Chapter 9

Discharge

VI. TENURE DENIAL AS A FORM OF DISCHARGE

VI. TENURE DENIAL AS A FORM OF DISCHARGE

§ 9:12 Generally

* American academia has largely, though not universally, adopted the institution of tenure. Tenure amounts to lifetime employment after a lengthy probationary period, usually six years, for teachers in higher education.[1] Consequently, decisions not to grant tenure provide the setting for some of the most subtle and difficult cases where employment discrimina-

---

[Section 9:12]

*Reprinted from Employment Discrimination Law and Litigation, with permission. Copyright © 2008 Thomson/West. For more information about this publication please visit www.west.thomson.com

[1]At most institutions, tenure is accompanied by promotion from assistant to associate professor, and those holding the ranks of "associate" or "full" professor are considered senior faculty. However, a few institutions separate the tenure and promotion decisions, permitting a tenured rank of assistant professor, while a few others grant the title of associate professor to untenured faculty, often after a lateral transfer.

tion is alleged.

The institution of tenure developed in the early part of this century through the efforts of organizations of educators. The American Association of University Professors (AAUP) has for decades worked to defend tenure to preserve academic freedom and economic security for professors.[2] Under conventions that have developed over the years, the tenure decision is based on an evaluation of three areas: teaching, scholarship, and service to the institution and profession (the first two are usually most important).

It is typical for departmental peers of the tenure candidate to undertake the task of conducting an in-depth review of the candidate's teaching, service and scholarship, often assisted in the latter task by experts in the field from outside the candidate's institution. In many institutions, after such a review, tenure recommendations issue from several levels, including the candidate's department, college-wide and/or university-wide faculty or faculty/administration committees, deans and other administrators, and the process culminates in a final decision by the president or board of trustees. Many institutions include elaborate appeal procedures of negative recommendations or decisions along the way.[3] Tenure, once acquired, generally means employment until retirement or dismissal for cause, the latter but rarely pressed.

Less technically viewed, tenure constitutes acceptance

---

[2]In 1940 the AAUP and the Association of American Colleges (a body representing undergraduate colleges and run by their top administrators) jointly published the 1940 Statement on Academic Freedom and Tenure, which has, along with commentaries and interpretations known as "recommended institutional regulations" (or RIRs) become a sort of constitution against which the actions of academic institutions can be judged. The full text of the 1940 Statement and subsequent RIRs, as well as advice about tenure matters, may be secured from the AAUP, One Dupont Circle, Washington, D.C. *See generally* Metzger, Walter P., "Academic Tenure in America: A Historical Essay," in Faculty Tenure, San Francisco, Jossey-Bass (1973), pp. 93-159. *See also* 53 Law and Contemporary Problems, passim (Summer 1990) (special issue on the fiftieth anniversary of the 1940 Statement of Principles).

[3]Quite often, institutional rules restrict such appeals to cases alleging "procedural" irregularities, variously defined. Some institutions define "procedural" narrowly; other include such matters as improper consideration of race, sex, age or other inappropriate characteristics, or unfair application of institutional regulations under the "procedural" rubric. The breadth of the grounds of appeal may influence a decision whether to pursue internal remedies instead of or prior to litigation. *See* § 9:13.

into a particular profession. It denotes recognition by peers in the profession that the scholar has attained a certain level of seriousness and maturity; frequently, tenured professors will decline transfers to other institutions that do not involve tenured appointments or at most a pro forma review soon after arrival at the new institution. Accordingly, many scholars view tenure denial as more than just a failure of promotion or loss of a job; it usually means the scholar must leave the institution within a year,[4] and makes some scholars consider leaving their profession altogether, especially if they have failed to secure the support of their peers. Even where scholarly peers have praised the unsuccessful tenure candidate's work, the stigma of tenure denial may derail or end the candidate's career.

All too often, discrimination has played a role in a negative tenure decision. Proving this, under laws prohibiting discrimination, and securing an appropriate remedy[5] have been exceedingly difficult for individuals challenging tenure denials. This section discusses strategies for winning cases where discrimination is alleged to have been a factor in the denial of tenure.

