

Subjective Criteria in Faculty Employment Decisions Under Title VII: A Camouflage for Discrimination and Sexual Harassment

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Most colleges and universities make faculty employment decisions in an extremely decentralized system that relies heavily on subjective criteria. This system may meet the needs of an educational institution, but it also creates difficulty in detecting sexual discrimination. This Article examines the unique decisionmaking process used in higher education, including the need to use subjective criteria, and analyzes court and Equal Employment Opportunity Commission decisions in this area. The Article concludes by offering guidelines for ensuring that both the rights of faculty and the needs of the institution are protected during the decision-making process.

INTRODUCTION

In recent years, the number of lawsuits brought under Title VII of the Civil Rights Act of 1964,¹ alleging that colleges and universities practiced racial or sexual discrimination in awarding faculty employment, promotion, or tenure, has increased.² This increase may be attributed to several factors. First, Congress did not apply Title VII to

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¹ 42 U.S.C. § 2000e (1970 & Supp. II 1972).

² See Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473, 522 n.245 (1980).

educational institutions until 1972.³ Second, federal government agencies have taken steps to ensure equal employment opportunity at colleges and universities receiving research grants.⁴ Third, increased competition in a shrinking academic job market has caused faculty members to challenge unfavorable decisions.⁵ Furthermore, courts are now more willing to examine employers' subjective decisionmaking criteria.

Public awareness of sexual harassment has also dramatically increased. Recent litigation⁶ and the Equal Employment Opportunity Commission's published guidelines⁷ have established that adverse employment decisions resulting from an employee's refusal to acquiesce to a supervisor's sexual advances constitute sex discrimination within the meaning of Title VII.

Finally, in light of a recent Supreme Court decision,⁸ courts may be

³ Equal Employment Opportunity Act of 1972 § 3, 42 U.S.C. § 2000e-1 (1982).

⁴ Executive Order 11,246 mandates that every institution contracting with the federal government take affirmative action to ensure that its employees are treated without regard to race, color, religion, sex, or national origin. Enforcement is provided for only by the Office of Federal Contract Compliance of the Department of Labor. *Rackin v. University of Pa.*, 386 F. Supp. 992, 1007-08 (E.D. Pa. 1974). For example, Columbia University, among others, was threatened with suspension or termination of federal research grants unless it submitted to the Department of Health, Education, and Welfare an adequate affirmative action plan on the hiring or promotion of women and minorities. See Exec. Order No. 11,246, *as amended*, 3 C.F.R. 173 (1973); Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614, 1614 n.4 (1973) [hereafter Note, *Upper Level Jobs*].

⁵ See H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 566 (1979).

⁶ See, e.g., *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (Title VII action claiming sexual harassment and gender discrimination brought by former federal air traffic controller); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (Title VII action by former police dispatcher against city alleging sexual harassment on her job); *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979) (civil rights suit brought by black woman against bank, alleging she was fired for refusing supervisor's demand for sexual favors); *Fisher v. Flynn*, 598 F.2d 663 (1st Cir. 1979) (action by fired assistant professor against college); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (plaintiff alleged Equal Opportunity Act of 1972 violation for job termination for refusal of superior's sexual advances); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983) (defendant employer not entitled to summary judgment on plaintiff's claim that, if proven, would establish a Title VII claim of sexual harassment in the work place); *Robson v. Eva's Super Market, Inc.*, 538 F. Supp. 857 (N.D. Ohio 1982) (Title VII action brought against supermarket and its employees by female counter clerk).

⁷ The EEOC Guidelines on Discrimination, 29 C.F.R. §§ 1604.11(a)-(g) (1986).

⁸ *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (Title VII sex discrimination action brought by female lawyer against defendant law firm for terminating her em-

faced with examining university systems that impose quotas on tenure, because tenure may be viewed as a "privilege" of employment under Title VII.⁹ Quota systems on tenure may have a deleterious impact on women and minorities, most of whom are relatively new in the higher education marketplace.

Most colleges and universities make faculty employment decisions in a committee setting that relies heavily on subjective criteria. This type of system creates difficulty in determining whether individual committee members voted on the merits or based on a discriminatory intent. The use of subjective criteria in faculty employment decisions is of paramount importance. Evaluators cannot rely solely on objective factors such as educational degrees and years of experience, but must also consider subjective criteria such as "collegiality," "teaching ability," and "scholarship." Colleges and universities need to use subjective factors in order to make decisions that are in the best interest of the institution as well as of the individual faculty member.

Courts have tended to accept this subjectivity in situations involving supervisory or professional employees, recognizing that in certain situations a fair decision could not be made otherwise.¹⁰ They generally give even broader deference to the use of subjective criteria in faculty employment decisions. This deference is legitimate only if it is intended to avoid replacing a university's judgments about academic employment with judgments made by the judiciary. Yet a court, in enforcing fair employment laws, cannot neglect its statutory responsibility to ensure fair employment practices in institutions of higher education. Therefore, judicial deference does not, and should not, take place in all instances.¹¹

In reviewing claims of employment discrimination in colleges and universities, courts are faced with the additional problem of determining at what level in the decisionmaking process the alleged discriminatory practice took place. This decisionmaking process is usually decentralized, with faculty members having a significant, and sometimes dominant, role. Moreover, in many instances, faculty decisions are made through an elaborate committee and subcommittee structure, which may serve to conceal discrimination.

This Article examines the unique decisionmaking process in colleges

ployment after not inviting her to become a partner).

⁹ *Id.* at 75.

¹⁰ See *infra* note 47.

¹¹ *Davis v. Weidner*, 596 F.2d 726, 731-32 (7th Cir. 1979) (sex discrimination charge brought against university by female former professor).

and universities and analyzes both the Equal Employment Opportunity Commission (EEOC) and the courts' evaluations of subjective criteria in cases involving professional faculty members. In addition, this Article offers guidelines for ensuring that the rights of the faculty are protected, while, at the same time, balancing this protection against the university's need to use subjective criteria.

I. THE FACULTY EVALUATION AND DECISIONMAKING PROCESS

In many employment decisions, especially those involving professional and supervisory employees, employers cannot rely solely on objective criteria and must, to some extent, use more subjective factors. Judges, in reviewing dissatisfied employees' claims, recognize the necessity of subjective criteria and are reluctant to substitute their judgment for that of employers. In particular, courts reviewing allegedly discriminatory university hiring practices have exhibited extraordinary deference to the judgment of university decisionmakers by expressly and consistently subjecting these decisions to only the most minimal judicial scrutiny.¹² To a large extent this judicial deference may be based not only on the professional nature of a faculty position, but also on the uniqueness of the decisionmaking process in colleges and universities. This section examines some of these unique characteristics, as well as the decisionmaking process.

A. Institutional Characteristics

The one characteristic that dominates all others in colleges and universities, and that distinguishes the academic from other institutions, is the principle of academic freedom. According to the 1940 Statement of Principles on Academic Freedom and Tenure, colleges and universities "are conducted for the common good" rather than for the good of individual teachers or the institution itself, and the common good depends upon "the free search for truth and its free exposition."¹³ The State-

¹² See, e.g., *id.*; *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974) (court deferred to university medical center faculty appointment decision in denying plaintiff's claim for sex discrimination); *Lewis v. Chicago State College*, 299 F. Supp. 1357 (N.D. Ill. 1969) (in denying plaintiff's claim against university for racial discrimination, court held university promotion decisions are not normally justiciable).

¹³ Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both

ment explains that academic freedom is “essential to these purposes and applies to both teaching and research” because freedom in research is fundamental to the advancement of truth.¹⁴

Although academic freedom is an important part of the academic setting, it has not risen to the level of a constitutional right. Nevertheless, the Supreme Court has recognized it as a “special concern of the First Amendment,” warranting protection as a particular type of free expression,¹⁵ and has recognized the importance to society of protecting free thought in institutions of higher learning.¹⁶ Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire* provides a useful definition of academic freedom:

For society’s good — if understanding be an essential need of society — inquiries into these problems, speculation about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.¹⁷

Frankfurter went on to quote from other definitions:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university — to determine for itself on academic grounds who may teach, what may be

teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 2 (1977) (footnotes omitted) [hereafter AAUP].

¹⁴ *Id.*

¹⁵ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). See generally Comment, *Academic Freedom vs. Title VII: Will Equal Employment Opportunity Be Denied on Campus?*, 42 OHIO ST. L.J. 989, 994 (1981) (discussing the nature and origin of the concept of academic freedom) [hereafter Comment, *Academic Freedom*].

¹⁶ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); see also *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state may not prohibit teaching of scientific theory of evolution based upon reasons violative of first amendment); *Whitehill v. Elkins*, 389 U.S. 54 (1967) (state act definition of a “subversive person” rendered unconstitutionally vague and overbroad by not delineating between permissible and impermissible conduct in the area of academic freedom); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958) (by engaging in teaching in public schools, petitioner did not give up his right to freedom of belief, speech or association); cf. *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (persons have no right to work for the state in the school system on their own terms).

