

## Advice from the Tenure Wars<sup>1</sup>

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American academia has largely, though not universally, adopted the institution of tenure. Since tenure amounts to lifetime employment, decisions not to grant tenure give rise to some of the most hard-fought cases of employment discrimination, with far-reaching consequences and subtle, difficult problems of proof.

I have been practicing employment law for nearly thirty years, and though many aspects of the law have changed, the persistence of inequitable application of tenure standards to women at many academic institutions has not. In this article I will suggest ways that female faculty first entering an institution can prepare for their tenure reviews in ways that will increase the likelihood of favorable outcomes. I will also share some strategies that I have found helpful in challenging tenure denials that all too often derail deserving candidates.

### ADVICE FOR NEW FACULTY.

One of the most appalling aspects of the American tenure system is how few institutions adequately orient their new faculty to the tenure review they will face in their fifth or sixth year. I continue to be amazed when new clients tell me that their institution publishes no guidelines for tenure candidates, provides no mentoring process, or at most, tells junior faculty nearing the tenure decision that they must demonstrate “excellence” in teaching, scholarship and service. (Since the definition of “excellence” in scholarship can range from having published two books of international renown, to being invited to speak in a colleague’s class, such vague pronouncements are next to useless.)

What should a new faculty member do? She should plan for the tenure review from her very first semester on campus, making a conscious effort to learn the ways of her new institution, and to meet the standards prevailing at the time. A few simple suggestions follow.

**First, gather information.** Be sure to read carefully the faculty handbook and any tenure guidelines that may exist. Speak with recent successful tenure candidates in your own and cognate departments about their accomplishments. Check out colleagues’ c.v.s to see what they had published before tenure, how many committees they had served on, and whether they had lectured at other institutions or conferences. Ask colleagues about their teaching loads and how teaching is evaluated.

**Second, find a mentor.** This person may or may not be the department chair, though it is important to secure the chair as an ally. Your mentor also may or may not be another woman. (Beware the occasional senior woman who exhibits “queen bee” syndrome, and prefers to remain the only woman to have succeeded in a man’s world.) Your mentor should be a senior person who has shepherded other candidates to tenure.

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<sup>1</sup> This article is based on and reproduces in part the author’s chapter “Tenure Denial as a Form of Discharge,” in Employment Discrimination: Law and Litigation, Merrick T. Rossein (Thomson Reuters). Excerpts reprinted with permission.

Early in your probationary period, your mentor should explain the unwritten rules of your institution: for example, at College A, only faculty who get unanimous votes at the department level can expect to earn tenure; in Department X at University B, though publication expectations are vague, only a candidate with a minimum of a book based on her dissertation and a second book completed in manuscript form will succeed; at small college Y, although the written guidelines proclaim that teaching is key, candidates with three or more articles in peer-reviewed journals have a good chance at tenure, even if their teaching is mediocre, while excellent teachers with fewer publications tend to be turned down.

Your mentor should also help you understand how you will be judged as a teacher. Will your peers visit your classes? Will you get useful feedback? How does the institution use student evaluations? Women faculty must guard against being assigned heavier teaching loads, with more new preparations, than their male colleagues, which, of course, cuts into the time available for scholarship and committee work.

**Third, make a plan.** In view of all the demands that will be made of you, you will have to set goals for yourself and stick to them, and review your progress at regular intervals with your mentor and other senior colleagues. The reality is harsh. Even at a research university, you will be expected to be at least as good a teacher as the average of the senior faculty members in the department. Even at a small college where teaching is key, you will be expected to publish as much or more, in as prestigious venues, as recent successful tenure candidates. You should not curtail your office hours or otherwise appear unavailable to students, nor should you decline (reasonable) invitations to serve on committees.

To make matters worse, many women find that the biological clock and the tenure clock run along parallel courses. What to do about parenthood? Here, too, the above three steps can help. Gather information about your institution's policies. Many colleges and universities have adopted policies in recent years to allow for a year off-the-tenure-clock for new parents. Make sure your institution understands that "off-the-clock" really means what it says. All too often, faculty colleagues complain that their junior colleague failed to finish her book during the year of her maternity leave. Get your mentor and your chair to help get you the leave you need. And plan how you will accomplish all that you need to do, along with responding to the new demands of parenthood.

### STRATEGIES FOR FACULTY DENIED TENURE.

For those who have stood for tenure, and been rejected, what challenges to the institution's decision might work? A woman denied tenure may well be the victim of discrimination. She can seek to prove discrimination by showing that the institution held her to a higher standard than comparable men, or that it applied its standards in a stricter manner to her.<sup>2</sup>

Whether the tenure candidate brings her challenge through a grievance procedure, a state or federal agency process, or a lawsuit, the process of proof is similar. Of course, it is important to consult a lawyer to determine the best forum for resolution of a discrimination complaint.