§ 9:13 Choice of forum

Tenure cases are exceptionally difficult to win in court. Between 1972, when Title VII was extended to cover private universities, and 1990, only a handful of individuals had

---

[4]AAUP regulations adopted in a large portion of academia provide that a professor's probationary period should not exceed seven years.

[5]Title VII and state law analogues are most frequently used to challenge tenure denials, but professors at public institutions have also brought claims under 42 U.S.C.A. § 1983 (denial of equal protection). *See, e.g., Gutzwiller v. Fenik*, 860 F.2d 1317, 50 Ed. Law Rep. 32, 48 Fair Empl. Prac. Cas. (BNA) 395, 48 Empl. Prac. Dec. (CCH) ¶ 38398, 12 Fed. R. Serv. 3d 994 (6th Cir. 1988). Suits may also be brought under 42 U.S.C.A. § 1981. *See, e.g., Saunders v. George Washington University*, 768 F. Supp. 854, 69 Ed. Law Rep. 337, 60 Empl. Prac. Dec. (CCH) ¶ 42018 (D.D.C. 1991). Other, less frequently used causes of action arise under state common law (e.g., breach of contract involving faculty manuals; misrepresentation if the facts warrant it) or under state or federal labor law if a union contract exists. *See Brown v. Trustees of Boston University*, 891 F.2d 337, 57 Ed. Law Rep. 761, 51 Fair Empl. Prac. Cas. (BNA) 815, 133 L.R.R.M. (BNA) 2013, 133 L.R.R.M. (BNA) 2443, 52 Empl. Prac. Dec. (CCH) ¶ 39497, 52 Empl. Prac. Dec. (CCH) ¶ 39707, 114 Lab. Cas. (CCH) ¶ 11840, 114 Lab. Cas. (CCH) ¶ 11841, 29 Fed. R. Evid. Serv. 642 (1st Cir. 1989).

managed to prove they were denied tenure in violation of Title VII.[1]Of these, not all emerged with tenure.[2] Before investing years of time, thousands of dollars, and untold emotional energy into an uncertain court suit, disappointed tenure candidates should always consider other available means of redress or reconsideration by an impartial body. Appeals to an administration that has already said no may not be fruitful, but access, such as through a grievance procedure, to a board of outside experts, an ad hoc faculty committee, or a labor arbitrator, may result in a favorable result, either in the form of a decision binding on the institution, or in the form of a nonbinding but politically inviolable recommendation.[3]In fact, one court has recently held that attorneys' fees are available pursuant to Title VII for work done in a state university's appeals procedure.[4] Another option is to litigate in the less formal setting of state administrative bodies charged with enforcing state antidiscrimination statutes.

The decision whether to pursue such private or administrative procedures instead of a court action turns on a host of factors, some legal and some political: What opportunity is

---

[Section 9:13]

[1]*See Kunda v. Muhlenberg College*, 621 F.2d 532, 22 Fair Empl. Prac. Cas. (BNA) 62, 22 Empl. Prac. Dec. (CCH) ¶ 30674, 55 A.L.R. Fed. 806 (3d Cir. 1980); *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 59 Ed. Law Rep. 599 (5th Cir. 1990); *Gutzwiller v. Fenik*, 860 F.2d 1317, 50 Ed. Law Rep. 32, 48 Fair Empl. Prac. Cas. (BNA) 395, 48 Empl. Prac. Dec. (CCH) ¶ 38398, 12 Fed. R. Serv. 3d 994 (6th Cir. 1988); *Brown v. Trustees of Boston University*, *supra; Planells v. Howard University*, 32 Fair Empl. Prac. Cas. (BNA) 336, 33 Empl. Prac. Dec. (CCH) ¶ 34089, 1983 WL 594 (D.D.C. 1983) (consent agreement).

