

# Tenure Denied: Cases of Sex Discrimination in Academia

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Over the past three decades, women have made remarkable strides in academia, and now make up a majority of college graduates and about half of those earning doctoral degrees. Women also have made impressive gains in faculty appointments at all ranks, growing from about one-fourth of the full-time faculty to more than one-third (AAUW Educational Foundation 2004). Despite these gains, women remain underrepresented at the highest echelons of higher education. Women make up more than one-half of instructors and lecturers and nearly one-half of assistant professors, but they represent only one-third of associate professors and one-fifth of full professors (see Appendix A). On average, women hold lower ranking positions than men and are less likely to have tenure. Despite a burgeoning pipeline of women with doctorates, the ranks of tenured faculty remain decidedly male.

This article focuses on women who took their fight for tenure to the courts. Drawing on cases supported by the American Association of University Women Educational Foundation Legal Advocacy Fund, we document the challenge of fighting sex discrimination in academia. In the process, we illustrate the overt and subtle forms of sex discrimination that continue to impede women's progress.

## The difference tenure makes

Tenure is a promise of lifetime employment awarded to scholars who demonstrate excellence in scholarship, teaching, and service. An employment practice unique to academia, its closest business equivalent may be achieving the position of partner in a law firm. According to the landmark *Statement of Principles on Academic Freedom and Tenure* made in 1940 by the American Association of University Professors and the Association of American Colleges, tenured faculty can be fired “only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.” The burden of proof for adequate cause or financial exigencies rests with the university or college, and dismissal of tenured faculty is a rare event. Tenure conveys the approval of the academic community as a whole and ushers the fortunate candidate into a position with extraordinary job security and prestige.

Tenure review generally takes place five to seven years after a candidate is hired. Although the nature of tenure review varies greatly among institutions, the criteria for tenure generally include research, teaching, and service. Most tenure committees depend on their own judgments, evaluations from outside faculty with expertise in the candidate’s area, and student evaluations or other forms of student input. Typically, the candidate’s department manages the process and makes the initial recommendation to the dean. In most cases, but not always, the final decision-maker—the provost or board of trustees—will defer to the dean’s recommendation. Increasingly, the AAUW Legal Advocacy Fund has received complaints from professors who have been denied tenure indicating that the recommendations of faculty committees and deans are being ignored.

A negative tenure decision is always painful. Losing a bid for tenure is much more damaging than merely being passed over for a promotion, because the disappointed candidate usually loses her job and must leave the university by the next academic year. Because academic disciplines are often tightly knit communities, rejected faculty can find it difficult to get a new job elsewhere in academia. In disciplines where few jobs are available outside academia, many disappointed tenure candidates are forced to change careers altogether—a difficult, time-consuming, and often costly feat. Universities and colleges stress the permanent nature of the tenure contract, but they often gloss over the fact that a negative tenure decision terminates the candidate’s job and, sometimes, his or her career.

The tenure process has a number of characteristics that contribute to the likelihood that the decision will end up in court. In a typical case, the tenure file and committee proceedings are confidential. Secrecy is needed, some argue, to allow for candid review. The downside, however, is that candidates do not have access to key documents used to make the tenure decision and often learn about deliberations through rumor. Because candidates receive only partial information, it is difficult for them to know if they have been treated fairly.

Ambiguity about the standards needed to secure tenure is another sore point among many rejected candidates. Many universities do not have clear and specific standards for awarding tenure. As a plaintiff highlighted in this article learned, several books and dozens of peer-reviewed articles will not always result in tenure. Disagreement even exists about how to “count” articles or books. Within a discipline, the prestige of a particular journal or kind of scholarship can be subject to debate. For example, an article in a women’s studies journal is sometimes viewed as a “second tier” publication compared with a publication in a traditional discipline, even if the women’s studies journal has wide circulation and a good reputation among interested scholars.

Although the standards for granting tenure remain ambiguous in the eyes of many applicants, most academics agree that standards have risen during the 1980s and 1990s as the number of tenure-track and tenured positions has dwindled relative to the number of applicants. This belief is so widely held that, as one judge noted in the *Hirschhorn v. University of Kentucky* (an LAF-supported case), a tenured professor cannot be used as a point of comparison for a tenure candidate because the standards have risen so substantially. It is ironic that some of the older tenured faculty presiding over tenure cases would not receive tenure by today’s competitive standards. This discrepancy can exacerbate the emotional frustration of disappointed tenure candidates.

Biased behavior and decision-making remain serious problems in the promotion and tenure processes of many universities and colleges. In some cases described herein, discrimination was overt. For example, one department chair argued that a woman professor didn’t need her job as much as a man did because she was married (and presumably could depend on her husband for support). In other cases, discrimination was more subtle, manifesting itself in the guise of personal animosity toward a female professor who did not seem sufficiently

“collegial.” Either way, if evidence indicates that tenure was denied based on gender, the candidate can sue the university claiming sex discrimination.

## **Sex Discrimination Laws and Judicial Interpretation**

Most of the tenure denial cases filed in federal court are brought under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex, race, national origin, and religion.<sup>1</sup> Discrimination based on sex was not initially covered under Title VII. Gender was added as a last-minute amendment by a conservative congressman intent on killing the bill. A small group of female legislators successfully rallied to support the amendment, and discrimination based on sex was included. From this awkward beginning, lawyers and plaintiffs have tried to build a coherent legal defense against sex discrimination.<sup>2</sup>

Two approaches to sex discrimination litigation exist under Title VII and have been developed through court decisions. The first major U.S. Supreme Court Title VII case, *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), applied a “disparate impact” theory of employment discrimination under Title VII. Disparate impact discrimination refers to practices that appear neutral on their face but that result in discrimination against a protected group. The issue in *Griggs* was whether an employer could require job applicants to have a high school diploma and pass aptitude tests that, the plaintiffs argued, were not based on real job requirements. Because these requirements excluded a much larger percentage of African American men than white men, the plaintiffs argued that the requirements constituted disparate impact discrimination. While the tenure process does appear to exclude a larger percentage of women than men, few tenure cases alleging sex discrimination have proceeded under the disparate impact theory.<sup>3</sup>

Most cases of sex discrimination in tenure denial have proceeded under a second approach: the theory of “disparate treatment” (the differential treatment of employees or applicants on the basis of their race, color, religion, sex, national origin, handicap, or veteran’s status). Under this approach, a plaintiff must prove intentional discrimination using direct or circumstantial evidence. The Supreme Court articulated the framework for proving disparate treatment discrimination in the landmark decision in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). The plaintiff must first establish that

she (1) belongs to a protected class, (2) is qualified for the position, (3) suffered an adverse employment action, and (4) was replaced with someone outside the protected class, i.e., a male. A plaintiff may meet the fourth element by showing that a comparable nonprotected person was treated more favorably. Once the plaintiff has established a prima facie case, the burden shifts to the employer who must articulate a legitimate, nondiscriminatory reason for its decision. When the employer has met this burden under *McDonnell Douglas*, the plaintiff must prove that the employer's legitimate nondiscriminatory reason is not the real reason for the decision but rather a cover story or a "pretext" for discrimination.

During the past two decades, judicial interpretations of the law have, for the most part, made it more difficult for a plaintiff in a tenure case to prove discrimination. Specifically, judicial interpretations of the question of "intent" to discriminate and the relative importance of motive have made it harder to prove sex discrimination. A major shift occurred when the Supreme Court ruled in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), that the college or university must produce a legitimate, nondiscriminatory explanation for its decision but that it does not have to convince the court that it was actually motivated by this reason. For example, in tenure cases, universities typically explain that they denied tenure because of inadequate scholarship or teaching. Under *Burdine*, the college or university does not need to prove that it actually based its decision on this rationale, only that a decision based on this rationale would be reasonable. Thus, winning sex discrimination cases became more difficult after *Burdine*, because the burden of persuasion now remains with the plaintiff throughout the life of the case.

More recent Supreme Court rulings have imposed additional burdens on plaintiffs, most notably in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In an opinion written by Justice Antonin Scalia, the Supreme Court concluded that even if a plaintiff could demonstrate that the employer lied about its reason for its employment decision, the plaintiff also would need to show that the employer lied specifically to mask discrimination. The pretext, Justice Scalia reasoned, may simply be disguising a nondiscriminatory but unsavory reason, such as personal dislike for the plaintiff, and in such cases, Title VII does not provide a remedy.