¹⁷ *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

taught, how it shall be taught, and who may be admitted to study.¹⁸

An analysis of this statement reveals the possibility for both expanding and limiting the concept of academic freedom. First, academic freedom is expanded to include employment decisions relating to "who shall teach." Yet, at the same time, this freedom is limited because a university may make these determinations only "on academic grounds."¹⁹

Academic freedom entitles a teacher "to full freedom in research and in publication of the results" as well as "freedom in the classroom in discussing his subject."²⁰ In order to be free to research, publish, and teach, a faculty member must not be restricted by fear of hostile reactions from outside forces, such as the community, or from internal forces such as colleagues or administrators who wish to limit an individual's pursuit of the truth because the pursuit is creating an adverse reaction to the institution itself. The faculty member seeks truth for the common good, not for the good of the institution;²¹ and tenure becomes a means to accomplish this pursuit of the truth.²²

In essence, tenure means permanent employment.²³ Tenure commits an institution to continue employing a faculty member until retirement unless there is adequate cause for termination.²⁴ In theory, this commitment serves the institution and fosters academic freedom because, by having job security, the faculty member is free to seek truth and knowl-

¹⁸ *Id.* at 263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (1952)).

¹⁹ Comment, *Academic Freedom*, *supra* note 15, at 995.

²⁰ *Id.* at 994. For a comprehensive study of the evolution of academic freedom, see Z. HOFSTADTER & W. METZGER, ACADEMIC FREEDOM IN THE UNITED STATES (1955).

²¹ AAUP, *supra* note 13, at 2.

²² Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligation to its students and to society.

Id.

²³ The Commission on Academic Tenure in Higher Education defines tenure as "an arrangement under which faculty appointments in an institution of higher education are continued until retirement for age or disability, subject to *dismissal for adequate cause* or unavoidable termination on account of financial exigency or change of institutional program." COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: A REPORT AND RECOMMENDATIONS 256 (1973) (emphasis in original).

²⁴ AAUP, *supra* note 13.

edge for its own sake, without regard to the pressures or prejudices of the university administration or the community at large. The arguments for and against tenure are beyond the scope of this Article.²⁵ The pertinent point is that the tenure decision is of crucial importance to both the faculty member and the institution. For the university, the decision represents a significant financial commitment. Further, the quality of the tenured faculty members has a direct impact on the quality and reputation of the institution. For the faculty member, tenure means permanent employment, financial security, and academic freedom.

Although the commitment between the faculty member and institution is somewhat amorphous, there are relatively few instances of tenured faculty members being fired for reasons other than financial exigency, gross incompetence, or grievous misconduct.²⁶ An institution must go through elaborate procedures before terminating a tenured professor's contract.²⁷ These procedures serve as a significant disincentive for an institution contemplating the discharge of any tenured faculty member. Thus, a tenure decision can represent an institutional commitment to employ a faculty member for thirty to forty years.²⁸ Because of this, tenure decisions should be made only after thorough evaluation and review.

After a short probationary period, normally not to exceed seven years,²⁹ a faculty member may receive tenure. Such lifetime personal service contracts are uncommon, except for protected civil service positions, which may contain fewer problems because of civil servants' ability to transfer to other departments. Professors of history, however, re-

²⁵ For a discussion of the arguments, see generally Machlup, *In Defense of Academic Tenure*, in *ACADEMIC FREEDOM AND TENURE* 310-11 (L. Joughlin ed. 1969) (suggesting the advantage of academic freedom provided by tenure outweighs its many disadvantages).

²⁶ Yurko, *supra* note 2, at 478.

²⁷ The procedures are required constitutionally at public institutions. See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Slochowner v. Board of Educ.*, 350 U.S. 551 (1956). The procedures used at private institutions are set out contractually. See, e.g., *Lehmann v. Board of Trustees*, 89 Wash. 2d 874, 576 P.2d 397 (1978). See generally Joughlin, *Academic Due Process*, in *ACADEMIC FREEDOM AND TENURE* 271-300 (L. Joughlin ed. 1969) (analyzing the point to point procedural management of a disputed decision to dismiss a teacher from her post).

²⁸ Yurko, *supra* note 2, at 478.

²⁹ "[T]he probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education." AAUP, *supra* note 13, at 2.

main in a department for life and cannot be transferred to the English department.³⁰

Because of the significance of the institution's commitment resulting from the tenure decision, courts have required dissatisfied faculty members denied tenure to demonstrate that their job performance was much more than "of sufficient quality to merit continued employment," a standard sufficient for those in nonfaculty positions,³¹ or that the tenure criteria was not fairly applied.³² In addition, because tenure decisions are made only after a thorough evaluation by a number of university constituencies with significant expertise and experience, the courts give the decisionmakers broad deference.

The "up or out" provision contained in most tenure provisions further highlights the uniqueness of college and university employment. In many nonacademic organizations individuals who are not promoted may stay in their current position indefinitely. These individuals are able to function at their current levels, even though they may not meet the requisite standards for promotion. Even some institutions of higher education allow faculty members who do not meet the standards for full professor to remain as an associate professor indefinitely.³³ However, this is not the case in tenure decisions at most institutions — failure to gain tenure means employment termination.

A final factor that makes academic employment decisions unique is that they are often noncompetitive. In other employment settings a decision to hire or promote one person is the flip side of a decision not to hire or promote another. In academic settings, however, a decision regarding one person usually does not affect the future of other candidates.³⁴ Although in some cases the number of tenure slots is fixed and

³⁰ *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984) (inability to transfer departments is one factor setting tenure decision apart from other employment decisions); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980).

³¹ As an example, the Seventh Circuit Court of Appeals recognized the lower standard in the case of a bricklayer. *See Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977); *see also Lieberman*, 630 F.2d at 64 (employment for tenured position required qualifications considerably higher than those for the making or renewal of an appointment).

³² *Labat v. Board of Higher Educ.*, 401 F. Supp. 753 (S.D.N.Y. 1975) (plaintiff failed to prove racial discrimination in the denial of his tenure and failed to establish that his qualifications met the college's criteria).

³³ For example, Hamline University School of Law emphasizes teaching ability for promotion to associate professor and scholarly contribution for promotion to full professor. There is no requirement that an associate professor be promoted within a certain time. Hamline Univ. School of Law, Faculty Policies, Jan. 8, 1979.

³⁴ *Zahorik*, 729 F.2d at 92 ("Whereas in other employment settings a decision not to

an affirmative tenure decision excludes other candidates,³⁵ even here the effect on those excluded is uncertain because the alternate candidates have no assurance that they would have received tenure had a slot been available.³⁶

The noncompetitive nature of academic decisions may stem from the lack of a pressing need to grant tenure or promotions, since teaching responsibilities can be discharged by a nontenured faculty member or one in a lower grade. Yet the noncompetitive nature of these decisions makes the evaluation process both difficult and unique. When competition exists among and between applicants, the employer is able to compare the ability of one applicant with that of another. In a university setting, the faculty member is judged on her merits alone against the standard of the "ideal."

B. *The Decisionmaking Process*

The evaluation process for tenure, promotion, and retention decisions can vary substantially from institution to institution. Nevertheless, there appear to be several common characteristics.

First, most institutions have both a formal and informal evaluation process. The formal process is defined specifically by each institution, while the informal process depends on the interest level of senior faculty members who observe their new colleague in a variety of informal settings and begin to form opinions on this individual. The informal process occurs continuously from the time of initial appointment; the formal evaluation occurs at several discrete points in time.³⁷ Each institution defines when a faculty member is eligible for promotion from one level to the next. In addition, institutions specify the period in which individuals are considered for tenure, which may depend both on time at the institution as well as achieving a specific academic rank, usually associate professor. At most institutions, however, the tenure decision is completely separated from the promotion process, although the mechanical procedures may be somewhat similar.

The procedures for evaluation typically involve multiple levels, and

hire one person is usually the flip side of a decision to hire another, a decision to grant or not grant tenure to a particular person does not necessarily affect the future of other tenure candidates.").

³⁵ The American Association of University Professors opposes imposing such quotas. *On the Imposition of Tenure Quotas*, AAUP POLICY DOCUMENTS & REPORTS 23 (1977).

³⁶ *Zahorik*, 729 F.2d at 92.

³⁷ *Yurko*, *supra* note 2, at 475.

include significant faculty participation. Generally the process entails a step-by-step series of recommendations from the department level through a series of academic and administrative levels, until the highest level is reached — usually the president for promotions or the board of trustees for tenure decisions. In most cases only favorable decisions move up the chain of command. The process stops when a level either fails to concur in a lower level's favorable recommendation or affirmatively rejects the candidate's application for tenure or promotion. A disappointed faculty member may have some right to appeal an adverse decision to the next level, but often such challenges are limited to procedural errors or alleged violations of academic freedom.³⁸

The system is decentralized, with significant faculty involvement in the early stages. Thus, the system is one of peer review, with an individual faculty member's colleagues evaluating her. The theory of this process is that only the faculty members have the expertise to judge each other on such academic matters as teaching ability, scholarship, and community service. Moreover, having faculty members perform this function seems to be in the institution's best interest.

Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments.³⁹

The decentralized system of peer review establishes a structure in which discrimination could be concealed. Since only favorable recommendations move forward, no independent review of cases denying promotion or tenure takes place unless the candidate appeals. Even at institutions that carry an unfavorable recommendation forward, potential problems exist because only the paper record, written at the lower levels, is reviewed. Also, in reviewing negative decisions, some institutions do not focus on the merits of the decision, but rather on insuring that proper procedures were followed and that a negative decision was

³⁸ See, e.g., *id.* (citing *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1152 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) (appeal to university's subcommittee on academic freedom)); *Sweeney v. Board of Trustees*, 569 F.2d 169, 173 (1st Cir.), *vacated and remanded on other grounds*, 439 U.S. 24 (1978) (*per curiam*) (faculty appeals committee may only investigate due process issues or new evidence).

³⁹ *Statement on Government of Colleges and Universities*, AAUP POLICY DOCUMENTS AND REPORTS 40, 43 (1977).

neither arbitrary nor capricious.⁴⁰ In either case, higher levels give substantial deference to those who made the evaluation because the evaluators alone possess the necessary expertise to make an initial recommendation based on the performance of an individual candidate.

Not only do those at higher levels lack sufficient expertise to consider the validity of a positive or negative recommendation, they may also have difficulty in accumulating sufficient statistical data that would identify possible cases of discrimination. University-wide statistics may obscure the fact that certain departments are engaging in illegal discrimination. The gender and racial composition may vary from department to department, creating difficulty in making statistical comparisons.

Also, employment decisions are usually made by committees rather than by individuals, making personal biases difficult to detect. Most committee discussions are conducted privately, with limited recorded minutes, and, in some cases, with no record of individual members' votes.

Finally, and perhaps most importantly, faculty employment decisionmakers cannot rely solely on objective factors such as educational degrees and prior experience, but must consider a wide variety of subjective factors ranging from "collegiality" to "teaching ability." Generally, the substantive elements of a proper faculty evaluation of current and potential performance include three key areas:⁴¹ scholarship, teaching ability, and service to the institution.⁴² These key areas include both objective and subjective factors. To some extent, the subjective factors tend to dominate the evaluation because objective standards are difficult to articulate or even to ascertain. The development of appropriate legal standards has been even more problematic.

⁴⁰ As an example of this approach, see *Zahorik v. Cornell Univ.*, 729 F.2d 85, 89 (2d Cir. 1984).

⁴¹ Yurko, *supra* note 2, at 476.

⁴² These key areas recur in a number of cases. See, e.g., *Huang v. College of Holy Cross*, 436 F. Supp. 639, 642 (D. Mass. 1977) (in action against college charging discrimination in the denial of tenure, school's tenure policy specified consideration be given to teaching, scholarship, and service to the college); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1340 (W.D. Pa. 1977) (medical school's tenure policy considered effectiveness as a teacher, research and scholarship, professional stature, and service contributions); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152, 160 (D. Mass. 1975) (Tufts University tenure criteria refer to candidate's quality of mind, intellectual force, scholarship, teaching effectiveness, and contributions to departmental objectives and those of the whole university); *Labat v. Board of Higher Educ.*, 401 F. Supp. 753, 757 (S.D.N.Y. 1975) (Queens College tenure policy stressed scholarship and research).

II. THE USE OF SUBJECTIVE CRITERIA IN EMPLOYMENT DECISIONS

Almost every employment decision includes some subjectivity. Clearly, evaluating a faculty member's performance in scholarship, teaching ability, and service to the institution invariably will contain subjectivity, especially because of the large number of individuals participating in the decision. Nevertheless, as an evaluation becomes less objective and more subjective, the ability to mask discrimination increases. This section examines the need for subjective criteria in faculty employment decisions and how the law has responded to this need.

To a large extent, the law of equal employment opportunity has developed in a blue collar context.⁴³ Much of the case law was fashioned from problems of providing equal employment opportunity for employees who work with their hands rather than with people, paper, and ideas. As such, the focus has been on the use of objective criteria. However, in certain employment situations it becomes necessary for the employer to use subjective criteria.

Using subjective criteria to make employment decisions is not per se unlawful.⁴⁴ On the contrary, fairness to both the applicant and the employer may require using such criteria in situations in which using objective criteria alone is not realistic.⁴⁵ Courts' acceptance of subjective factors increases as the jobs move into the white collar ranks,⁴⁶ particu-

⁴³ See generally Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979).

⁴⁴ B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 191 (2d ed. 1983).

⁴⁵ *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.) ("in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards above"), *vacated and remanded on other grounds*, 443 U.S. 809 (1975); *Hester v. Southern Ry.*, 497 F.2d 1374, 1381 (5th Cir. 1974) ("subjective hiring procedures are not violative of Title VII *per se*. Title VII comes into play only when such practices result in discrimination."); see also *Rich v. Martin Marietta Corp.*, 467 F. Supp. 587, 615 n.40 (D. Colo. 1979) ("subjectivity gains its operative significance where it is accompanied by *other* factors which strongly indicate the presence of discrimination") (emphasis in original); *Whack v. Peabody & Wind Eng'r Co.*, 452 F. Supp. 1369, 1372 (E.D. Pa. 1978) (court found use of subjective criteria capable of being applied in a nondiscriminatory manner); *Rogillio v. Diamond Shamrock Chem. Co.*, 446 F. Supp. 423, 428 (S.D. Tex. 1977) (quoting *Hester*, 497 F.2d at 1381); *Nath v. General Elec. Co.*, 438 F. Supp. 213, 220 (E.D. Pa. 1977) ("An evaluation of technical ability is necessarily based on factors that are not purely objective."); *Sanchez v. Southern Pac. Transp. Co.*, 29 F.E.P. 746, 752 (S.D. Tex. 1980) (quoting *Rogers*, 510 F.2d at 1345).

⁴⁶ See generally Waintroob, *supra* note 43 (surveying and evaluating law regarding

larly those in the professional and supervisory areas.⁴⁷ In essence, the courts have taken a sliding scale approach, which recognizes the special problems faced by both the employer and employee.

However, in some cases courts have required employers to use objective criteria when the subjective criteria used was a pretext or mask for discrimination.⁴⁸ The leading case in this area is *Rowe v. General Motors Corp.*,⁴⁹ which took place in a blue collar setting.

In *Rowe*, the Fifth Circuit, relying on statistical evidence, found that a process in which employees were recommended by all-white supervisors on the basis of subjective factors such as "ability, merit, and capacity" resulted in a paucity of blacks being promoted.⁵⁰ The court listed five particulars that it viewed as violative of Title VII:

(i) The foreman's recommendation is the indispensable single most important factor in the promotion process.

(ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)

discrimination in white collar and professional positions); Note, *Upper Level Jobs, supra* note 4 (providing a framework to assess legal problems of discrimination in upper level employment, especially in hiring and promotion); Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165 (1976) (predicting judicial response to a "subjective criteria defense" asserted by employers and suggesting plaintiff's strategies in meeting the defense) [hereafter Comment, *Professional Jobs*].

⁴⁷ See *Ramirez v. Hofheinz*, 619 F.2d 442, 446 (5th Cir. 1980) (supervisory clerical position); *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 726 (4th Cir. 1980) (casualty underwriter); *Guy v. Peaches Records & Tapes, Inc.*, 477 F. Supp. 656, 657-58 (E.D. Mo. 1979) (supervisor of cashiers); *Nath v. General Elec. Co.*, 438 F. Supp. 213 (E.D. Pa. 1977) (design engineer); *Milton v. Bell Laboratories*, 428 F. Supp. 502, 507-08 (D.N.J. 1977) (patent attorney); *Frink v. United States Navy*, 16 F.E.P. 67, 69-70 (E.D. Pa. 1977) (naval architect), *aff'd mem.*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 455 U.S. 930 (1980).

⁴⁸ See, e.g., *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 453 (5th Cir. 1971) (subjective system excluding blacks from jobs for which they might otherwise qualify unlawful under Title VII), *cert. denied*, 406 U.S. 906 (1972); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 657 (2d Cir. 1971) (ordering employer to establish objective criteria for hiring and promotion, and to administer its programs in a nondiscriminatory manner); *Baxter v. Savannah Sugar Ref. Corp.*, 350 F. Supp. 139, 147 (S.D. Ga. 1972) (ordering employer to implement objective criteria regarding employment policies toward blacks), *aff'd in part and rev'd and remanded in part*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

⁴⁹ 457 F.2d 348 (5th Cir. 1972).

