roebuck's extensive service, the president minimized its importance by reminding Roebuck he was "not seeking a public relations appointment," and while service is important, "it does not substitute for either teaching or scholarship." He also found the scholarship deficient, reiterating that in the university policies, scholarship and teaching are the primary matters affecting tenure.

Roebuck then filed suit in the federal district court, claiming that Drexel, in denying him tenure and promotion, intentionally had discriminated against him on the basis of his race. The court denied Roebuck's claim and Roebuck appealed. (*Roebuck v. Drexel University*, 1987)

On appeal, the court overturned the decision and granted a new trial. The court held that more exacting standards had been

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applied to him as opposed to other candidates, and that his contributions had been devalued without legitimate reason. In its decision, the court stressed not only the importance of a university having guidelines and published criteria for evaluating a tenure applicant, but also the importance of abiding by those very criteria. The court noted that Drexel could, in another context, emphasize on-campus service and minimize community service; however, once the university had established the ground rules for Roebuck's employment and had defined "important service" as it related to him, the university was obligated to abide by those rules.

For example, the court found that the department chair's determination that Roebuck lacked service in the "professional sphere" was impermissible because nowhere in the university guidelines was professional service listed as a relevant criterion in the tenure decision. In fact, testimony showed that such a requirement had never been applied to any other member of the department, thus allowing for an inference of pretext. In addition, the president based his ultimate denial of tenure on the fact that service was less deserved of merit than scholarship or teaching. The university guidelines, however, created no such hierarchy. The court found that the president had devalued arbitrarily the strongest component of Roebuck's application and, in so doing, had created an inappropriate standard solely for him.

Finding these and other instances in which a jury could infer a pretext for discrimination, the court granted a new trial. Later, however, Roebuck and the university settled the case. Roebuck is no longer teaching at Drexel.

In *Rudin v. Land of Lincoln Community College*, 2005, Janine Rudin, an adjunct professor in the Department of Business and Public Services filed a lawsuit against the college alleging race discrimination after being passed over for a full-time tenure track position. Rudin, a Caucasian female, had taught in her department for nine years. She was one of the over 100 individuals who applied for the tenure track position, and following the

college's screening policy, was among the finalist selected for an interview.

According to the college's policy, the list of finalist must be reviewed by the institutions Equal Opportunity Compliance Officer, Nicole Ralph, to "determine if there was sufficient diversity among the interviewees." After reviewing the list, Ralph decided to add Paul Hudson, an African-American male, to the list of finalist. When the final candidates were interviewed by the screening committee, Rudin was rated second-highest and Hudson was rated second from the bottom. The department chair, however, recommended Hudson for the position. The chair's recommendation was never discussed by the selection committee, which violated the college's screening policy. Hudson's recommendation was approved by the two vice presidents of instruction and academic affairs, as well as the president; however, the ultimate decision was to be made by the board of trustees.

Rudin was told she was not selected for the job by the department chair. According to Rudin, the chair told her that he had been under administrative pressure with respect to the hiring decision and that he had nothing to do with the decision. Rudin also recalled the chair telling her that the person who was hired was not more qualified and had not been teaching at the college longer than her.

After learning that she had not been hired for the position, she contacted and subsequently met with several members of the board of trustees regarding her belief that she should have been offered the position. The board members denied they pressured the department chair regarding the hiring decision, although one board member acknowledged there was a problem with the hiring process.

Prior to the board of trustee's final decision, it requested the administration provide a memorandum describing the hiring process. The memorandum reviewed by the board included the unique circumstance surrounding Hudson's recommendation and specifically stated that he was selected in part because of "the