The U.S. Court of Appeals applied the *Hicks* decision to academia in the oft-cited and important ruling *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997), a case supported by the Legal Advocacy Fund and highlighted in this article. The *Fisher* court concluded:

Individual decision-makers may intentionally dissemble in order to hide a reason that is nondiscriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility . . . . The fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff. (*Fisher*, 1337)

Because tenure decisions involve multiple decision-makers, a decision will be made for multiple reasons. In a complex decision-making process, it becomes increasingly difficult for plaintiffs to demonstrate that the driving force behind the negative decision was discrimination.

More-complicated Title VII disparate treatment cases involve “mixed motives” (both legitimate and discriminatory motives) for the employment decision. The Supreme Court addressed the issue of mixed motives in its landmark ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In this case, the court held that Price Waterhouse had both legitimate and discriminatory reasons for denying the plaintiff partnership at the firm. In affirming part of the lower court’s ruling for Hopkins, Justice William J. Brennan determined that under Title VII, “the critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made*” (*Price Waterhouse*, 241) [n.b., emphasis in the original opinion]. In other words, sex discrimination must have played a motivating part in the employment decision but it need not be the only motivation.

The Civil Rights Act of 1991, which amended Title VII, codified the motivating factor standard.<sup>4</sup> Thus a plaintiff who can show that a decision was the product of a combination of legitimate and illegitimate motives has put forward direct evidence of discrimination and does not need to demonstrate pretext as required under the *McDonnell Douglas* paradigm. Under *Price Waterhouse*, “The plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another” (*ibid.*, 246).

When a disappointed faculty member becomes a plaintiff in a sex discrimination case, she and her legal counsel must demonstrate that she has enough evidence for her case to be heard by a court. Plaintiffs can satisfy the prima facie burden in several ways. As described in *Zahorik v. Cornell University* a plaintiff can attempt to show “departures from procedural regularity, such as a failure to collect all available evidence” on her candidacy, and she can present “conventional evidence of bias on the part of individuals involved” in the tenure decision. She also can show that she was denied tenure despite the fact that “some significant portion of the departmental faculty, referrants [sic] or other scholars in the particular field hold a favorable view on the question” of her promotion (ibid., 94). Some courts have admitted statistical data concerning the percentage of tenured female faculty as sufficient to make a prima facie case, and others will consider a “hostile environment” in the department (Cooper 1983).

Hostility and disrespectful behavior by a faculty member or members involved in the tenure decision constituted the central complaint of several discrimination lawsuits and were factors in other cases. Some plaintiffs alleged that the hostile treatment toward them was in retaliation for their advocacy on behalf of women. Plaintiffs cited bias in measuring accomplishments, the failure to accommodate pregnancy and infant care, and unequal distribution of assignments and resources as reasons for pursuing legal action. Most disappointed tenure candidates believe that they should have been granted tenure. They embark on the difficult path of pursuing a lawsuit, however, when they believe they were denied tenure for discriminatory reasons.

## **Methodology**

Cases discussed in this article are drawn from the files of the AAUW Educational Foundation Legal Advocacy Fund (LAF). Founded in 1981, LAF is the nation’s largest legal fund focused solely on sex discrimination in higher education. It has helped female students, faculty, employees, and administrators challenge discriminatory practices such as sexual harassment, pay inequity, denial of tenure and promotions, retaliation for complaining about discrimination, and inequality in women’s athletics programs. The case *Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984) was the impetus for the creation of LAF. Eleven female faculty members and coaches—known as the Cornell 11—brought a complaint of sex discrimination against Cornell University alleging violations of both Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of

1972. To support the plaintiffs, members of the Ithaca, N.Y., branch of AAUW joined forces with a group known as the Friends of the Cornell 11. The Ithaca branch members asked AAUW to bank funds raised in support of the plaintiffs' case, and LAF was born. For further information on LAF, visit the AAUW Web site at [www.aauw.org](http://www.aauw.org).

The research draws on a variety of public documents regarding the cases, as well as interviews with plaintiffs. The cases are described primarily from the plaintiffs' perspectives, but the defenses articulated by universities and colleges also are presented. No attempt is made to second-guess the courts' decisions. Rather, this article aims at a higher target. What can we learn from these cases about sex discrimination in the academic setting? What can universities learn about their systems and practices of hiring and promotion? And what is the message for policy-makers considering new programs to end sex discrimination in academia and other professional settings?

### **Case Study: Departures from Normal Procedure**

When a department or university violates its usual procedures in a tenure review, the disappointed candidate—and the court—invariably wonders why. Because tenure decisions involve several different levels of decision-makers and committees, ample opportunity exists for both honest error and impermissible discriminatory behavior. A lack of integrity or consistency in the tenure process itself—for example, the distortion and rejection of positive outside references, the suppression of favorable reviews, or the improper solicitation of external peer reviews—do not by themselves prove that a female professor has been denied tenure based on sex discrimination. They do invite speculation along those lines, however, and in the legal arena ultimately may be sufficient to support an inference of discrimination.

Marcia Falk, a widely published poet, translator, and feminist critic, joined the University of Judaism Department of English in 1984 as an associate professor of literature. She applied for tenure in late 1985. From the outset, procedural questions delayed and complicated Falk's tenure bid, with the evaluating committee and Falk wrangling about the quantity and organization of materials for her tenure dossier. The committee insisted on complete anonymity, so Falk had no opportunity to discuss the process with any committee members. The university's published procedures for tenure and promotion did not require an

anonymous review committee, thus the secrecy around Falk's tenure review was the first of many departures from normal procedure.

Access to information about the evaluation process was an issue throughout Falk's tenure review. The committee refused to let Falk review outside letters of reference, letting her see only a summary report purportedly synthesizing the letters. Pursuant to a request by Falk, investigators from the American Association of University Professors (AAUP) read the original letters as well as the summary and concluded, "One has difficulty recognizing that the letters and the report are discussing the same publications and the same person" (AAUP 1988, 27). For example, the evaluating committee summarized that one reviewer "repeatedly evinces hesitations about the frequent failure of [Falk's] poems to engage." The reviewer's actual letter, while not without qualification, was decidedly more positive:

Her syntax is simple and her language almost ascetically modest. . . . This mode can shade off into the commonplace. For the most part, however, she writes a taut, precise plain style that proves that she is unafraid to be straightforward yet alert to nuance. . . [Her poems] testify to a lucid intelligence and a solid craftsmanship. She is a poet who will bear watching. . . I recommend warmly for promotion to full professor. (Ibid.)

In a final procedural anomaly, the university provided no mechanisms for Falk to receive a response to her allegations of sex discrimination in the process. The AAUP report concluded, "The possibility is distinct, although it cannot be determined with certainty, that discrimination based on sex . . . contributed significantly" to the university's rejection of Falk's candidacy (ibid., 28).

Falk and her legal counsel argued that sex discrimination was behind the departures from the normal tenure review process, and the AAUP investigation noted that some administrators expressed a personal dislike for Falk that may have been based on her sex and on her work as a feminist critic teaching in a conservative Jewish university. The university emphatically denied this hypothesis, arguing that other professors also engaged in critical, iconoclastic scholarship.

An investigation by the U.S. Equal Employment Opportunity Commission (EEOC) also identified procedural irregularities in the handling of Falk's tenure application and found reasonable cause to believe that Falk's charge of sex discrimination in the denial of tenure was valid. Falk filed a lawsuit in 1988 and settled her case against the University of Judaism in 1991. Although Falk no longer has a full-time academic appointment, she continues to teach and publish.

### **Case Study: A similarly situated man is hard to find**

A professor applying for tenure is judged in comparison to peers at her university and peers in her specialty at other universities. Such comparisons are at the core of sex discrimination cases. To prove that she has suffered gender discrimination, a plaintiff needs to find a "similarly situated" male colleague to serve as a point of comparison. Plaintiffs can demonstrate discrimination, at least in part, by showing that male candidates with similar or inferior qualifications in teaching, scholarship, or service received promotions, higher pay, or tenure while female candidates did not.

A similarly situated man is hard to find. A plaintiff who builds a case around a comparison with a tenured male colleague must show that the university granted tenure to a professor of comparable or inferior qualifications in roughly the same time period that the plaintiff was denied tenure. Universities typically consider only a few candidates for tenure per year, however, and these candidates are likely to teach in different departments and disciplines with different criteria and measures of success. Candidates in highly specialized areas often have few or no comparable colleagues anywhere undergoing the tenure process at the same time. Because tenure standards have escalated dramatically in the past two decades, the records of colleagues who received tenure under the less rigorous standards of earlier generations cannot be used for comparison. On paper, making a comparison with a similarly situated male colleague seems straightforward—it is a matter of counting publications, classes taught, and service activities. In practice, however, these comparisons are rarely straightforward. For example, publications can be evaluated differently because the relative quality of journals, book publishers, and other accomplishments is often a matter of debate. A tenure file is somewhat like a Rorschach test, saying as much about the reviewer as the applicant.