⁵⁰ Of 114 employees promoted from hourly jobs to salaried jobs between 1963 and 1967, only seven were blacks. Between 1967 and 1969, although 330 employees were promoted or transferred from hourly to salaried jobs, only 20 blacks were promoted or transferred. *Id.* at 357 n.18.

(iii) Those standards which were determined to be controlling are vague and subjective.

(iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.

(v) There are no safeguards in the procedure designed to avert discriminatory practices.⁵¹

Clearly, a major aspect of the case was that an all-white supervisory workforce was responsible for these decisions. The court noted one of the dangers inherent in such a system: "Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between these two groups."⁵² Moreover, many white male evaluators may not know how to evaluate minorities and women objectively. To some extent, an evaluating supervisor may look for traits that the supervisor feels he himself has, and may find these traits more easily in other white males than in minorities or women.⁵³

A similar situation may exist at colleges and universities in which the key decisionmakers are white, male professors and the applicable subjective criteria include nebulous factors such as "collegiality" and "ability to get along." Moreover, those who are in the high management positions of colleges and universities tend to be predominantly white males with similar backgrounds. This fact, coupled with the tendency of those in higher positions to defer to the faculty's decisionmaking expertise, makes the appeal of an adverse decision within the institution questionable at best, forcing dissatisfied employees to seek relief outside of the institution.

However, relief outside of the institution is somewhat problematic. Courts cannot apply the *Rowe* analysis and require universities to rely on objective criteria, dismissing subjective criteria as pretexts or masks for discrimination. Fairness to both the employer and the faculty member necessitates the use of subjective criteria. Evaluating such general areas as teaching ability, scholarship, and service to the institution requires more than objective factors alone. The weight assigned to each of these criteria often varies according to institutional or departmental goals.⁵⁴

At the same time, faculty employment decisions are not confined to these three areas of scrutiny. The process takes into account factors

⁵¹ *Id.* at 358-59 (footnote omitted).

⁵² *Id.* at 359 (footnote omitted).

⁵³ Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737, 739 (1976).

⁵⁴ Yurko, *supra* note 2, at 476.

extraneous to a specific department, such as overall institutional staffing needs, tenure quotas, financial stability of the institution, and student enrollment in a department. In addition, there may be subjective institutional factors such as how the faculty member's educational philosophy relates to that of the department and the institution, and whether or not her personality is compatible with other colleagues. These factors inevitably involve subjective judgment.⁵⁵

The use of subjective factors in these employment decisions is necessary and not innately illegal. The institution could never achieve the level of harmony necessary to fulfill its stated purpose without taking into account the wide diversity of individuals that exists in a university or college setting.

Clearly, significant differences exist between jobs in industry and those in academia, and prominent differences exist in the evaluation processes for each. Yet, some evaluation criteria used in upper level management positions are comparable to those used in academic settings. Thus, a relevant industrial analogue is the upper level manager or professional, not *Rowe's* factory worker. In these employment decisions, a subjective analysis of qualifications is essential.⁵⁶

In industry, decisional hiring criteria include overall management ability and how much the person will bring to the company in terms of business acumen, clients, or increased profits.⁵⁷ In academia, the focus is on teaching skill, scholarship, and how much this faculty member will enhance the university's reputation. In either case, the decisionmakers must rely on subjective factors.

An employee dissatisfied with an employment decision, either in industry or in academia, may attack the criteria, the process, or the resulting judgment. When the dissatisfied employee seeks relief outside of the institution, the court is not to determine if the employment decision was "correct."⁵⁸ Rather, the court's role is limited to determining whether any statutorily impermissible prejudice entered into the employment decision. Yet, until recently, relief outside of the institution was generally difficult for faculty members to obtain despite Congress' extension of Title VII to apply to educational institutions. Early cases show courts' unwillingness to intervene. For example, one court stated that "[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level

⁵⁵ *Id.* at 478.

⁵⁶ Comment, *Academic Freedom*, *supra* note 15, at 1001.

⁵⁷ *Id.*

⁵⁸ *Id.*

are probably the least suited for federal court supervision.”⁵⁹ Another court noted:

[T]his court should not and will not undertake a *de novo* review of plaintiff's academic performance and qualifications. This court is powerless to substitute its judgment for that of the University as to whether plaintiff's academic credentials are such that tenure should have been awarded. The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an academic committee's decision. The courts will not serve as a Super-Tenure Review Committee The tenure decision has a rational basis and the *ad hoc* committee did not predicate its evaluation and decision on constitutionally impermissible factors. That is the extent of this court's power to review the *substance* of the tenure decision.⁶⁰

Obviously, several conflicting factors lead to courts' reluctance to get involved in these decisions, the most prominent of which is courts' lack of expertise. This reluctance to overrule the university's judgment of the plaintiff's qualifications is understandable. The court does not have the expertise to undertake a *de novo* review of plaintiff's qualifications and academic performance, especially because of the substantial need to use subjective factors. Nevertheless, a “hands-off” approach elevates the concept of academic freedom to a new level, thus preventing the court from using its true expertise — determining whether statutorily impermissible reasons were the true basis for denying tenure or promotion. Moreover, the “hands-off” approach neglects the court's duty to safeguard the individual faculty member's interest in fair treatment in employment decisions. Therefore, the court should enforce the law and not simply replace a university's judgment about academic employment with the same judgment made by the judiciary.

The courts started to recognize this in 1978 when the articulated “hands-off” policy began to change. In *Sweeney v. Board of Trustees*⁶¹ the First Circuit voiced “misgivings over . . . [the recurrent] notion that courts should keep ‘hands off’ the salary, promotion, and hiring decisions of colleges and universities.”⁶² Furthermore, the court, while acknowledging that university employment decisions require subjective

⁵⁹ *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974).

⁶⁰ *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264, 1270 (M.D. Pa. 1976) (emphasis in original). Similar statements are found in *Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976); *Cooper v. Ross*, 472 F. Supp. 802, 810 (E.D. Ark. 1979); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1354 (W.D. Pa. 1977); *Lynn v. Regents of Univ. of Cal.*, 21 Empl. Prac. Dec. (CCH) ¶ 30, 558 (C.D. Cal. 1979).

⁶¹ 569 F.2d 169 (1st Cir. 1978).

⁶² *Id.* at 176.

evaluation and that such evaluations are most appropriately made in the academic setting, cautioned against "permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily for other Title VII suits."⁶³

Several months later, a federal district court in *Kunda v. Muhlenberg College*⁶⁴ analogized academic institutions to industry, declaring that "[t]he decision to grant or deny a promotion to a college faculty member is not substantially different from a similar decision in business or industry."⁶⁵ Furthermore, the court recognized that the theories of disparate treatment and disparate impact are applicable to academic institutions as well as industry.⁶⁶

III. DISPARATE TREATMENT: LEGAL STANDARDS

The Supreme Court has recognized two types of cases covered by Title VII: disparate impact cases, in which facially neutral job requirements result in a disproportionate representation of a particular group in hiring and promotion;⁶⁷ and disparate treatment cases, in which there is intentional discrimination against a particular employee or class of employees.⁶⁸ This section examines the disparate treatment approach used in most college and university cases.

Because most employment claims fall under the disparate treatment theory,⁶⁹ the courts have developed a model in analyzing such claims. The essence of disparate treatment is different treatment: blacks are treated differently than whites or women differently than men. Little distinction is made on whether the treatment is better or worse. The key is that the treatment is different. Thus, the issue becomes whether the employer intentionally treated "some people less favorably than

⁶³ *Id.*

⁶⁴ 463 F. Supp. 294 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980).

⁶⁵ *Id.* at 307.

⁶⁶ *Id.* at 306-07.

⁶⁷ *See* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁶⁸ *See* *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁶⁹ Three other discrimination theories are used in Title VII cases: (1) policies and practices that perpetuate the effects of past discrimination; (2) policies and practices having an adverse impact not justified by business necessity; and (3) failure to make reasonable accommodations to an employee's religious observance or practices. B. SCHLEI & P. GROSSMAN, *supra* note 44, at 1.

others because of their race, color, religion, sex, or national origin.”⁷⁰ The initial burden is on the plaintiff to offer “evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.”⁷¹ In other words, courts require that Title VII plaintiffs establish a prima facie case — “a legally mandatory, rebuttable presumption.”⁷² A prima facie case is not the equivalent of an ultimate finding of discrimination, but merely “a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.”⁷³ How the prima facie case is established depends on whether the case is brought by a single plaintiff or by a class action alleging a pattern or practice of discrimination.

A. *Private Actions Brought by a Single Plaintiff*

The Supreme Court established the legal standard of proof in a private, nonclass action alleging employment discrimination in *McDonnell Douglas Corp. v. Green*:⁷⁴

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.⁷⁵

In order to establish a prima facie case the plaintiff must prove that she belongs to a protected class, applied for an available job for which she was qualified, and was rejected under circumstances that allow the court to infer unlawful discrimination. Once the plaintiff has established a prima facie case, the court may infer discrimination because the plaintiff has eliminated the two most common legitimate reasons for failure to hire: that there was no available position or that the plaintiff was not qualified for the job.⁷⁶ In this situation, if the employer remains silent, the court must decide in favor of the plaintiff.