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<sup>2</sup> This formulation is articulated in *Brown v. Trustees of Boston University*, 891 F.2d 337, 346 (1st Cir. 1989) cert. denied, 110 S.Ct. 3217 (1990).

Whatever the forum, the institution's response is likely to be the same: the typical academic employer will deny that it discriminated, and will claim that it was merely exercising institutional academic freedom – which, the institution will doubtless remind the arbitrator, hearing officer, or court, includes the right to “determine for itself, on academic grounds, who may teach<sup>3</sup>” – and that for reasons best known to itself, the tenure candidate simply did not measure up. Variations on this theme include the refrain that although the tenure candidate had strong peer support, “reasonable minds can differ” about such intangibles as academic quality, promise or creativity; or, conversely, that since the candidate's peers did not support the candidate, her work is deficient in quality; or that standards are rising and the institution has a right to improve itself; or that while the candidate's teaching was excellent, her scholarship was no more than average (or the reverse); or that the institution could not have discriminated since it employs so many other women (at least in junior positions). In making this sort of argument, the institution will seek to elicit a deferential attitude from the forum that will defeat all claims not supported with “smoking gun” evidence<sup>4</sup>. To counter the factfinder's anticipated deference, the faculty plaintiff must show the institution's position to be implausible, by all available means.

No matter what the strengths and weaknesses of the case, the plaintiff will invariably have to make the point that the issue is not whether she has faults, or could have done more, measured against an abstract Olympian concept of excellence, since everyone has faults and falls short of an absolute standard. Rather, the issue is whether or she met the standards for the award of tenure *at the defendant institution*.<sup>5</sup>

As discussed above, very few institutions utilize objectively measurable standards for tenure (e.g., a strict count of publications or of students or courses taught), nor would such a system be desirable, since obviously quality as well as quantity of effort should be considered. But assessments of quality are permeated by subjective judgment; the challenge to the plaintiff is to show that the subjectivity was actually bias rather than a simple difference of opinion.

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<sup>3</sup> From Justice Frankfurter's celebrated concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

<sup>4</sup> The conventional wisdom is that academic personnel are too sophisticated to make blatantly sexist or racist remarks. However, this view underestimates the insensitivity of at least some university teachers and administrators. See, e.g., *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990) (promotion denial and sexual harassment case); *Brown v. Trustees of Boston University*, supra at 349-350 (sexist remarks by university president).

<sup>5</sup> To make out a prima facie case of discrimination in the tenure context, a plaintiff must show that she was a member of a protected class; that she was qualified for tenure in the sense that a decision awarding tenure would have been a reasonable exercise of discretion; that despite her qualifications she was rejected; and that tenure positions were being awarded at the institution at the time the plaintiff was denied. See *Fields v. Clark University*, 817 F.2d 931, 934 (1<sup>st</sup> Cir. 1987). *Fields* cites to and restates the formulation stated in *Banerjee v. Board of Trustees of Smith College*, 495 F. Supp. 1148, 1155-56 (D. Mass. 1980), *aff'd*, 648 F.2d 61, 62-63 (1<sup>st</sup> Cir.), *cert denied*, 454 U.S. 1098 (1981). There, the connection to the defendant institution's particular standards is explicit. The second prong of the prima facie case is stated as a requirement of a showing “that plaintiff was a candidate for tenure and was qualified under the particular college's standards, practices and customs.” The court further explained that the plaintiff need show only that her qualifications “were at least sufficient to place [her] in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.” See also discussion in *Powell v. Syracuse University*, 580 F.2d 1150, 1154-56 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

Where the institution asserts that the candidate's scholarship lacks creativity, says nothing new, or the like, the plaintiff should see how other individuals with similar records fared. Now that a litigant's right to confidential peer materials is firmly established,<sup>6</sup> the plaintiff in any agency or court action should seek such materials in discovery, including both her own and other tenure candidates' cases.<sup>7</sup> To prevail, the plaintiff must discover in the files of reasonably contemporary successful male tenure candidates, comments at least as critical or praise no stronger than is found in her own file. Or the plaintiff can show her file to be stronger overall than those of successful male candidates, giving rise to an inference of discrimination. To this end, the plaintiff should scrutinize all departmental and other evaluations regarding her record from inside the institution and compare them with those of previous successful male tenure candidates from the same or similar departments.

Letters from outside experts often provide useful ammunition. The plaintiff may find that the negative decision in her case rests on a quotation out of context or a lone negative remark in one of a dozen letters, whereas the fair-haired boy of a year previous may have received scathing and repeated criticism that the same university decision-makers chose to overlook. The plaintiff might find something as simple as a requirement that she produce a larger quantity of publications than was required of other candidates, or that her total number of publications exceeded in number and prestige of publication venue those of previous candidates.<sup>8</sup>

In reading letters of evaluation, one should be aware that those who write them utilize what amounts almost to a code. Overt criticism can usually be taken at face value, but words of praise fall into distinct categories. At some institutions it is sufficient to be "hard-working," "thorough," "interesting" or "competent" to earn tenure; at others, "insightful and creative" may not even suffice, and "brilliant," "dazzling" and "the best of her generation" may be required. A faculty interpreter serving as an expert witness may be necessary.