Lucinda Miller, a former professor of pharmacy practice, sued the Texas Tech University Health Sciences Center for sex discrimination in the denial of tenure, retaliation when she complained about the discrimination (in violation of Title VII and Texas state laws), and pay inequity in violation of the Equal Pay Act.

In 1997 the Texas Tech School of Pharmacy hired Miller as a professor and vice chair of the pharmacy practice department. The school also hired a female, who would later become Miller's co-plaintiff, as an associate dean. According to Miller, the university assured the new hires that they would be considered for tenure immediately. During the hiring process Miller was told that the institution was prohibited from paying her more than a specified base salary and \$5,000 as an administrative stipend, although she later discovered that other professors were paid more.

During her time at Texas Tech, Miller carried a full teaching load, published several scholarly articles, was the founding editor of a new scholarly journal, and established a clinical program for the School of Pharmacy. She also served on eight committees and chaired five of them. In 1998 Miller and her female colleague submitted tenure applications. Each had written numerous publications and received prestigious recognition. At that time, only one other professor, a male applicant, was eligible for tenure. Despite favorable recommendations and praise from outside reviewers, Miller and her female colleague both were denied tenure, while the male applicant was awarded tenure.

Both women felt they had been unfairly denied tenure. Miller compared her 63 publications in peer-reviewed journals and 84 publications overall to her male colleague's three peer-reviewed publications and 16 publications overall. Miller elaborated that her male colleague's scholarly record was even weaker than these numbers suggest because the bulk of his non-peer-reviewed publications appeared in a monthly column he wrote for *Drug Topics*, which was not considered an academic journal and was not peer reviewed. Miller, in contrast, had published in top-tier medical journals such as the *Archives of Internal Medicine* and the *American Journal of Psychiatry*, which were considered far more prestigious forums, and was primary author of 61 of her publications. Additionally, Miller had published a book, founded a journal, and had a copyright and one patent; her male colleague had none of these accomplishments. In the critical area of research funding and grants, Miller had secured almost \$500,000 in research money.

In response to Miller's EEOC complaint, the university alleged that she had applied for tenure prematurely. The university denied that Miller had been assured an early tenure appointment when she joined the faculty and rejected her tenure application "because she had not yet completed sufficient teaching, clinical practice or research at Texas Tech" when she applied for tenure. The chair questioned Miller's demonstrated teaching excellence and demonstrated excellence in practice or research and asserted that Miller had not attained a national reputation in the field.

Miller and her female colleague alleged that they were subjected to a hostile environment and that procedural irregularities occurred throughout the tenure process. The chair of the tenure committee allegedly informed Faculty Affairs Committee members that the male applicant's tenure application would receive a "smooth highway" but the women's tenure applications would not (*Miller v. Texas Tech*, Complaint, 2000, 7). The work environment was so unbearable for Miller that she resigned in March 1999.

Miller and her colleague filed a joint lawsuit in U.S. District Court in 2000. Faculty and former students came to the aid of both Miller and her female co-plaintiff with affidavits and depositions, and the two women assembled nearly a dozen individuals to serve as expert witnesses. In contrast, the university had not secured a single external expert witness. The university subsequently filed a motion for summary judgment that was denied. Ultimately, Miller and her colleague were allowed to proceed only on their Equal Pay Act claims, with a jury awarding them \$58,000 combined in lost wages in 2006.

### **Case Study: Pregnancy Discrimination**

An academic career can be surprisingly unfriendly to motherhood, pregnancy, and childbirth, in large part because the tenure clock often collides with the biological clock. The typical graduate student attends graduate school for more than seven years and is 33 years old when he or she graduates with a doctorate and enters the job market (Hoffer et al. 2003, 23). This long training period poses a dilemma for aspiring women. Younger female faculty hear stories of trailblazing women who sacrificed children and family for their profession, and a rich lode of anecdote and lore among female academicians suggests the optimal and worst times to give birth. Some academics urge female professors to play biological roulette and postpone childbearing until they have tenure.

Others advise women to try to have children before applying for tenure-track jobs, perhaps initially after completing their dissertations. Still others share stories of promising candidates who they say were denied tenure because of the distraction of babies and child care.

Pregnancy and motherhood affect women's hiring and promotion in academe in direct and indirect ways, and anecdotal evidence suggests that this form of sex discrimination should be monitored more closely. Not only do most women become mothers at some point, but all women of childbearing age can be viewed as potential mothers. Few colleges or universities openly admit to harboring discriminatory intent, and, indeed, as women become more commonplace in academe, they more easily enjoy genuine respect and collegiality from their male peers. A more subtle form of discrimination persists, however, regarding mothers' commitment to serious scholarship. Unspoken assumptions about women and motherhood can cloud the judgment of even well-meaning colleagues.

When political science professor Jill Crystal was denied tenure by the University of Michigan, she alleged pregnancy discrimination and retaliation for demanding her right under the Pregnancy Discrimination Act of 1978 (an amendment to Title VII). Her accusation was multifold. In a report to the grievance review board, Crystal detailed numerous "serious, willful, and multiple violations of procedures and norms at the Department level" that "contaminated" her tenure review (Crystal 1993, 107). She further contended that her tenure denial was part of a general pattern of sex discrimination, which was manifested in a "thread of secrecy and deceit" in the department's tenure reviews for three female candidates, including herself (*ibid.*, 131). Crystal charged that the university essentially held women to a different standard if they were not permitted time off following childbirth.

When she announced her pregnancy in 1990, Crystal discovered that the university did not have a written maternity policy. In practice, the university typically required pregnant women to take off a semester without pay. The *de facto* policy was to encourage women to give birth either during their research leave or over the summer, so that the burden would fall on their research, on which their promotions most heavily depended, rather than their teaching. Without paid leave, Crystal noted, "the burden fell on the women to solve what the University defined as their problem" (*ibid.*, 145). Crystal viewed these acts as a violation

of the Pregnancy Discrimination Act and pursued the matter with the administration. After months of negotiations and discussions, the university offered to allow her to take the fall term off at full pay, an arrangement in conformity with the law and satisfactory to Crystal. Yet Crystal concluded, “I won the battle, but I lost the war” (Ibid., 148). Because she had exercised her right to maternity leave, Crystal believed, the university branded her a troublemaker and, at the first opportunity, fired her.

Crystal’s discussions with other female faculty provide a ground-level view of the direct and indirect obstacles to tenure for mothers. Professors described to Crystal that they made heroic efforts to return to teaching immediately after childbirth (“I . . . came back in 2.5 weeks”), tried to plan pregnancies for the summer (“My . . . chair mentioned something to me about summer being the best time to have a kid”), relied on the personal generosity and flexibility of their departmental colleagues and chairs (“Thanks to the support of my chairperson . . . things worked well for me”), or improvised other solutions (ibid., 143). They found, in one woman’s terms, “informal and individual ways of maneuvering around” the university’s policies (ibid., 144). Crystal reported that several female professors believed that pregnancy had hampered their chances for tenure because they were viewed as less serious about or committed to their careers, limiting their productive research time and service contributions or creating animosity concerning teaching responsibilities.

Crystal filed a lawsuit against the University of Michigan in 1993. A court-ordered mediation panel found in favor of Crystal in 1996, and she was awarded \$100,000. She now teaches at Auburn University.

### **Case Study: Hostile Work Environment**

Work environment can have a profound effect on productivity. Co-authorship and other forms of collaboration between senior and junior faculty are unlikely in a chilly work environment. In a hostile environment, productivity can become impossible. There are many small ways that senior colleagues can help or hinder the progress of junior faculty— from teaching assignments to office space. Although individual acts of sexism or exclusion typically would not constitute sex discrimination, a persistent pattern of exclusion which has professional ramifications can be considered discriminatory.

According to Sonia Goltz and Beth Kern, the University of Notre Dame College of Business was a hostile work environment. The accounting department celebrated a male colleague's birthday with a "boob cake" in the shape of a woman's breast (Fosmoe 1998). When an employee turned down dates with male faculty members, they openly bantered that she "must be a lesbian" (Goltz & Kern 1993, 22). When a couple of women signed up for an athletic team, they discovered the next day that a new sheet had appeared in the faculty mailroom stating, "Any new person, poor player, and all women can sign up for a second team. . . . [T]he primary team would consist of the people who had been playing together prior to the women requesting membership" (ibid., 10). These events were typical of the unprofessional behavior of some male faculty.