Establishment of the prima facie case in effect creates a presumption that

⁷⁰ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

⁷¹ *Id.* at 358.

⁷² *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981).

⁷³ *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

⁷⁴ 411 U.S. 792 (1973); *see also Furnco*, 438 U.S. 567.

⁷⁵ *McDonnell Douglas*, 411 U.S. at 802.

⁷⁶ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.⁷⁷

Under the *McDonnell Douglas* approach, when a plaintiff successfully proves a prima facie case, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its action.⁷⁸ If the employer carries this burden, a genuine issue of fact is raised, dropping the presumption of illegal discrimination. Thus, the plaintiff retains the burden of persuasion to prove that the defendant's explanation was not the true reason for the employment decision, the true reason being intentional discrimination.⁷⁹

Applying this approach to colleges and universities is not a simple task. A plaintiff may readily prove that she belongs to a protected class, but proving that she is qualified for the position is somewhat problematic. A faculty member may be qualified based on objective factors. For example, she may have the appropriate educational degree, the requisite number of published articles, and an acceptable number of years of experience. However, using the same factors subjectively she may not be qualified because her degrees were not from sufficiently "prestigious" institutions, or her articles were not "scholarly" enough, or her experience was not of sufficient depth. Thus, the plaintiff may have difficulty in establishing a prima facie case.

B. Class Actions

The court follows a different order of proof in class actions.⁸⁰ Class actions are brought by private plaintiffs or by the government on behalf of many employees charging that an employer engages in discriminatory practices throughout all or a major part of its operations. In these cases, the trial is bifurcated into a liability phase and a remedial phase.⁸¹ During the liability phase, the plaintiff must prove by a preponderance of the evidence that the defendant engaged in a pattern or practice of unlawful discrimination in various company policies. In other words, "discrimination was the company's standard operating

⁷⁷ *Burdine*, 450 U.S. at 254.

⁷⁸ *McDonnell Douglas*, 411 U.S. at 802.

⁷⁹ *Burdine*, 450 U.S. at 254-56.

⁸⁰ See *Teamsters*, 431 U.S. 324; *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

⁸¹ *Teamsters*, 431 U.S. at 360-62.

procedure — the regular rather than the unusual practice.”⁸² In such cases, the plaintiff normally relies on statistical evidence showing disparities between similarly situated protected and unprotected employees with respect to hiring, job assignments, promotion, and salary. Other evidence, such as testimony about specific incidents of discrimination, may supplement such statistical evidence.⁸³

In rebuttal, the defendant will attempt to demonstrate that the plaintiff’s “proof is either inaccurate or insignificant.”⁸⁴ For example, an employer might show that the claimed pattern of discrimination is a product of hiring decisions made prior to the passage of Title VII, or that during the period in question the employer made too few employment decisions to justify an inference that it had engaged in a regular practice of discrimination.⁸⁵ If the defendant fails to rebut the plaintiff’s evidence, the trial court may find that a violation has occurred and then determine the appropriate remedy.⁸⁶

By proving that the defendant engaged in a pattern or practice of discrimination, the plaintiff has established class eligibility for appropriate prospective relief and has set out a prima facie case with regard to the remedial phase of the suit in which relief for individuals is considered. During this phase the burden shifts to the employer “to prove that individuals who reapply were not in fact victims of previous hiring discrimination.”⁸⁷

Plaintiffs from colleges and universities may have difficulty in gathering appropriate statistics to support their cases. University-wide statistics may obscure the fact that certain departments are engaging in illegal discrimination. At the same time, departmental statistics may be insufficient because too few decisions have been made. In addition, racial and gender composition may vary from department to department, creating difficulty in establishing meaningful comparison.

Overall, in both class actions and individual suits, the initial burden is on the plaintiff to prove a prima facie case. For some plaintiffs the burden may be insurmountable and their cases will be dismissed. To

⁸² *Id.* at 336.

⁸³ *See Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 470 (8th Cir. 1984).

⁸⁴ *Teamsters*, 431 U.S. at 360.

⁸⁵ *See id.*

⁸⁶ *Id.* at 361.

⁸⁷ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). The normal standard of proof in civil litigation is preponderance of the evidence. *Santosky v. Kramer*, 455 U.S. 745, 754-57 (1982); *Craik*, 731 F.2d at 470 n.8. *But see McKenzie v. Sawyer*, 684 F.2d 62, 77-78 (D.C. Cir. 1982) (imposing a “clear and convincing” evidence burden on the employer).

understand how a plaintiff can meet the burden, one needs to examine some cases in which the plaintiff succeeded. These cases are covered in Part V.

IV. SEXUAL HARASSMENT

Sexual harassment on the college campus is not a recent phenomenon,⁸⁸ but today there is a greater awareness and intolerance of this type of sex discrimination.⁸⁹ Although most of the literature and the cases involve faculty members and students, Title VII protection is available for harassed faculty members in the employment setting. Nevertheless, the unique decisionmaking process in colleges and universities makes sexual harassment more difficult to detect and prove.

Sexual harassment takes place when one abuses her power over another in an effort to gain sexual favors. A faculty member abuses the powers she has over a student when her concern is not with the student's intellectual growth but satisfying her own sexual needs or desire for power. Similarly, a faculty member abuses her power when her vote in an employment decision is based not on the merits but on a discriminatory intent.

An adverse employment decision that was made because the employee refused a superior's sexual demands constitutes sex discrimination within the meaning of Title VII.⁹⁰ Even in the absence of an adverse employment decision, an employer may violate Title VII when management knows about sexual harassment but fails to investigate or remedy the situation.⁹¹

EEOC guidelines define sexual harassment to include:

[U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to the harassment is made either explicitly or implicitly a term or condition of employment, (2) submission to or rejection of the harassment is used as a basis for employment decisions that affect the individual, or (3) the harassment has the purpose or effect of unreasonably interfering with an individual work performance or creating an intimidating, hostile, or offensive work-

⁸⁸ See generally B. DZIECH & L. WEINER, *THE LECHEROUS PROFESSOR* (1984); C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); *ACADEMIC WOMEN ON THE MOVE* (A. Rossi & A. Calderwood eds. 1973).

⁸⁹ See generally Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 *CAP. U.L. REV.* 445 (1981) (history and development of the law on sexual harassment).

⁹⁰ See *supra* notes 6-7.

⁹¹ See *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981).

ing environment.⁹³

Although courts give the guidelines great deference, the guidelines are not inclusive in describing activities that constitute sexual harassment under Title VII.⁹³

The guidelines do not clarify this definition of sexual harassment further. Instead, courts examine complaints on a case-by-case basis to determine if surrounding circumstances indicate a violation of Title VII.⁹⁴ The definition's nebulous nature recognizes that unique proof issues may exist in a particular complaint.

The basic order and allocation of proof in disparate treatment cases, set out in *McDonnell Douglas v. Green*,⁹⁵ may not work in all sexual harassment cases because of the difficulty employees may have in proving that an adverse employment decision was made due to sex plus their failure to submit to sexual advances.⁹⁶ Accordingly, courts have made certain adjustments in the process.

In *Bundy v. Jackson*,⁹⁷ the District of Columbia Circuit adjusted the *McDonnell Douglas* approach to relieve the plaintiff of the burden "to show as part of her prima facie case that other employees who were no better qualified, but who were not similarly disadvantaged, were promoted at the time she was denied a promotion."⁹⁸ Thus, the act of harassment and not the denial of the promotion becomes the basis for the illegal discrimination. Therefore, the proper allocation of proof is as follows:

(1) The employee must show that (a) she was a victim of a pattern or practice of sexual harassment attributable to her employer; and (b) that she applied for and was denied a promotion for which she was technically eligible and of which she has a reasonable expectation.

(2) If the plaintiff makes out her prima facie case, the burden then shifts to the employer to prove by clear and convincing evidence, that its decision was based on legitimate, nondiscriminatory grounds.

(3) As in *McDonnell*, if the employer succeeds in meeting that stringent burden, the plaintiff may attempt to prove that the employer's purported reasons were mere pretexts.⁹⁹

Because of the unique decisionmaking process in higher education, a

⁹³ The EEOC Guidelines on Discrimination, 29 C.F.R. § 1604.11(a) (1980).

⁹⁴ See *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985).

⁹⁵ See 29 C.F.R. § 1604.11(b) (1986).

⁹⁶ 411 U.S. 792 (1973).

⁹⁷ *B. SCHLEI & P. GROSSMAN*, *supra* note 44, at 426.

⁹⁸ 641 F.2d 934, 953 (D.C. Cir. 1981).