It is noteworthy that two of these cases (*Ford* and *Planells*) involved white males; the other three involved white females. For the time period 1970–84, two researchers who made an exhaustive survey counted 42 tenure discrimination cases decided on the merits, *see* LaNoue and Lee, Academics in Court, University of Michigan Press, 1987, table 1. Only in *Kunda*, *supra*, did the plaintiff prevail in the years surveyed.

[2]*See*, § 9:16 on remedies.

[3]*See, e.g.*, Swift, *Becoming a Plaintiff,* 4 Berkeley Women's L.J. 245 (1980–90) (tenure grievance settled by referral of case to outside review committee which recommended tenure; institution implemented recommendation).

[4]*See Duello v. Board of Regents of University of Wisconsin System*, 170 Wis. 2d 27, 487 N.W.2d 56, (Wis. App. 1992) (nonretention of faculty member into tenure review year).

there for input into selection of new decision-makers or arbitrators? What will their powers be? Will the newly involved decision-maker or recommending body be truly independent? What evidence may be discovered or considered? Will the institution be compelled to follow a favorable recommendation, either by its own rules, or in response to political realities? Does pursuit of a grievance or appeal foreclose (practically or otherwise) later resort to the courts? What recourse exists if the institution declines to follow its own procedures?

Even if filing a grievance does not seem promising, the faculty member must face the difficult question of what financial, emotional, familial and collegial resources he or she has available, as these will likely be strained to the limit in the course of a court battle.[5]If tenure is the goal, and some sort of meaningful, independent, de novo review is available outside the court system, the faculty member would be wise to utilize it if at all possible.[6] The only category of case better tried in court is one heavily dependent on evi dence available only in that forum, such as a case based on access to confidential materials that the institution refuses to disclose and that are unavailable to the faculty member through other means.

§ 9:14 Proving the case—Discovery

The typical academic employer's response to charges that it discriminated in denying tenure is that nothing of the sort occurred, that it was merely exercising institutional academic freedom—which, the institution will doubtless remind the court, includes the right to "determine for itself, on aca-

---

[5]*See, e.g., Academics in Court, supra, passim.*

[6]Courts tend to defer unduly to the "academic judgment" asserted by institutions of higher learning as grounds for denying tenure to faculty members. *See, e.g., Kumar v. Board of Trustees, University of Massachusetts*, 774 F.2d 1, 12, 27 Ed. Law Rep. 1051, 38 Fair Empl. Prac. Cas. (BNA) 1734, 38 Empl. Prac. Dec. (CCH) ¶ 35533 (1st Cir. 1985), *cert. denied, 475 U.S. 1097 (1986)* ("the district court . . . is [not] empowered to sit as a super tenure board. . .. Courts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding . . . factors that are not susceptible of quantitative measurement"). Scholars practiced in peer evaluation are unlikely to so defer to an institution's initial tenure decision.

demic grounds, who may teach"[1]—and that for reasons best known to itself, the tenure candidate simply did not stack 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 or his 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 or his scholarship was deficient (or the reverse); or that the institution could not have discriminated since it employs so many members of the faculty member's sex, race, or ethnicity. In making this sort of argument, the institution will seek to elicit a deferential attitude from the court that will defeat all claims not supported with "smoking gun" evidence.[2] To counter the factfinder's anticipated deference, the faculty plaintiff must show the institution's position to be insupportable, 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 he or 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 he or she met the standards for the award of tenure *at the defendant institution.*[3]

Showing that the plaintiff did so requires perseverance

[Section 9:14]

[1]From Justice Frankfurter's celebrated concurring opinion in *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).

[2]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, 64 Ed. Law Rep. 84, 57 Fair Empl. Prac. Cas. (BNA) 647, 55 Empl. Prac. Dec. (CCH) ¶ 40443 (S.D. Iowa 1990) (promotion denial and sexual harassment case).

[3]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

and creativity in discovery. 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 and quantity of effort should be considered. But assessments of quality are permeated by subjective judgment; the challenge to the plaintiff is to show the subjectivity was actually bias rather than a simple difference of opinion.