Discrimination against female faculty also could be seen in the assignment of teaching responsibilities. Goltz was not assigned to teach graduate courses. Because the college was hoping to establish a doctoral program, this lack of experience with graduate students made her less attractive for promotion to tenure. For Kern, the problem was an unusually heavy teaching load, limiting the time available for research and publications.

Service loads differed as well, and women were "asked to perform service significantly more often than men" were (ibid., 14). Service, while nominally a criterion for tenure, in fact receives scant attention in the evaluation process. Goltz and Kern attributed Notre Dame's increased demands on women for service to the "appearance of a crowd" ploy, where schools ask female faculty—as well as faculty of color—to attend more functions and serve on more committees than their white, male counterparts so that the school can appear to have adequate representation. Since women comprised less than 10 percent of Notre Dame's College of Business faculty, Kern and Goltz were asked to appear at many functions "to present an image of having a substantial number of women on the faculty" (ibid., 15). By the same logic, they were also asked to meet with prospective female faculty in other departments, a simple task that could, in fact, consume many hours and had almost no value in a tenure review (ibid., 16).

In and of itself, any one of these instances would not necessarily constitute sex discrimination. But when an incident becomes part of a pattern of exclusion and when this exclusion has professional ramifications, it constitutes sex discrimination. For Kern and Goltz, the sexist climate and uneven treatment of men and

women led ultimately to two negative tenure reviews and grueling lawsuits. Goltz lost her case at trial; Kern's case resulted in a settlement.

### **Case Study: Bias Against Women's Studies**

As women have entered academia in growing numbers, many are challenging the established curricula in fundamental ways. Since the 1970s, women's studies programs and scholarly journals have proliferated. Some academics appear to be biased against women's studies, however, discounting publications in women's studies journals in their assessment of scholarly productivity. While students have embraced classes in women's studies—and articles on gender have been published in many well-respected scholarly journals—some academics remain skeptical, albeit usually silently.

Women's studies scholars face difficulties in tenure reviews because their work cuts across disciplines and is published in women's studies journals rather than the top-tier journals in the department from which they are seeking tenure. A women's studies scholar based in a history department, for example, may have published her most significant work in a top-tier interdisciplinary journal such as *Signs* or *Feminist Studies* but not in a top-tier history journal such as the *American Historical Review*. This means that colleagues not disposed to women's studies may feel that her scholarship is inadequate for tenure. In *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1343 (9th Cir. 1981) (not an LAF-supported case), the court found, "A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women." Plaintiffs supported by LAF have made similar allegations.

Among other allegations, Diana Paul, an Asian American professor of religion who filed a sex and race discrimination case against Stanford University, argued that her colleagues belittled feminist scholarship. The summary of the personnel committee's report on Paul to the dean included disparaging remarks about feminist studies. The department noted that Paul's conclusion in one piece consisted of "feminist ideological declarations" and saw her material on feminism as "appropriate and timely . . . but . . . it does not evidence long-range promise of scholarly distinction." Paul noted that her department's attitude toward feminist studies contrasted with the stated position of Stanford in the faculty handbook on affirmative action, which declared: "The study of race and gender in history...

has moved from the periphery of attention to an important role in understanding the development of society” (*Paul v. Stanford University*, Declaration, Jan. 23, 1986, 40).

Paul recalled that when she applied for tenure, the chair of her department told her that he had recommended against tenure for a professor in the history department because her work focused too heavily on women. The only tenure-track woman in the department competent to teach feminist issues, Paul also shouldered substantial service burdens and extracurricular demands. She chaired a curriculum review panel, the M.A. in feminist studies committee, and the East Asian studies committee and served as a member of the feminist studies committee, in addition to other service responsibilities (*Ibid.*, 39). Paul argued, “The Department not only did not consider my attention to feminist studies an asset, they belittled the field and behaved with hostility towards it” (*Ibid.*, 40).

The judge in Paul’s case found persuasive evidence that Paul would be able to establish a prima facie case based on the belittling of women’s studies, women in general, and Japanese women in particular, by senior faculty in decision-making positions. The former chair of the department, the judge concluded, “demonstrated on numerous occasions that he thought of Asian women as playthings, unworthy of professional dignities afforded professors” [*Paul v. Stanford University*, 1986 WL 614, 6 (1986)]. Paul eventually settled her case against Stanford and received \$54,000.

## **Collegiality**

Courts have recognized collegiality (a candidate’s working relationships with other faculty and students) as a valid, nondiscriminatory basis for tenure and promotion decisions. The concept has gained currency in sex discrimination cases since it was first recognized in higher education case law in 1981 in *Mayberry v. Dees*, 663 F.2d 502 (4th Cir. 1981). Among the standards for tenure, the collegiality criterion is the most easily abused. Lack of collegiality can be applied to any candidate whose demeanor, personality, academic interests, or political beliefs clash with those of senior faculty members.

The AAUP recently cautioned that the collegiality criterion lets in through the back door what Title VII shuts out at the front door, namely, a legally valid ratio-

nale for denying tenure to colleagues with unpopular feminist beliefs or those whose gender makes their colleagues uncomfortable. According to Martin Snyder of AAUP, recent collegiality cases “all came down to the same thing. They’re all-male dominated departments that hadn’t tenured a woman in a long time, or ever, and there’s some language about how the woman ‘just doesn’t fit in.’ What comes through is the sense that these are aggressive women who are seen as uppity” (Lewin 2002).

Some women have filed suits contending that collegiality is a smokescreen for denying tenure to women. *Stein v. Kent State University Board of Trustees*, 994 F. Supp. 898, 909 (N.D. Ohio 1998), summarizes the prevailing legal interpretation: “The ability to get along with co-workers, when not a subterfuge for sex discrimination, is a legitimate consideration for tenure decisions.” The trick is to distinguish the valid from the invalid applications of this ambiguous criterion.

Carol Stepien opted to fight back when Case Western University’s all-male tenured biology faculty denied her tenure, a decision supported by the university-wide review committee as well. Unlike other cases in this article, her department did not dispute the quality of her training, scholarship, or research accomplishments because she had been prolific and quite successful in publications and grants. In her view, she had been ensnared and impeded in her tenure bid by a department that had “all the characteristics of an old boys’ club” (Mangels 2001). In this “chilly and hostile work environment,” Stepien alleged, “it was extremely unlikely that I would be able to prepare for a successful tenure review” (Mangels 2000, 14).

The biology department introduced the theme of collegiality in 1994 in Stepien’s annual review, citing two incidents that were characterized as examples of poor collegial interactions and inappropriate behavior. For example, the review described in detail a weeklong class trip to the Bahamas that Stepien had organized and for which she had sought reimbursement for her extra, overnight babysitting expenses of \$315 for her 6-year-old son (Stepien was then a single parent). Stepien had received conflicting information about whether the expenses were reimbursable, so she submitted the receipt. “Instead of simply telling me this wasn’t an allowable expense,” Stepien stated, the department chair “took it up with the senior faculty and then with the Dean’s Office and the provost. . . He presented it to others as if I was trying to deceive in some

way” (Mangels 2000, 15). Her annual review cited the incident as evidence of her alleged confrontational personality.

Stepien received no explanation for her denial of tenure. She appealed the decision to Case Western’s grievance committees before filing an EEOC complaint and, eventually, a lawsuit in federal court in March 2001.

Stepien’s critics felt that she could not get along with colleagues. Her supporters saw gender as central to the friction between Stepien and her department. “There might be a perception,” speculated a former colleague at another school, “that, as a woman, [Stepien] should have a warm and fuzzy personality. She’s not a warm and fuzzy person. Carol has a very strong personality. [But] it’s inappropriate for people to make [tenure] decisions based on that” (Mangels 2000, 22). Another former colleague, who served on both of Stepien’s grievance panels similarly argued that discriminators “don’t realize that often they—men and women—expect women to make them feel comfortable, and [discriminators] don’t expect men to make them feel comfortable.” When women don’t make them feel comfortable, discriminators “register that as being difficult” (*ibid.*, 15). This discomfort around the female colleague can then provoke her annoyance and anger, which in turn compounds the collegiality charge. A sympathetic colleague interpreted the collegiality charge to mean that Stepien “doesn’t do what they want, because she doesn’t step aside” (Smallwood 2001, A15).

Case Western’s grievance panel concluded as much when it found that the department “may not be comfortable with Professor Stepien’s style,” which was “demanding and assertive,” and thus may have “inadvertently engaged in gender discrimination” (Mangels 2000, 17). Stepien settled her lawsuit in May 2002. Today she directs the Lake Erie Center at the University of Toledo and continues to publish and teach in her field.