⁹⁹ *Id.*

⁹⁹ *Id.*

faculty member may have difficulty in proving that an adverse employment decision was related to harassment. The alleged harasser's vote may be only one vote out of many, and one vote in a process that has a number of different levels. Proving that the harasser influenced the votes of others is even more problematic, given the closed nature of the decisionmaking process and the use of subjective criteria.

However, the plaintiff's chance of winning improves significantly when she proves that other faculty members knew, or should have known, that acts of sexual harassment were taking place. When an employer has actual or constructive knowledge of sexual harassment by the supervisor, the employer is liable for the harassment.¹⁰⁰ An employer may also be liable for sexual harassment between fellow employees when the employer ("or its agents or supervisory employees") knows or should have known of the sexual harassment.¹⁰¹ Thus, the institution might be liable if a court considers the faculty members doing the evaluation the employer, agents of the employer, supervisors, or fellow employees.

More importantly, the institution might also be liable even if no adverse employment decision was made. The United States Supreme Court recently rejected the view that Title VII discrimination must have economic consequences.¹⁰² "Terms, conditions, or privileges of employment" is a phrase that indicates a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment.¹⁰³ In holding that "hostile environment" harassment violates Title VII,¹⁰⁴ the Court held that employees have "the right to work in an environment free from discrimination, intimidation, ridicule, and insult."¹⁰⁵

The unique institutional characteristics and decisionmaking process in colleges and universities may make it difficult to detect if sexual harassment is occurring or if a hostile environment exists. However, these same characteristics and this same process make colleges and universities particularly vulnerable.

¹⁰⁰ See cases cited *supra* note 6.

¹⁰¹ 29 C.F.R. § 1604.11(d) (1986) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

¹⁰² See *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986).

¹⁰³ *Id.* at 2404.

¹⁰⁴ *Id.* at 2405.

¹⁰⁵ *Id.*; see also 29 C.F.R. § 1064.11(a) (1985).

That little litigation is taking place does not mean that little sex discrimination is occurring. Some assume that highly educated people in professional positions do not engage in this type of activity. Yet, recent studies invalidate a prior assumption that faculty members do not harass students.¹⁰⁶ The cause of action is of recent origin, and some litigation has occurred recently at the state level.¹⁰⁷ At the same time, several institutions have quietly¹⁰⁸ or publicly¹⁰⁹ settled complaints of sexual harassment in order to reduce adverse publicity that may damage the institution's reputation. Perhaps other institutions have made similar settlements to avoid litigation. Thus, the extent of sexual harassment on campus is subject to speculation.

V. SPECIFIC CASES

To develop permissible guidelines and procedures, college and university decisionmakers must understand the response of the Equal Employment Opportunity Commission and the courts to faculty members' Title VII complaints. Specifically, decisionmakers must understand that the mere use of subjective criteria in academic employment decision-making has no talismanic quality. This section examines a representative sample of cases in which plaintiff faculty members have succeeded in equity and in law despite the decisionmakers' reliance on subjective criteria.

A. EEOC Cases

The EEOC recognizes the necessity of using subjective criteria with regard to faculty.¹¹⁰

We recognize that employment standards in academia, as in other fields, are somewhat *sui generis* and that a certain measure of subjectivity is inevitable in reaching the decision of whether to retain a faculty member and grant him or her tenure. The situation is made more difficult by the

¹⁰⁶ See generally Goodman, *supra* note 89.

¹⁰⁷ See, e.g., Howard Univ. v. Best, 484 A.2d 958 (D.C. Ct. App. 1984) (terminated university faculty member claimed sexual harassment by other faculty member).

¹⁰⁸ Stanko v. Clark Univ., No. 81-5088 (Mass. Sup. Ct., filed Oct. 13, 1981), 7 Women's Rights Law Rptr. 100 (1982).

¹⁰⁹ Minneapolis Star & Tribune, June 28, 1984, at 2, col. a; Mar. 8, 1984, at 2, col. a; Nov. 7, 1983, at 1, col. a; N.Y. Times, June 29, 1984, at 9, col. 6; Mar. 23, 1984, at 11; Nov. 8, 1983, at 11, 18.

¹¹⁰ See, e.g., 1983 EEOC Decisions (CCH) ¶ 6394, at 4051 (Aug. 7, 1973) (claims that instructor was "abrasive" were discounted as a true basis for departmental action); 1983 EEOC Decisions (CCH) ¶ 6563, at 4051 (Feb. 28, 1976) (female instructor required to attain a higher "academic achievement").

fact that in making or reviewing such a decision one is not dealing with the relative qualifications of competing individuals, but rather with the qualifications of a person relative to some nebulous norm.¹¹¹

The level of subjectivity is not the important criterion. Rather, the controlling factor is whether subjectivity is used to conceal discrimination. However, the Commission refuses to let subjective criteria mask discrimination. In one case the Commission weighed the positive contribution that the employee made to the university against her "personality conflicts" and "aggressiveness" and found that sex was a factor in the way her male colleagues perceived her: "We believe that the treatment that females can expect from males under similar circumstances can be viewed with equal skepticism. Further, it is significant that only male faculty members considered Charging Party's personality too aggressive. Charging Party's female colleagues voiced no such complaints."¹¹² In making a determination, the Commission often relies upon the *Rowe v. General Motors Corp.*¹¹³ analysis. The Commission may use statistical evidence to bolster its decision that subjective criteria enabled the employer to camouflage its discriminatory decisions. In one case the Commission was influenced by the fact that only 4.2 percent of the tenured faculty was female, and by the fact that while 32.4 percent of male faculty members achieved tenured status, only 11.9 percent of their female counterparts gained tenure.¹¹⁴

On the other hand, statistics are not indispensable in cases involving university discrimination. In one case, without statistical support, the Commission still found sexual discrimination by a tenure committee when the reason for denying the charging party tenure was her inability to get along with some of the faculty.¹¹⁵ In a similar statistically barren case, the Commission found sufficient evidence to demonstrate that a female assistant professor was treated differently than her male counterparts when the primary decisionmaker had an attitude that ster-

¹¹¹ 1983 EEOC Decisions (CCH) ¶ 6394, at 4051, 4053 (footnotes omitted) (Aug. 7, 1973).

¹¹² *Id.* ¶ 6394, at 4055-56; see also 1983 EEOC Decisions (CCH) ¶ 6657, at 4595, 4597 (Dec. 8, 1975) (female faculty member lacked the "force" to sustain classroom discussion).

¹¹³ 457 F.2d 348 (5th Cir. 1972); see, e.g., 1983 EEOC Decisions (CCH) ¶ 6432, at 4153 (Mar. 6, 1976). See generally Comment, *Professional Jobs*, *supra* note 46, at 199 (predicting judicial response to a "subjective criteria defense" asserted by employers and suggesting plaintiff's strategies in meeting the defense) [hereafter Comment, *Subjective Criteria*].

¹¹⁴ 1983 EEOC Decisions (CCH) ¶ 6410, at 4096 (Nov. 12, 1973).

¹¹⁵ *Id.* ¶ 6394.

eotyped men and women.¹¹⁶

To some extent, the Commission's lack of insistence upon statistical evidence may be based on the recognition that a meaningful statistical group is difficult to find in this area. Some colleges and universities make few faculty employment decisions each year. In addition, many of these decisions are decentralized and made primarily at the department level in the form of positive or negative recommendations. Because the gender and racial composition may vary from department to department, an accurate statistical comparison may be difficult to ascertain. Moreover, the use of university-wide statistics may obscure certain departments' illegal discrimination. Thus, the Commission is focusing on the point in the process when a negative employment recommendation has been made and on that particular unit as a separate entity within a university. In some cases the focus may be on a single individual.¹¹⁷

Most cases, however, involve several layers of decisionmakers, and may include an appeals system to review initial negative decisions. The presence of such a system does not prevent a reasonable cause finding. In a case involving a medical school, the Commission, relying on statistical evidence, found reasonable cause to believe that an elaborate tenure system, consisting of several faculty committees and several administrative layers, using highly subjective criteria that were applied almost exclusively by men, treated women differently than it treated men under similar circumstances.¹¹⁸

That some universities have written guidelines stating their subjective decisionmaking criteria does not influence the EEOC.¹¹⁹ In one case, relying on statistical evidence, the Commission found reasonable cause to believe that sex discrimination occurred when a charging party was denied tenure, even though the faculty handbook set forth the subjective and objective qualifications for tenure.¹²⁰ In another case, the

¹¹⁶ *Id.* ¶ 6426, at 4132.

¹¹⁷ *Id.* at 4134 (department chairman had an attitude of "condescension" toward women and overtly treated women less favorably than men).

¹¹⁸ 1983 EEOC Decisions (CCH) ¶ 6410, at 4096 (Nov. 12, 1973).

¹¹⁹ See Comment, *Professional Jobs*, *supra* note 46, at 201.