Where the institution asserts that the candidate's scholar ship lacks creativity, says nothing new, or the like, the plaintiff should see how other individuals with similar records fared. Now that the EEOC's right to confidential peer materials is established,[4] the plaintiff in any court action should seek such materials in discovery,[5] involving both his or her own and other tenure candidates' cases.[6]To prevail, the plaintiff must discover in the files of reasonably contem-

---

awarded at the institution at the time the plaintiff was denied. *See Fields v. Clark University*, 817 F.2d 931, 934, 39 Ed. Law Rep. 43, 43 Fair Empl. Prac. Cas. (BNA) 1247, 43 Empl. Prac. Dec. (CCH) ¶ 37141 (1st 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), judgment aff'd, 648 F.2d 61, 62–63 (1st Cir. 1981), 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, 17 Fair Empl. Prac. Cas. (BNA) 1316, 17 Empl. Prac. Dec. (CCH) ¶ 8468 (2d Cir. 1978).

[4]*See University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571, 57 Ed. Law Rep. 666, 51 Fair Empl. Prac. Cas. (BNA) 1118, 52 Empl. Prac. Dec. (CCH) ¶ 39539, 28 Fed. R. Evid. Serv. 1169, 15 Fed. R. Serv. 3d 369 (1990).

[5]Some defendants will undoubtedly argue that *University of Pennsylvania* applies only to agency subpoenas for documents, not to discovery requests by individuals. However, the language of the case is so broad, and its rejection of such shibboleths as an institution's academic freedom privilege so unequivocal, that such defendants' efforts should not succeed.

[6]The AAUP 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.

porary successful tenure candidates who are not in the same protected class, comments at least as critical or praise no stronger than is found in plaintiff's own file. Or plaintiff can show her file to be stronger overall than those of other, more successful candidates, giving rise to an inference of discrimination. To this end, the plaintiff should scrutinize all departmental and other recommendations regarding his or her case from inside the institution and compare them with those of previous successful tenure candidates from the same or other departments.[7]

Letters from outside experts often provide useful ammunition. The plaintiff may find that the negative decision in his or 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 received scathing and repeated criticism which the same university decision-makers chose to overlook. The plaintiff might find something as simple as a requirement that he or she produce a larger quantity of publications than was required of other candidates, or that his or her total number of publications exceeded in number and prestige of publication those of previous candidates.[8]

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

---

These policies may be cited as a statement of developing norms in the profession for purposes of internal university appeals.

[7]The entire file, and the files of similarly situated but successful peers, should be scrutinized regardless of whether the negative tenure recommendation occurred at the departmental level or later in the process.

[8]Shifting criteria should arouse suspicion. *See, e.g., Bachman v. Board of Trustees of University of District of Columbia*, 777 F. Supp. 990, 71 Ed. Law Rep. 453, 61 Fair Empl. Prac. Cas. (BNA) 1692, 60 Empl. Prac. Dec. (CCH) ¶ 42069 (D.D.C. 1991) (promotion case).

with those of successful tenure candidates. An expert can assist here to translate technical jargon and to assess the professional stature of reviewers.

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 him or herself and others, again through an expert. That individual could be asked to compare the plaintiff's work to that of recent tenure recipients, with a view towards showing 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. If it seems inescapable that the plaintiff scored lower on numerical student evaluations, the legitimacy of those evaluations as a measure of teaching quality should be investigated. A growing body of literature suggests that such numerical evaluation devices reflect societal prejudices, especially with regard to women.[9]Unfortunately, peer visits are also suspect.[10]

Other members of the plaintiff's protected class should be surveyed for anecdotes of prejudiced actions or remarks. In many jurisdictions, such evidence is permitted to show a discriminatory environment or to bolster inferences of discrimination.[11]

Finally, if the plaintiff is in a field such as women's stud-

---

[9]*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).