## **Payback and Retaliation**

Advocacy for women and women’s rights in academia can be as risky as they are necessary. Women often are informally counseled to wait until tenure before “rocking the boat.” The five or six years before the tenure vote, however, can go by slowly for a woman working in a hostile environment, and rocking the boat may be necessary to put a stop to abusive treatment of oneself or others. Female advo-

cates and whistleblowers rarely are thanked by their colleagues, and advocacy and whistle-blowing can lead to more serious consequences, like denial of tenure.

Voicing one's concerns about hostile or harassing behavior is a risky endeavor. In the case of education professor Lynn Ilon, complaints of a male colleague's inappropriate behavior instigated a long battle of retaliation. Her complaint filed with the Niagara County, N.Y., Supreme Court in 2000 summarizes her case. In 1994, Ilon contended that a male colleague sought her complicity in varying the final exam procedure for a female student. When Ilon refused to cooperate, the man continued to pursue the matter, confronting Ilon in such a way that she reported fearing for her physical safety. During the next four years, according to Ilon, the colleague remained hostile. Ilon also alleged that he usurped her work. She felt that he treated her like a subordinate and that his attitude toward her stemmed from her gender. In 1998, four female students told Ilon they were willing to testify about the male colleague's sexual advances. She shared her concerns about his alleged inappropriate behavior to other colleagues, but no action was taken.

Ilon wanted to apply for tenure in February 1999 but withdrew her application when she realized her colleague would deliberate on her application. In March 1999 the university's equal opportunity and affirmative action office advised Ilon to suspend her complaint against her colleague to facilitate her tenure review and to apply for tenure in the 1999–2000 academic year because her colleague would be out of the country. Despite taking these precautions, the university president rejected Ilon's tenure application in September 2000.

To Ilon, her colleague's behavior and her failed tenure bid were clearly related. She argued that her tenure bid was denied as retaliation for her protests against his behavior toward herself and students. She alleged that the university inadequately investigated her complaint against her colleague and took no steps to remedy the situation. From early 1998 until her tenure denial, Ilon's adversary and his colleagues made decisions about her teaching schedule, advisers, and work rules without consulting her. In addition Ilon alleged that the colleague and others had engaged in a months-long smear campaign against her. They portrayed Ilon as "uncooperative and difficult to get along with," attempted to cast her performance in a negative light, and maneuvered her into the "awkward position of working with and supporting [the male col-

league] or appearing uncooperative.” Ilon’s “refusal” to work with him, in turn, was marshaled by the university as evidence of her lack of commitment to the department (*Ilon v. State University of New York SUNY Buffalo*, Complaint, Nov. 27, 2000, 6).

In 2000, Ilon filed a lawsuit in state court alleging, in part, retaliation under state law. As of 2007, the case had ended the discovery (fact-finding) phase of litigation, but a trial date had not been set.

### **Case Study: Proving Lies and Discrimination**

The legal process often involves questions of procedure as well as substance. The phases of a typical sex discrimination case involving tenure include the court’s acceptance of a prima facie case presented by the plaintiff (establishing that sufficient evidence exists for the case to be heard), followed by the university’s defense that includes the establishment of a nondiscriminatory reason for its decision. The next step is the plaintiff’s rebuttal. Under the *McDonnell Douglas* analysis, the plaintiff must show that the university’s rationale is, in fact, a lie or pretext to cover discriminatory intent and motive. Alternatively, she can present a mixed-motive case using direct evidence that gender was a motivating factor in the university’s decision. In such a case, sex discrimination does not necessarily have to be the only factor in the university’s decision, but it must be an important factor.

When the plaintiff has demonstrated direct evidence of discrimination, or in a mixed-motive case, and the court has determined that discrimination occurred, a university may be able to limit what it must provide as a remedy for the discrimination. As a practical matter, plaintiffs often allege both pretext and mixed motives at the outset of the case.

As the case below illustrates, the burden of proof for plaintiffs is exacting. Neither proving that the university lied about its stated reason for rejecting the tenure candidate nor demonstrating that the tenure denial was unfair is sufficient. The highly subjective criteria for tenure make it relatively easy for universities to point to unseemly but not illegal reasons for their actions. Faculty on a tenure committee can assert that the candidate was not collegial, which can be permissible grounds for tenure denial, or they can marshal evidence of other biases not rooted in sex to deflect the core charge of sex discrimination.

In a closely watched and influential case dealing with the issue of pretext, Cynthia Fisher eventually lost her lawsuit against Vassar College. Alleging that Vassar had discriminated against her based on her sex, marital status, and age, Fisher prevailed in her first trial, proving to Judge Constance Baker Motley that Fisher was equally if not more qualified for tenure than comparable scholars and using statistics to show that Vassar had a history of not granting tenure to married women.

Vassar countered that Fisher's scholarship did not meet the standards for tenure and tried, unsuccessfully, to introduce its own statistics concerning married women and tenure. Motley agreed that Vassar's reasons for denying Fisher tenure were pretextual: "The termination of plaintiff's employment resulted not from any inadequacy of her performance or qualifications or service, but from the pretextual and bad faith evaluation by Vassar of her qualifications" [*Fisher v. Vassar College*, 852 F. Supp. 1193, (S.D.N.Y. 1994)]. The court ordered Vassar to reinstate Fisher and to pay \$626,000 in damages.

Vassar appealed the federal district court's ruling, arguing that Fisher had failed to undermine Vassar's legitimate reasons for denying her tenure, including negative departmental reports on her originality, scholarship, service, and unique contributions to the biology curriculum. Vassar argued its first appeal in March 1995 before three judges who wrestled with the question of pretext in their ruling, reversing in part and vacating Fisher's district court victory. Citing the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the court underscored that Fisher had to prove by a "preponderance of evidence" not only that Vassar had dissembled in its rationale for denying her tenure, but also that it was trying specifically to disguise sex discrimination [*Fisher v. Vassar*, 70 F.3d 1420, 1433 (2d Cir. 1995)]. The court wrote that it is, "the plaintiff's burden to demonstrate (a) that the College's explanation for denial of tenure was false and pretextual and (b) that the real reason for denial was discrimination based on either sex or sex plus marriage" (Ibid).

The district court had concluded that the biology department's tenure report on Fisher was pretextual and "made in bad faith . . . and represented the application of patently discriminatory standards" [*Fisher v. Vassar College*, 852 F. Supp. 1193, 1209 (S.D.N.Y. 1994)]. Among other examples, Motley pointed to distortions of Fisher's record in the tenure report to support the conclusion that Vassar

had generated a pretext for denying Fisher tenure. These included a charge that Fisher had not used her sabbatical year wisely for research when in fact she had spent nine months out of that year in a laboratory; collaborated with several different groups of scientists; submitted eight grant proposals, six of which were funded; published one manuscript and written another; and presented papers at national and international meetings. Motley also found that the biology department had distorted Fisher's teaching recommendations by "selectively exclud[ing] favorable ratings and focus[ing] on the two courses in which Dr. Fisher had difficulties" (ibid.).

The appellate judges agreed that Fisher had demonstrated a prima facie case of discrimination and that the lower court had reasonably and without clear error interpreted the tenure material as pretextual. The appellate court emphasized, however, that a prima facie case and the establishment of pretext does not amount to a finding of liability for discrimination and thus disagreed with the district court's interpretation of the weight assigned to pretext, saying, "The finding of pretext here did not alone justify a finding of discrimination" [*Fisher v. Vassar College*, 70 F.3d 1420, 1437 (2d Cir. 1995)]. Quoting *Hicks*, the appellate court reminded the district court, "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race [or sex, in this case] is correct" (Ibid., 1438).

The appellate judges conceded that although "there are cases in which discriminatory intent is the only probable reason for the employer's proffer of a pretextual reason to the court," that was not the situation in this case (ibid., 1437). The court reviewed the evidence relied upon by the district court in its opinion as well as other evidence offered by Fisher at trial and determined that none of the anecdotal evidence supported a finding that Vassar had a policy of discriminating against married women or that Vassar discriminated against Fisher based on her sex. The court also found error in the district court's reliance on the statistics presented by the plaintiff to support a finding of discrimination.

Fisher's attorney requested an en banc hearing (a hearing before the full appellate court). In 1997, the court upheld the earlier appellate ruling and revisited the question of pretext. Defining pretext as "a proffered reason that is not credited by the finder of fact (i.e., the judge)," the en banc opinion clarified that the establishment of pretext, as in the Fisher case, "does not answer the question: pretext for

what?” The court noted that decision-makers may dissemble for “small-minded” but nondiscriminatory reasons such as “back-scratching, ... institutional politics, envy, nepotism, spite, or personal hostility.” While unattractive, these “true” reasons underneath the pretextual façade are not discriminatory per se or, for that matter, impermissible in tenure decisions. “In short, the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff” [*Fisher v. Vassar*, 114 F.3d 1332, 1337 (2d Cir. 1997)].