¹²⁰ See 1983 EEOC Decisions (CCH) ¶ 6410, at 4096 (Nov. 12, 1973). For example, the criteria for an associate professor is as follows:

An Associate Professor should have completed all formal academic preparation for a teaching career and should have had substantial experience in teaching, research, advanced study, or applicable non-academic professional experience.

He should have demonstrated a capacity and will to maintain teaching effectiveness and should have a capacity for continuing growth, as a teacher, as a scholar, and as a member of his profession. He should have

Commission found impermissible racial bias when an otherwise qualified white music teacher was not rehired based on a failure to meet the "needs of black students," despite the university's reliance on written guidelines listing subjective criteria including the "capacity to meet the educational needs of the community."¹²¹

The concern about the use of subjectivity is heightened when a charging party is subjectively evaluated by someone of a different race or sex. In one case in which a white instructor was discharged on the basis of subjective criteria used by a black department chairman at a predominantly black state university, the Commission found the discharge was based on spurious reasons and on a criterion not applied to similarly situated black faculty members.¹²² The white faculty member originally was discharged without the benefit of official explanation. In reviewing the facts of this case, the Commission noted:

Courts have often observed that proof of discrimination is seldom direct. Often an inference of discrimination must be drawn from the totality of the circumstances, and while one factor standing alone might not warrant an inference of discrimination, a coalescence of factors may suffice to so demonstrate. In this case, one major circumstance to consider is the fact that the entire process of determining who shall or shall not be reappointed is apparently accomplished in a highly subjective, essentially non-reviewable manner. It is clear from the evidence presented above with respect to Respondent's reasons for not reappointing Charging Party, that any guidelines which Respondent does maintain are at best nebulous and have indeed been applied in a highly subjective, unequal manner without the benefit of notice. Any employment policy maintained in this way can operate to disqualify an otherwise qualified person. This is so particularly where, as here, those who make the employment decisions are members of a racial group different from that of the person adversely affected.¹²³

Nevertheless, a claim of discrimination is not necessarily foreclosed if the evaluating party is of the same race or sex as a charging party.¹²⁴ In a case in which the charging party and all evaluators were white, the Commission held that the charging party may have been subjected to racial discrimination because the evaluators were seeking black

made substantial progress in attaining eminence in a scholarly or professional field. He should have the capacity for consistently mature performance in course and curriculum planning, in the guidance and counseling of students and of younger staff members, and in participation in the activities of the university.

Id. ¶ 6410, at 4098.

¹²¹ *Id.* ¶ 6427, at 4139, 4140.

¹²² *Id.* ¶ 6432, at 4153.

¹²³ *Id.* at 4155 (citations and footnotes omitted).

¹²⁴ See Comment, *Professional Jobs*, *supra* note 46, at 201.

teachers.¹²⁵ The Commission noted that: "[A]lthough *Rowe* involved subjective selection criteria exercised by whites to the disadvantage of blacks, it has been the commission's experience that regardless of the race or sex of the evaluator, subjective criteria are suspect and provide a convenient tool for the discriminator."¹²⁶

Overall, the Commission has not hesitated to challenge subjective evaluations. At the same time, it has been cautious about testing the subjective criteria to determine job-relatedness or business necessity.

B. Federal Court Cases

Although many faculty members have sued their respective institutions over unfavorable employment decisions, few have won.¹²⁷ The losses are attributable to several factors, the most prominent of which is the difficulty in proving a prima facie case. Discrimination is rarely overt. On the contrary, it is usually hidden, and sometimes quite subtle. This section examines some instances in which faculty members have prevailed.

Under Title VII a faculty member can allege that she was intentionally subjected to disparate treatment on account of her race, color, sex, religion, or national origin; or because some facially neutral practice of the institution had an unjustified disparate impact on members of her particular race, color, sex, religion, or national origin.¹²⁸ The faculty member may sue as an individual or as the representative of a class of similarly situated individuals.¹²⁹ In either case, the plaintiff has the initial burden of proving a prima facie case.

1. Preliminary Relief

The Act's enforcement provisions allow courts to enjoin institutions that have intentionally engaged in or are intentionally engaging in an

¹²⁵ 1983 EEOC Decisions (CCH) ¶ 6427, at 4139 (Apr. 2, 1974).

¹²⁶ *Id.* ¶ 6427, at 4142-43.

¹²⁷ A list of such cases occurring between 1974-80 is found in Yurko, *supra* note 2, at 482 n.48.

¹²⁸ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *Sweeney v. Board of Trustees*, 569 F.2d 169, 174 n.8 (1st Cir.), *vacated and remanded on other grounds*, 439 U.S. 24 (1978) (per curiam).

¹²⁹ See, e.g., *Scott v. University of Del.*, 455 F. Supp. 1102 (D. Del. 1978) (class action brought by black professor against university on behalf of all blacks discriminated against by the university in regard to university employment practices), *modified*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979).

unlawful employment practice.¹⁸⁰ Nevertheless, a court will issue a preliminary injunction only upon a demonstration that the plaintiff will probably prevail on the merits and that, absent such preliminary injunctive relief, the plaintiff will suffer irreparable injury.¹⁸¹ Thus, even though the plaintiff wishes to maintain the status quo until trial, the court must look at both the merits and the likely harm.¹⁸² A plaintiff may have a difficult time in proving irreparable injury because many institutions give the person denied tenure one year notice before service is terminated.¹⁸³

In *EEOC v. Tufts Institution of Learning*,¹⁸⁴ Professors Joost-Gaugier and White requested preliminary injunctions for reinstatement pending litigation on the merits of their charges of sex discrimination. Each party offered the testimony of witnesses and substantial documentary evidence.¹⁸⁵ The district court denied the requested injunction for Joost-Gaugier while granting it for White.

The court refused to examine their objective and subjective qualifications, and instead focused on the institution's procedures.¹⁸⁶ The court noted the distinction between the criteria used and the decisionmaking process:

Evaluation of a faculty member's eligibility for promotion in teaching rank or for tenure necessarily involves exercise of the judgments of several persons. In applying the criteria for academic advancement, the weighing of the factors properly to be considered can seldom, if ever, be reduced to measurements by mechanical processes or standardized tests. In the absence of specific standards in the Act or under the regulations, the criteria and procedures established by a university . . . are controlling. Thus where the criteria are reasonably related to the professional duties of the academic position sought and to the personal qualifications of the appli-

¹⁸⁰ Section 706 (42 U.S.C. § 2000e-5(g) (1982)) provides in part:

(g) if the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

¹⁸¹ See *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 390 F.2d 113 (1st Cir.), cert. denied, 391 U.S. 914 (1968).

¹⁸² *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152 (D. Mass. 1975).

¹⁸³ AAUP, *supra* note 13; 1976 *Recommended Institutional Regulations on Academic Freedom and Tenure* § 8 at 20.

¹⁸⁴ 421 F. Supp. 152 (D. Mass. 1975).

¹⁸⁵ *Id.* at 157.

¹⁸⁶ *Id.* at 158.

cant, and are applied through prescribed or settled procedures fairly and reasonably followed, the court should not substitute its judgment for that of the university authorities.¹³⁷

The court found that the procedures were not fair in White's case because the five member subcommittee of the Committee on Tenure and Promotion that made the initial recommendation to deny tenure included an openly sexist department chairman as a member.¹³⁸ The fact that only one subcommittee member was sexist did not alter the suspect character of the deliberation.¹³⁹ Rather, that he was chairman and the sole tenured member of the department served to accentuate his influence.¹⁴⁰ The taint of sexism had infected the subcommittee's vote. "White was entitled to be judged by a subcommittee that was free from the influence of sex bias."¹⁴¹

In contrast, Joost was unable to establish a prima facie case and thus was denied injunctive relief. The court found that the decision not to reappoint her was made by an unprejudiced dean and not by the sexist department chairman. The dean concluded that "Joost's performance as a scholar left much to be desired" and that "Tufts could and should make a better and stronger appointment."¹⁴² Thus, there was a rational basis for the decision that the institution's procedures were fairly and reasonably followed.

The court recognized that actual sex discrimination in university employment practice may not be readily discerned. Sometimes statistical data will furnish evidence of disparate treatment.¹⁴³ Yet, "statistics can be misleading, and a critical analysis of the data will ordinarily be required."¹⁴⁴ Unless the statistics speak for themselves by showing a clear imbalance favoring one sex over another, a plaintiff needs more significant evidence to meet the burden of establishing a prima facie case.¹⁴⁵

Another district court used an entirely different mode of analysis when faced with determining whether to issue a preliminary injunc-

¹³⁷ *Id.* at 161, 163.

¹³⁸ *Id.* at 164.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 163.

¹⁴³ *See, e.g.*, *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973) (plaintiff's presentation of statistics showing the imbalance of men and women with tenure in the medical school established her prima facie case of sex discrimination).

¹⁴⁴ *Tufts*, 421 F. Supp. at 158.