In institutions where tenure candidates' published work is typically reviewed in the professional literature, it may be helpful to compare published reviews of the plaintiff's work, or numbers of citations, with those of successful tenure candidates. An expert can assist here to translate technical jargon and to assess the professional stature of reviewers or journals.

In an institution that does not use outside evaluations, but which nonetheless considers scholarship in the tenure decision, the plaintiff will do well to solicit comparative outside reviews of her work and that of her successful peers, again through an expert. The expert can help show that the institution judged the plaintiff by a higher standard.

If the institution denied tenure on the grounds of insufficiently excellent teaching, the same sort of comparative data described above in the context of scholarship should be examined.

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<sup>6</sup> See *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990).

<sup>7</sup> The American Association of University Professors has now endorsed a policy permitting broad access to relevant documents and files both generally and in the specific case of internal university review of discrimination complaints. See *On Processing Complaints of Discrimination and Access to Faculty Personnel Files*, in *Academe*, July-August 1992, at pp. 19-23 and 24-28, respectively. These policies may be cited as a statement of developing norms in the profession for purposes of internal university appeals.

<sup>8</sup> Shifting criteria should arouse suspicion. See, e.g., *Bachman v. University of District of Columbia*, 777 F. Supp. 990 (D.D.C. 1991) (promotion case).

Where the plaintiff scored lower on numerical student evaluations, the legitimacy of those evaluations as a measure of teaching quality should be investigated. A large body of literature has long suggested that such numerical evaluation devices reflect societal prejudices, especially with regard to women.<sup>9</sup> Unfortunately, peer visits are also suspect.<sup>10</sup>

Other women at the plaintiff's institution should be surveyed for anecdotes of prejudiced actions or remarks. Such evidence underscores that a discriminatory environment exists, and bolsters the inference of discrimination.<sup>11</sup> Finally, if the plaintiff works in a field such as women's studies, and the plaintiff's field of expertise is itself the subject of criticism or contemptuous remarks by those making a negative recommendation or decision, these too may constitute evidence of discrimination.<sup>12</sup>

Although tenure battles are tough, they are not unwinnable. But here is one last piece of advice: while you are fighting, recall that the best course may be to nurture your career in whatever ways remain open to you. Good luck!

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<sup>9</sup> See, e.g., Martin, Elaine, *Power and Authority in the Classroom: Sexist Stereotypes in Teaching Evaluations*, Signs, pp. 482-492, Spring 1984; Basow, S.A. and Silberg, N.T., *Student Evaluations of College Professors: Are Female and Male Professors Rated Differently?*, 79 J. of Educational Psychology 308-14 (1987); Bennett, S.K., *Student Perceptions of and Expectations for Male and Female Instructors: Evidence Relating to Questions of Gender Bias in Teaching Evaluations*, 74 J. of Educational Psychology 170-79 (1982).

<sup>10</sup> See Lewis, Lionel, *Scaling the Ivory Tower: Merit and Its Limits in Academic Careers*, John Hopkins University Press, 1975.

<sup>11</sup> See, e.g., *Brown v. Trustees of Boston University*, supra (district court did not abuse discretion by allowing introduction of later sexist remarks by university president to another woman in plaintiff's department); see generally (non-tenure cases): *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 n.3, 715 (1983) (successful showing of discriminatory intent does not require direct evidence); *Krieger v. Gold Bond Bldg. Products*, 863 F.2d 1091, 1096-97 (2d Cir. 1988) ("discriminatory intent ... may be proven through evidence of past conduct or incidents"); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987) (circumstantial evidence of discriminatory atmosphere relevant to question of motive in individual case); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1423 (7th Cir. 1986) ("[g]iven the difficulty of proving employment discrimination ... a flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted ... would be unjustified"); *Morris v. Washington Metropolitan Area Transit*, 702 F.2d 1037, 1045 (D.C. Cir. 1983) ("[t]he question of the legitimacy of the employer's motivation in firing the employee ... is one upon which the past acts of the employer have some bearing").

<sup>12</sup> See, e.g. *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1343, n.5 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982) ("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"). But see also the disapproval of such evidence in *Brown*, 891 F.2d at 351 (regarding Women's Studies department funding), and in *Langland v. Vanderbilt University*, 589 F. Supp. 995, 1006 (M.D. Tenn. 1984), *aff'd without op.*, 772 F.2d 907 (6th Cir. 1985) (same).