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

[11]*See, e.g., Brown, 891 F.2d at 349–350* (district court did not abuse discretion by allowing introduction of later derogatory remarks by university president about another member of plaintiff's protected class); *see generally* (non-tenure cases): *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3, 103 S. Ct. 1478, 75 L. Ed. 2d 403, 31 Fair Empl. Prac. Cas. (BNA) 609, 31 Empl. Prac. Dec. (CCH) ¶ 33477, 13 Fed. R. Evid. Serv. 1368 (1983) (successful showing of discriminatory intent does not require direct evidence); *Krieger v. Gold Bond Bldg. Products, a*

ies or African American 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.[12]

§ 9:15 Tactical considerations and common pitfalls

Almost as common as the defensive claim of institutional academic freedom, certain defense tactics turn up in tenure cases like clockwork. Predictably, claims of untimeliness top the list.

The lead case in this area is not new. In *Ricks v. Delaware State College*,[1] the Supreme Court made clear that the date which begins the Title VII clock's ticking is the date the fac-

---

Div. of National Gypsum Co., 863 F.2d 1091, 1096–97, 48 Fair Empl. Prac. Cas. (BNA) 1050, 48 Empl. Prac. Dec. (CCH) ¶ 38550, 27 Fed. R. Evid. Serv. 506 (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, 44 Fair Empl. Prac. Cas. (BNA) 753, 43 Empl. Prac. Dec. (CCH) ¶ 37264, 23 Fed. R. Evid. Serv. 1024 (1st Cir. 1987), certified question answered, 402 Mass. 385, 523 N.E.2d 255, 49 Fair Empl. Prac. Cas. (BNA) 1243, 47 Empl. Prac. Dec. (CCH) ¶ 38384, 74 A.L.R.4th 737 (1988) (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, 41 Fair Empl. Prac. Cas. (BNA) 721, 41 Empl. Prac. Dec. (CCH) ¶ 36417, 21 Fed. R. Evid. Serv. 188 (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 Authority*, 702 F.2d 1037, 1045, 31 Fair Empl. Prac. Cas. (BNA) 169, 31 Empl. Prac. Dec. (CCH) ¶ 33469, 12 Fed. R. Evid. Serv. 1947 (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").

[12]*See, e.g. Lynn v. Regents of University of California*, 656 F.2d 1337, 1343, 26 Fair Empl. Prac. Cas. (BNA) 1391, 28 Fair Empl. Prac. Cas. (BNA) 410, 27 Empl. Prac. Dec. (CCH) ¶ 32149 (9th Cir. 1981) ("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, 19 Ed. Law Rep. 533, 36 Fair Empl. Prac. Cas. (BNA) 200 (M.D. Tenn. 1984), decision aff'd, 772 F.2d 907, 27 Ed. Law Rep. 682, 42 Fair Empl. Prac. Cas. (BNA) 163 (6th Cir. 1985) (same).

[Section 9:15]

[1]*Ricks v. Delaware State College*, 605 F.2d 710 (3d Cir. 1979), cert. granted, 444 U.S. 1070, 100 S. Ct. 1012, 62 L. Ed. 2d 751 (1980) and

ulty member learned of the decision of the final authority in the tenure chain, typically either the institution's board of trustees or president. The clock does not stop for Title VII purposes if the tenure candidate undertakes an appeal, no matter how elaborate, nor does it wait until the tenure candidate's last day of work. If there is any chance a disappointed tenure candidate may wish to resort to the courts, he or she should be sure to file a timely administrative charge.[2]

Institutional defendants generally, and academic institutions in particular, have adopted a second popular litigation tactic: seeking to stymie the plaintiff's discovery by insisting that all institutional employees are somehow alter-egos for the institutional defendant, and that plaintiff's counsel will violate the legal code of ethics by seeking to interview these employees *ex parte* (outside the presence of defendant's counsel).[3] This argument rests on Disciplinary Rule 7-104(A)(1) of the ABA Code of Ethics, which prohibits counsel for a party from contacting any other party involved in the matter that is the subject of the first counsel's representation if that lawyer knows the second party is represented by another lawyer. The practical effect of the ethical rule is to compel plaintiff's counsel to forego informal discovery and investigation and to use depositions to gather evidence. In a tenure case this can be devastatingly expensive, since virtually all key witnesses are university employees. It also permits defendant's counsel to discover the plaintiff's case to his or her detriment.