The en banc ruling summarized that pretext alone cannot establish the plaintiff’s discrimination case. A finding of pretext may “advance” the plaintiff’s case, if other evidence also suggests discrimination, but it cannot carry the day for the plaintiff unless she shows by a “preponderance of evidence” that the pretext hid discrimination (Ibid., 1333).

Fisher appealed to the U.S. Supreme Court, which refused to hear her case. Today, Fisher is on the faculty at the University of Illinois at Urbana/Champaign.

### **Aftermath: The Costs and Rewards of Litigation**

The odds in sex discrimination cases do not favor plaintiffs. If a sex discrimination case reaches trial, universities win most of the time. Many cases do not reach trial either because they are dropped or resolved during the litigation process. The process of suing a university for sex discrimination can exact a heavy toll on plaintiffs and their families. But, as so many of the LAF-supported plaintiffs found, the process does have intangible rewards that come from doing what one believes is right. And while the legal process can be financially and emotionally draining, it also can empower plaintiffs. Regardless of the outcome, many plaintiffs found that fighting the good fight was worthwhile in and of itself—for themselves and for other women.

### **Legal Outcomes**

A majority of LAF plaintiffs settled their cases out of court. Most settlement agreements include confidentiality clauses that prohibit the plaintiff from discussing the specific terms of the settlement or, in some cases, the details of her suit. In the limited number of LAF-supported cases in which attorneys and plaintiffs could disclose specific information about the settlement terms, some plaintiffs received sizeable financial settlements that included compensation for emotional distress and injury as well as front and back pay and reinstatement or tenure.

The potential costs and rewards of trials differ from those of settlement, both for universities and for plaintiffs. The Civil Rights Act of 1991 gives all plaintiffs litigating under Title VII the right to demand a jury trial. Some lawyers argue that plaintiffs fare better in a jury trial, and the advantages of a jury trial may have grown with the conservative judicial appointments of the 1980s and early 1990s. “Historically, juries have been . . . more sympathetic to employee claims than judges [have],” wrote law professor Martha West (1994, 123). Regardless of the outcome, a trial can generate negative publicity that may roil some faculty, alumni, donors, national organizations, and other constituents.

For many plaintiffs, going to trial presents the best opportunity to publicly disclose their experiences with discrimination, even if they are not victorious. When the University of Kentucky offered biology professor Ricky Hirschhorn a pretrial monetary settlement, she opted for a jury trial so that she could publicly discuss the university’s treatment of her and have her day in court. In the end, the jury ruled against Hirschhorn, who lost a subsequent appeal of the case as well. Having one’s day in court may be appealing from a psychological standpoint, but a trial is always risky.

### **Financial Costs**

Lawsuits can be time-consuming and expensive, and tenure cases are no exception. Litigation expenses, the most quantifiable and literal cost to the plaintiff, are daunting, especially for untenured academicians who do not enjoy substantial salaries vis-à-vis their peers in business, law, medicine, or other professions. Plaintiffs whose lawyers bill hourly are shocked at how quickly basic research, correspondence, and filing fees can deplete their savings and financial resources. The least costly lawsuit was estimated at \$20,000 for a case that settled out of court. Other cases, including Beth Kern’s against the University of Notre Dame, tallied more than \$170,000. Most plaintiffs reported legal expenses between \$50,000 and \$100,000. “Litigation is not for the poor,” concluded a plaintiff who found the financial obligations to be “the most daunting. I didn’t file suit to make money. . . . To call it frightening is a great understatement. The financial risks are nightmarish.”

Plaintiffs fund their lawsuits through a variety of means. Financial support from the LAF usually covers only a small percentage of legal expenses. Some plaintiffs receive financial help from supporters at their university, community organiza-

tions, local businesswomen, or others sympathetic to their cause. For most plaintiffs, the bulk of the money comes from their own and their families' personal reserves and savings. Beth Kern, covered her legal costs of \$170,000 through "self funding [during] a booming stock market." Another plaintiff took out a second mortgage, used savings, and sold family heirlooms on consignment.

A plaintiff's financial distress may encourage her to settle or drop the case entirely. Universities, in contrast, have legal departments versed in university policy and relevant employment law, the financial wherewithal to supplement that counsel with outside support as necessary, and, in many cases, a well-heeled alumni base that might donate to the university's defense. Universities in state systems have the additional legal resources of the state, and all universities with stature in their communities are likely to enjoy informal connections and networks with legislators, legal professionals, and the business community.

### ***The Personal and Professional Price Tag***

As high as the financial burden can be for plaintiffs in a sex discrimination case, costs reach far beyond a plaintiff's wallet. Plaintiffs described the legal process as "nightmarish," "a journey to hell and back," and "traumatic." One simply commented, "It has made me sad."

Disappointed tenure applicants have a long way to fall. They move from seeing themselves as competent professionals on the cusp of tenure and lifelong employment to hearing that they are unworthy of tenure and slated for dismissal from the university, usually within one year of the decision. Losing a job can be devastating for anyone, but it is particularly difficult for highly specialized professionals. A professor in medieval literature, for example, would be hard-pressed to find employment in her field outside academia.

Finding a position at another university also can be difficult. News of a tenure denial spreads rapidly in the tightly knit, insular worlds of academic disciplines. Some schools may hesitate to hire someone rejected for tenure by another school—even by a highly ranked university. In today's crowded academic job market, rejected tenure candidates face an uphill battle.

Once a lawsuit is filed, many plaintiffs are labeled "troublemakers" by their small academic community. This label further exacerbates the search for a

new academic appointment. Professors inhabit a small pond in their particular discipline and a smaller pond still in their subspecialty and area of expertise. In some areas, only a handful of professors work on themes of particular interest to the plaintiff. Plaintiffs who pursue other academic jobs may find themselves stymied by negative formal or informal references from the university they sued and their former colleagues.

One plaintiff, Janet Lever, found that being labeled a troublemaker was the most difficult aspect of being a litigant: “It makes getting other academic appointments more difficult. Deans don’t trust you, or faculty committees don’t waste scarce resources recruiting you when they think you won’t get past the dean.” Another plaintiff agreed: “The troublemaker label is difficult to deal with. It taints all levels of your professional life at the university, communities, grant proposals, support for projects” and so on. When one’s fate rests so squarely in the hands of a few individuals, opting for legal action against one of the big players is essentially opting out of the profession.

In the tightly knit academic community, reverberations of a lawsuit can be painful on a personal as well as professional level. Many professors derive a sense of identity from their work, and many have long-standing friendships from graduate school, conferences, and professional associations. Once a lawsuit is filed, some plaintiffs find themselves pariahs to colleagues with whom, just a few weeks earlier, they had enjoyed amiable professional relationships. For some plaintiffs, the devastation of professional ties and collegiality is one of the most surprising and heartbreaking aspects of their litigation. An anonymous plaintiff stated, “There are people who will not talk to me . . . people who are afraid to talk to me (they’ve told me so) . . . some clearly find it uncomfortable to be seen talking to me.” She noted, as did other plaintiffs, “Friends *outside* the university provide the most support.”

Once litigation is under way, the university’s defense invariably will include documentation of the plaintiff’s shortcomings in scholarship, teaching, or service or negative assessments from her colleagues or external reviewers. The university produces these items to show legitimate, nondiscriminatory reasons for its decision and tries to show the candidate’s scholarship and personality in the least favorable light. Of course, a lawsuit is an adversarial action, and institutions can be expected to put their best foot forward by highlighting the

plaintiff's weaknesses. Still, hearing her alleged shortcomings is a notably unpleasant experience for the plaintiff.

In one case, the university argued that the plaintiff's colleagues simply did not like the candidate and did not want to develop a lifelong professional relationship with her. Other plaintiffs read reviews of their scholarly work that contained stinging criticisms or must hear, as one plaintiff did, that a colleague finds their work "shockingly bad." For plaintiffs enmeshed in depositions or a trial, the experience can become a Kafkaesque ordeal of listening to unflattering critiques of their personalities and professional abilities stated for the public record and then elaborated and dissected by legal adversaries. One woman described the process as humiliating.

Suing for sex discrimination in an academic context can be a consuming avocation that affects every aspect of life. One plaintiff summarized: "The toll of pursuing such cases is extraordinary. There are few, if any, women who emerge uncompromised with respect to their health, their financial situation, or their professional life."