The matter has been much litigated generally. Fortunately for plaintiffs, most courts have read the disciplinary rule narrowly to apply only to top decision-makers in an institution. In the tenure context, the one court that has addressed the matter head-on has permitted *ex parte* contact with faculty who served on various tenure review

---

judgment rev'd, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980).

[2]Some courts will toll the statute of limitations where an institution has failed to post required notices regarding laws prohibiting discrimination. *See, e.g., Linn v. Andover Newton Theological School*, 642 F. Supp. 11, 34 Ed. Law Rep. 1022, 44 Fair Empl. Prac. Cas. (BNA) 814, 2 I.E.R. Cas. (BNA) 1268 (D. Mass. 1985) (failure to post agency notice tolls statute of limitations in age discrimination case involving dismissal of tenured faculty member).

[3]*See* § 14:41 for a full discussion of this issue.

bodies.[4]However, *Morrison* has not stopped defendant's counsel from using the tactic to intimidate plaintiffs and cause them additional expense.

On the plaintiff's side, two current tactical developments bear comment. The first is the matter of trying a case to a jury rather than a judge. Prior to the enactment of the Civil Rights Act of 1991, plaintiffs in tenure cases making claims under Title VII could secure jury trials only if they taught at state-funded universities that could be sued under 42 U.S.C.A. § 1983, or if they could add a pendent common law claim entailing a jury trial right. Significantly, in at least two such cases, the jury ruled for the plaintiff while the judge ruled for the institution on the Title VII claim.[5]

The Civil Rights Act of 1991 extended the jury trial right to all Title VII plaintiffs seeking legal relief. However, in cases predicated on events pre-dating that change in law, alternate bases for a jury trial should be sought since the retroactive application of the new law is uncertain.

The second recent development that tenure case plaintiffs should keep in mind is the Supreme Court's ruling in *Price Waterhouse v. Hopkins*.[6] *Price Waterhouse* (now enshrined in Title VII pursuant to the Civil Rights Act of 1991) extended to Title VII cases the shifting burdens of proof discussed in

---

[4]*Baker v. Connecticut Bank & Trust Co.*, 125 F.R.D. 25, 48 Fair Empl. Prac. Cas. (BNA) 304, 48 Empl. Prac. Dec. (CCH) ¶ 38589 (D. Conn. 1988). Other cases involving faculty matters, albeit not tenure, which grant broad *ex parte* access to university employees, are *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 53 Empl. Prac. Dec. (CCH) ¶ 39775, 1990 WL 29199 (D. Mass. 1990) and *Sobel v. Yeshiva University, 23 E.P.D. 32,479 (S.D.N.Y. 1981)*.

[5]*See, e.g., Gutzwiller v. Fenik*, 860 F.2d 1317, 50 Ed. Law Rep. 32, 48 Fair Empl. Prac. Cas. (BNA) 395, 48 Empl. Prac. Dec. (CCH) ¶ 38398, 12 Fed. R. Serv. 3d 994 (6th Cir. 1988) (jury found for plaintiffs on § 1983 claim, while court improperly ignored jury verdict to rule for institution on Title VII claim); *Hooker v. Tufts University*, 581 F. Supp. 98, 16 Ed. Law Rep. 1133, 34 Fair Empl. Prac. Cas. (BNA) 278 (D. Mass. 1983) (jury verdict for plaintiff on contract claim; court rules no Title VII violation in denial of tenure). Because of judges' observed tendency to identify with the typically white, male leaders of corporations and other institutions, discrimination plaintiffs tend to fare better with juries (though even there the set of successful plaintiffs is very small). *See generally* Bartholet, Elizabeth, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