Given that a lawsuit can wreak havoc on everything from a plaintiff's self-esteem to her financial outlook, one might conclude that litigation isn't worth it. In retrospect, some plaintiffs say that they regretted their decision to sue.

### **Intangible Rewards**

Yet plaintiffs' cumulative biography is decidedly not a cautionary tale against litigation. To the contrary, litigants often describe two things vividly and simultaneously: the profound challenges and frustrations that a lawsuit can bring and their commitment to the decision nonetheless. In many cases they aver that they would not have done anything differently, even with the benefit of hindsight, and that they have few, if any, regrets about their decision.

Why is this so? Some plaintiffs, of course, reach a favorable resolution through settlement, mediation, or court victories. These plaintiffs conclude that the struggles to achieve resolution are ultimately worth the cost. Even those who do not win the suit or who receive no settlement still report having been transformed positively by the experience as well.

Plaintiffs do not typically interpret their primary motives as personal vindication or desire for financial gain. While these reasons may be important, most plaintiffs see themselves as academic whistleblowers who decide to take action to insist on fairness and justice for women and to change the academic culture. They envision their suit as beneficial for other women and a tool to expose what they perceive to be a discriminatory atmosphere or climate in their university or discipline. Although the triggering incidents differ from person to person, the inspiration to continue with the suit typically comes from a broader commitment to women's rights in the academic community.

Plaintiffs often describe their motivation in the language of justice and a quest to "do what's right." Anna Penk, lead plaintiff in a class-action suit described below, was asked why she would risk an accomplished career for a sticky court battle. "Why are you living?" she responded. "Why do you climb mountains? Why do you dance or listen to music? I feel as long as you're living, there's a lot of work to be done" (Hughes 1983, 3B).

Although citing litigation as "one of the most painful endeavors I have ever undertaken," an anonymous plaintiff also took comfort in having done the right thing by filing suit. Cynthia Fisher, who saw a \$500,000 settlement in her favor reversed on appeal, had no regrets about the lawsuit and "did not go into it expecting to win, and certainly not to win money." She initiated the suit because she and her lawyers felt she had an especially strong case of sex discrimination in academia, including that rarest of creatures—an absolute comparable male candidate whose record Fisher surpassed on most criteria.

Faith in the abstract virtue or rectitude of litigation may seem a small consolation, but it is at the core of many plaintiffs' initial impetus to go public with their case and their stamina through the arduous process. Purely individual goals for settlement, money, or retribution clearly would be insufficient to sustain the momentum through an often years-long legal odyssey against a well-resourced and tenacious university.

### **Winning in the Court of Public Opinion**

Despite these sobering comments, cases can spur significant institutional changes simply by making the public aware of the problem. *Penk v. Oregon State Board of Higher Education* is a case in point. The class-action suit relied

on statistical analysis to show disparities in pay and promotion between men and women. The board countered that sex-neutral factors could account for pay differences and argued that individual institutions within the state education system were the appropriate targets of legal action, not the board. U.S. District Court Judge Helen Frye concluded that no pattern or practice of discrimination existed of which the state higher education board should have been aware. Frye's ruling stunned Oregonians and others who had followed the case. Penk and her colleagues appealed the ruling to the 9th Circuit Court of Appeals and the Supreme Court and lost.

Yet *Penk* was heard in the fabled court of public opinion as well as the courtroom proper. Editorials and op-eds sided with the *Penk* plaintiffs against the state university system. State legislators also were impressed with the evidence heard in the case, and the Oregon Legislature subsequently passed a law against discrimination in the state's institutions of higher education. The case also attracted the attention of California legislators, whose State Assembly Committee on Education held hearings on the tenure review process and its impact on women and minorities.

Publicity in such cases can benefit the plaintiff and female faculty because it gets the attention of legislators, advocates, and other organizations that can work toward long-term safeguards against sex discrimination and improvements in hiring and promotion. Thus, the plaintiff's personal battle is often one catalyst for change in a much longer process for universities.

## **Restoration**

For many plaintiffs, the litigation process *restores* more than it takes away. Plaintiffs already experience one form of powerlessness—personal loss—as well as discrimination when the university makes its adverse employment decision. From this vantage point, the plaintiff's decision to tell her story to a grievance committee, the courts, or to other audiences restores a sense of respect and personal esteem. She imagines that a stance of passive acceptance or silence would be far more personally damaging than all of the challenges of litigation would be. As one plaintiff summarized: "I let [the university] take away my self-respect while I was on its faculty. The litigation process restored it. That is priceless." Plaintiffs report that they gain things in unexpected ways and places through the process of appeal and litigation as well as the introspection that the dismissal

and lawsuit stimulate. Some re-examine their fundamental career and life goals and find new professions and avocations; some gain confidence from pursuing litigation, responding to detractors, dealing honestly with critics of their character and work, and speaking out openly about their experiences; some discover new networks of support and friendship; and some confirm the strength of their families and friendships.

## **Recommendations**

To paraphrase Tolstoy, all happy departments in universities are happy in the same way, but all unhappy departments are unhappy in different ways. We do not hear much about functional, fair, and equitable academic departments because these departments do routine things correctly. They apply policies consistently, deliberate fairly on employment decisions, and take proactive steps to resolve faculty grievances before they ever reach the courts. Unhappy departments and tenure cases, on the other hand, are as variable and complex as the individuals and universities involved.

Plaintiffs supported by the Legal Advocacy Fund describe different triggers for a lawsuit—a hostile letter, inflammatory comments, a violation of tenure procedures, or perceived animus by a senior faculty member or administrator. Plaintiffs sense that they have been treated differently, and worse, than their colleagues. In some cases, the complaint centers around one or two individuals who allegedly used the tenure process to vent their hostility toward female scholars or women’s studies. More subtle, but no less insidious, are the alleged prejudices against mothers as scholars, thinly veiled as “concerns,”—concerns that are rarely or never voiced about fathers. Ultimately, plaintiffs reach the same conclusion: In one form or another they have been discriminated against because of their sex.

A lawsuit should be a last resort. Legal action is an expensive and time-consuming process that can bring public embarrassment to one or both parties. Below we offer recommendations to universities and colleges and to individual academics, drawing on the collective of these cases.

## **Recommendations for Universities and Colleges**

Good employment policy, followed up with good practices, goes a long way. At a minimum, the tenure process should be consistent and clearly articulated. Pro-

cedural lapses create ill will and insecurity among faculty and invite suspicions of discrimination. For example, if the dean can reverse department recommendations, this should be made clear to incoming faculty.

Explore ways to reward faculty for accomplishments throughout their careers. The heavy emphasis on the first five to seven years of an academic career contributes to the burden of work-family balance facing many female faculty. Universities should consider pilot projects exploring alternative paths to tenure. At a minimum, universities and colleges should consider adopting a policy allowing for “time off” the tenure clock for childbirth and parenting. Ensure that this policy fulfills requirements of the Family and Medical Leave Act as well as any state laws regarding pregnancy and the rights of new parents.

Practical steps such as requiring annual written evaluations with explicit performance measures can go a long way toward improving fairness and transparency. Base tenure decisions on concrete, measurable contributions rather than vague or inconsistent characterizations of “strong scholarship” or “excellent service.” For example, scholarly productivity might be quantified within a department by having all faculty, through consensus, clarify the quality and relative weight assigned to publications in particular journals and rank the quality of journals. Universities should provide written policies and procedures to all faculty and prospective employees. Several LAF-supported plaintiffs asserted that promises made to them regarding tenure or promotion were not honored. Documenting all aspects of a job offer can help avoid a “she said, he said” disagreement.

Some of the changes needed at the university/college level fall into the rubric of a change in culture; while it is difficult to quantify cultural changes, these shifts lie at the heart of good human resource practice. For example, universities and colleges should take conflicts of interest in hiring or promotion seriously. As one LAF-supported plaintiff puts it, having a close friend or old adviser on the search committee is the equivalent of “getting the answers before the test.” If strong personal friendships or bonds between a candidate and a search committee member all but pre-select the candidate, that committee member should not be in a sole or influential decision-making position. Universities and colleges should recognize the power of tenured professors over junior faculty and actively watch for abuses. Have a range of consequences for offenders so that punishment will be meted out for all infractions, not just the

most egregious. Several plaintiffs were dismayed that “serial harassers” had been protected throughout their careers, consequences which tacitly sanction their behavior.