[6]*Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

Mt. Healthy City School Dist. Bd. of Education v. Doyle.[7]

In the tenure context, it is often difficult to decide whether to pursue a mixed-motive or a pretext strategy. The decision turns on the strength of the various pieces of evidence in the particular case, and how central to the tenure decision are any blatant instances of discrimination. Fortunately, as the Supreme Court made clear, a plaintiff need not make this strategic decision at the outset of the litigation.[8]

§ 9:16 Tenure as a remedy

Since 1972 in only five reported cases have plaintiffs surmounted the barriers to proving that their institution discriminated in denying them tenure. One would expect, given the extreme difficulty of demonstrating liability, that these few prevailing plaintiffs would secure tenure as a matter of courts' unquestioned right to order "make-whole" relief. How else but through an award of tenure can a faculty member denied tenure be made whole?

But some courts are uneasy imposing their will even on an institution guilty of discrimination. Preferring to view the acts of discrimination as an aberration rather than as part of a pattern endemic to academia, they reinstate the plaintiff in an untenured status and remand the case to the institution so that a different set of presumably less biased individuals will make a de novo review of the candidate's credentials.[1]

---

[7]*Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). According to *Mt. Healthy*, once the plaintiff in a case involving a mixture of legitimate and unlawful motives demonstrates that impermissible factors *contributed* to the defendant's adverse decision, the burden shifts to the defendant to prove that it would have made the same decision absent the discrimination.

[8]*Price Waterhouse, 109 S. Ct. at 1789, n.12*. Regardless of which route (pretext or mixed motive) the plaintiff follows, she must first establish a prima facie case.

[Section 9:16]

[1]*See, e.g., Gutzwiller, 860 F.2d at 1333* (tenure should be awarded by the court "only in the most exceptional cases . . . [w]hen the court is convinced that a plaintiff reinstated to her former faculty position could not receive fair consideration . . . of her tenure application"); *Ford, 896 F.2d at 875–76* (same).

Other courts (those in *Kunda*, *Brown* and *Planells*)[2] can be called upon as authority for the appropriateness of tenure as a remedy. *Brown* in particular is significant because the institution there specifically disputed the quality of Brown's scholarly work (unlike, e.g., *Kunda*, where even the defendant conceded the plaintiff was qualified though she lacked a required degree).[3] But *Brown* may be limited to its own facts, since such a strong majority of the outside experts in Brown's field, as well as an overwhelming majority of faculty evaluators (who numbered some forty individuals) supported a tenure award for her, against three administrators without advanced training in her field. *Brown* may be just the sort of exceptional case the *Gutzwiller* court had in mind.[4]

Developments in other employment settings may actually be more helpful to tenure plaintiffs than the rare successful tenure case. When courts declare themselves willing to upset negative partnership decisions regarding, for example, partnership candidates at accounting firms, and to order promotion to partnership in those settings, they thereby breach barriers almost as forbidding as the ivied walls of academe.[5]

---

[2]*See* § 9:12.

[3]Indeed, in what may further down the road be revealed as overstatement, *Brown* has been hailed as "the realization of Title VII's legislative intent" which "will have a significant impact on Title VII litigation." Brammen, J., Lallo, D. and Ney, S., 17 J.C. & U.L. 551–63 (1991).

[4]*See* the plaintiff's brief to the Supreme Court in *Brown* opposing Boston University's certiorari petition, wherein the facts of *Brown* are distinguished from those in *Gutzwiller*.

[5]*See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 52 Fair Empl. Prac. Cas. (BNA) 1275, 53 Fair Empl. Prac. Cas. (BNA) 1499, 53 Empl. Prac. Dec. (CCH) ¶ 39922 (D.D.C. 1990), judgment aff'd, 920 F.2d 967, 54 Fair Empl. Prac. Cas. (BNA) 750, 55 Empl. Prac. Dec. (CCH) ¶ 40413 (D.C. Cir. 1990) (award of partnership to manager on remand).