Another example of a cultural change is the care taken in communicating with candidates. Universities and colleges should treat disappointed tenure candidates respectfully in all correspondence. A substantial number of LAF-supported plaintiffs reported that the poor handling of their cases, the careless or thoughtless way they were informed about the decision, or the university’s reluctance to explain the decision honestly and diligently became emotionally significant final straws that pushed the plaintiffs further toward litigation. If the faculty and administration have deliberated fairly and with due diligence, they should explain their decision forthrightly and with respect for the disappointed candidate’s dignity and professional contributions. Universities and colleges can provide services to support faculty as they seek new positions so that a tenure denial does not become the end of the rejected candidate’s academic career.

### **Recommendations for Female Academics**

One cannot avoid becoming a victim of sex discrimination, but there are tactics for reducing one’s risk as well as strategies for dealing with discrimination that avoid the financial and emotional costs of litigation. Steps taken before accepting a job as well as during the pretenure years can help women protect themselves against discrimination. Individuals can ask for written information about the university’s promotion and tenure policy, including a description of recent tenure cases. Whenever possible, conduct these conversations by e-mail and save all correspondence.

Before accepting a job, candidates should ask the department chair and other tenured faculty in their departments what kind of record in service, teaching, and scholarship will be needed for tenure. Individuals should request specific examples (e.g., which journals are considered “top tier,” how different accomplishments—books, articles, grants, other honors—are weighed). If a candidate is considering a joint appointment, discuss how the contributions made to both fields will be weighed in the tenure decision. Also bear in mind that there is likely to be a different department chair by the time a candidate is evaluated for tenure, so individuals should consider likely scenarios for succession to department chair and what impact succession may have on the candidate’s position.

Of course, red flags may not appear until an individual is already on the job. There are strategies that can help minimize vulnerability: New faculty should observe and verse themselves in the unofficial practices. This informal culture may or may not correspond clearly to formal, written policies, but it inevitably plays a role in hiring and promotion decisions. Some of your colleagues may also be your friends, but working relationships and job retention may trump friendship if you charge the institution with sex discrimination. Cultivate friends, communities, and colleagues outside your department and outside academia. Should you eventually find yourself in a dispute over salary, promotion, or tenure, these nonacademic sources of support will be especially sustaining and important. Do not expect to be rewarded for doing favors or for “being flexible.” Be a good team player, but document any special favors or concessions in writing. In dire cases, cut your losses early. One plaintiff wishes she had looked for another academic job as soon as she realized how women were treated in her department. In some cases, this may be the best, pre-emptive course of action if you value a long-term academic career, given the difficulties of overcoming the “troublemaker” label once you have sued. By applying for other jobs before a tenure review, you may stand a good chance of getting recommendations and support from the department. Finally, individuals should learn about their rights as an employee under federal and state law. Many sources of information about employee rights are available on the Internet. For example, if you are expecting a child, learn about your rights under the federal Family and Medical Leave Act as well as any related state law.

Ultimately, women may not be able to avoid sex discrimination, and sometimes a lawsuit is the best course of action. If you decide to sue for sex discrimination, carefully document all of the conversations you have and the actions you take, and save written materials that may be relevant to your case. Chronology is important. In some cases, skilled mediators may be able to facilitate negotiations with the university early in the process—before litigation becomes the last resort.

*Seek experienced legal counsel.* Personal rapport is indeed critical, but it is not enough. To secure the best possible legal counsel, plaintiffs recommend that litigants ask several specific questions, including the following:

- What experience does the lawyer have in both civil rights law and faculty discrimination?
- What is the lawyer’s track record in arguing or trying similar cases?
- Does the lawyer understand academia? One plaintiff comments, “It has

been difficult trying to explain the nuances of tenure and review process” to her counsel.

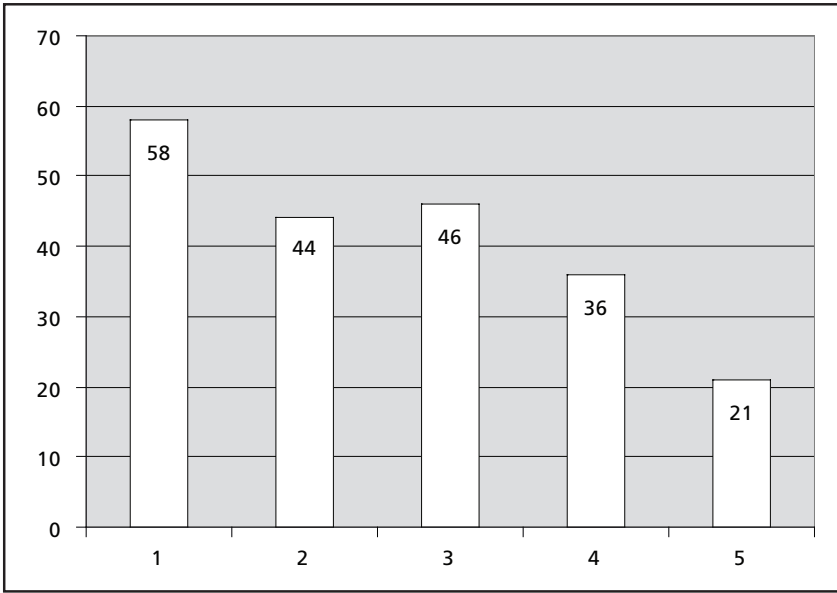
- How does the lawyer assess if a case can be won?
- Does the lawyer ask a lot of meaningful and logical questions about the case? Is she or he engaged in your narrative?
- Does the lawyer have high visibility—which is critical when suing universities that have prominence and deep roots in the community—and a good track record in lawsuits against large institutions?

Individuals should consider *that publicity may help rather than hinder a case*. Although plaintiffs often have a tendency to keep their potential lawsuit as quiet as possible in hopes of an early resolution or in fear that their actions will impede their job search, there are also advantages to going public with the story.

Finally, individuals should not have to go through the process alone. Almost all LAF-supported plaintiffs underscore that they could not have pursued litigation without the unfailing support of family, friends inside and outside the academy, and other communities. Seek support from other organizations, individuals, and groups that understand the tenure process and support female plaintiffs. In addition to the AAUW Educational Foundation Legal Advocacy Fund, plaintiffs in this study sought financial and emotional support from the American Association of University Professors (AAUP), the National Women’s Studies Association (NWSA), local women’s groups, and other organizations. Individuals who would like support for their cases, or would like to contribute to the AAUW Educational Foundation Legal Advocacy Fund, can find more information at [www.aauw.org](http://www.aauw.org).

## APPENDIX

### Women are getting the credentials, but not rising through.



1. Women as a percentage of those earning bachelor's degrees (four-year degrees)
2. Women as a percentage of those earning doctoral degrees (the credential needed to teach at a university or college)
3. Assistant professors (usually not tenured)
4. Associate professors (often tenured)
5. Full professors (nearly always tenured)

Source for data on faculty: AAUW calculations based on data from U.S. Department of Education, National Center for Education Statistics, Integrated Postsecondary Education System (IPEDS), Fall Staff Survey, as cited in William B. Harvey, *Minorities in Higher Education*, 20th Annual Status Report, 2002-2003, (2003, pp. 90-92)

Note: Data on bachelor's degrees refer to four-year institutions for the academic year 2001-02. Source: U.S. Department of Education, National Center for Education Statistics. (2003). *Postsecondary Institutions in the United States: Fall 2002, and Degrees and Other Awards Conferred: 2001-02* (NCES 2004-154).

## ENDNOTES

<sup>1</sup> As originally enacted, Title VII did not cover faculty members at universities and colleges. Spurred by discrimination in educational institutions' Congress amended Title VII in 1972 to cover faculty at these institutions. Title IX of the Education Amendments of 1972 was also passed to prohibit sex discrimination in education programs or activities receiving federal funds. While most sex discrimination in tenure cases have been filed under Title VII, and this is the primary law discussed throughout this report, Title IX also covers employees of educational institutions.

<sup>2</sup> Women denied tenure also may claim violations of the Pregnancy Discrimination Act. The Pregnancy Discrimination Act is an amendment to Title VII and prohibits discrimination on the basis of pregnancy, childbirth, and related medical conditions.

<sup>3</sup> On limited efforts to apply disparate impact to tenure discrimination cases see the articles by West (1994), and Mahony (1987) and Cooper (1983). Attempts to apply disparate impact in tenure discrimination cases based on sex (or race) include *Campbell v. Ramsay* (1980, *Davis v. Weidner* (1979), and *Scott v. University of Delaware* (1978).

<sup>4</sup> The Civil Rights Act of 1991 also codified an affirmative defense for employers during the remedy phase. Thus, if an employer can prove that it would not have given tenure to the plaintiff anyway, despite a partial discriminatory motivation, the employer does not have to provide the plaintiff with a remedy.

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