¹⁴⁵ *Id.*

tion.¹⁴⁶ The court noted that a preliminary injunction's purpose was to maintain the status quo pending a final determination on the merits.¹⁴⁷ Thus, the court did not consider the likelihood that the plaintiff would prevail and focused instead on balancing the hardship in granting or denying injunctive relief. In this case, the hearing commenced on the day before plaintiff's contract was to terminate. Therefore, the court recognized that "the underlying question of sex discrimination cannot be disposed of at this stage, but is a difficult, complex issue requiring detailed analysis and extensive testimony."¹⁴⁸ In balancing the harm to the plaintiff versus that to the institution, the court found "the arguments advanced by the college show no real injury at all which would result from retaining the plaintiff as a faculty member for another semester or even a full year."¹⁴⁹

In another case, a court followed an entirely different approach by not looking at the hardship, but at the merits.¹⁵⁰ After five days of testimony, the court determined that the plaintiff had made out a prima facie case of intentional discrimination on the basis of sex by the following proof: (1) statistical evidence of a pattern and practice of discrimination against women; (2) evidence that a comparable male was granted tenure through disparate treatment based on sex; (3) proof that men were given higher salary increases than women; (4) the procedures adopted by the department were never used prior to the termination; (5) evidence that the defendants in their affirmative action plan had taken no substantial steps to eliminate discrimination against women; and (6) evidence that the number of women on the faculty decreased during the time in which complaints on sex discrimination were pending.¹⁵¹

Ironically, although this plaintiff won a preliminary injunction on the merits, she also lost the case on the merits. In a trial lasting seventy-four days during seventeen weeks, with 12,085 pages of testimony from seventy-three witnesses, and close to 1000 exhibits, the court found that the defendant's position was justified and that plaintiff had shown no violation of her statutory or constitutional rights.¹⁵² In essence, the court found that the employment decision was based on the

¹⁴⁶ See *Wagner v. Long Island Univ.*, 419 F. Supp. 618 (E.D.N.Y. 1976).

¹⁴⁷ *Id.* at 619.

¹⁴⁸ *Id.* at 619-20.

¹⁴⁹ *Id.* at 622.

¹⁵⁰ See *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973).

¹⁵¹ *Id.* at 1011.

¹⁵² *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977).

plaintiff's ineffectiveness as a teacher and not on discriminatory reasons.

The various approaches employed by courts in preliminary relief hearings are not necessarily inconsistent. The burden is on the moving party to show a reasonable probability of success in litigation and that she will be irreparably injured if, pending litigation, relief is not granted to prevent a change in the status quo.¹⁵³ In cases of sex discrimination, courts rarely will find direct evidence of discrimination such as a faculty committee resolution to engage in sex discrimination. Thus, courts must draw inferences from the circumstances.¹⁵⁴ Yet, plaintiffs have achieved some success because they were able to establish enough of a case to maintain the status quo pending a more complete hearing. Yet, the ultimate decision in *Johnson* suggests that in preliminary relief cases courts may look less at the merits and more toward balancing the hardships. The only alternative would be a more complete hearing on the merits at the preliminary relief level.

To some extent, the current direction that these preliminary relief cases are taking could assist the institution. Once a dismissed faculty member files a complaint, some colleges may be reluctant to hire a replacement for her because of subsequent problems if the institution loses. They may continue an informal or formal review of the situation in an effort to settle the matter. Besides causing a potential delay of a replacement, such reluctance may also cause the faculty member to feel that she will be retained and thereby reduce her incentive to look for another job. The result is that the plaintiff will suffer a greater harm than the institution if the status quo is not maintained.

The institution could reverse the balance by 1) giving the dismissed faculty member adequate notice of dismissal, which will give her sufficient time to change positions; 2) giving her no additional appeals; and 3) operating under the presumption that she will not prevail and, accordingly, replacing her or restructuring the academic setting based on her anticipated departure. This strategy would force the plaintiff to seek temporary relief much earlier to stop the institution from replacing her, which might shift the hardship balance in favor of the employer. When the plaintiff temporarily has a job and may have sufficient time to get a full hearing on the merits, a court will probably be reluctant to grant temporary relief. With the hardship balance tipped in the defendant's favor, the plaintiff's hardship ceases to be a factor in preliminary

¹⁵³ See *A.L.K. Corp. v. Columbia Pictures Indus., Inc.*, 440 F.2d 761 (3d Cir. 1971).

¹⁵⁴ *Johnson*, 359 F. Supp. at 1007-08.

relief decisions unless the defendant increases her hardship by replacing her.

Moreover, the elimination of the plaintiff's hardship argument would make it less likely that the plaintiff could appeal the decision to deny preliminary relief because the area within the trial judge's discretion would be reduced. In reviewing a preliminary injunction decision, appellate courts examine whether the district court abused its discretion. The appellate court's role is "to decide whether the district court applied proper legal standards and whether there was reasonable support for its evaluation of factual questions."¹⁵⁵ In other words, unless the trial court clearly abused its discretion, the decision should stand.

In actual practice the standard may be higher. The issue of whether a party was a victim of discrimination is a mixed question of law and fact subject to a clearly erroneous standard of review.¹⁵⁶ Thus, to prevail in her contention that the trial court drew the wrong conclusion from the evidence before it, the appellant must show that the court's conclusion had no reasonable support.¹⁵⁷ In employment discrimination cases, a decision will not be overturned as long as the trial judge weighs the evidence with care and concludes that the plaintiff has not sustained her burden of proving that the reasons given for her dismissal were pretextual or that consideration of her sex entered into the decision.¹⁵⁸

Similarly, an institution is unlikely to get a reversal of a decision to grant preliminary relief. Yet, eliminating the plaintiff's hardship argument would result in fewer preliminary relief decisions being made. Therefore, both parties would have to seek a final decision on the merits.

2. Decisions on the Merits

Faculty members who have brought employment claims against their employers have not achieved considerable success. Judges are unwilling to substitute their judgment for that of the university unless illegal employment practices have occurred. The complexity of the decisionmaking process used by colleges and universities can make illegal employment practices difficult to detect. Nevertheless, plaintiffs can prevail in two types of cases: 1) when the institution violates its own practices or

¹⁵⁵ *Hochstadt v. Worcester Found.*, 545 F.2d 222, 229 (1st Cir. 1976).

¹⁵⁶ *See* FED. R. CIV. P. 52(a) ("Findings of fact [by the court] shall not be set aside unless clearly erroneous."); *Sweeney v. Board of Trustees*, 604 F.2d 106, 109 n.2 (1st Cir. 1979).

¹⁵⁷ *See* *Manning v. Trustees of Tufts College*, 613 F.2d 1200, 1203 (1st Cir. 1980).

¹⁵⁸ *Id.* at 1204.

procedures, or 2) when the institution engages in blatant misconduct. To a certain extent, both types of cases tend to overlap, as illustrated in *Kunda v. Muhlenberg College*.¹⁵⁹ After a trial on the merits, the district court found that Muhlenberg College discriminated against Kunda on the basis of sex.¹⁶⁰

Kunda was denied promotion during the 1971-72 academic year. Throughout the internal institutional process, including an appeal, she was never told that she needed a master's degree to be promoted or considered for tenure in the future.¹⁶¹ The following academic year Kunda again requested consideration for promotion. Yet, due to an "egregious oversight"¹⁶² the dean failed to submit her name to the appropriate committee. The committee later unanimously recommended her promotion. Despite the report, the dean disagreed with the recommendation because Kunda did not possess a master's degree. Accordingly, the president did not recommend her promotion.

During the next academic year, all senior members of the department wrote to the dean recommending Kunda's promotion and, for the first time, that she be granted tenure. The committee unanimously concurred. Again, the dean forwarded a negative recommendation to the president, stating that Kunda's performance justified a permanent appointment but cited as the basis for his decision the high percentage of tenured faculty in the department as well as the department's uncertain future. The president concurred and Kunda was notified that she would receive a terminal contract for the 1974-75 academic year.¹⁶³

The trial court, noting that the law prohibits only "discrimination," evaluated the college's practices toward Kunda in light of its practices toward the allegedly more favored male group.¹⁶⁴ Using this analysis, the court noted that during the period of Kunda's employment three faculty members without master's degrees were promoted. The dean had specifically counseled the male faculty members of the necessity of obtaining this degree, but at no time gave similar advice to Kunda.¹⁶⁵

The court also found two procedural irregularities that helped to establish the prima facie case. First, in contrast to his usual approach, the dean attended committee meetings to speak against Kunda's candidacy.

¹⁵⁹ 621 F.2d 532 (3d Cir. 1980).

¹⁶⁰ *Id.* at 535.

¹⁶¹ *Id.* at 537.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 539.

Second, by "egregious oversight," he failed to submit her name with the other candidates.¹⁶⁶

Overall, the court found that the plaintiff was treated differently than male faculty members. Because the college articulated no reason for the disparate treatment, the court decided that the plaintiff had proved her case.¹⁶⁷ The appeals court affirmed the decision.

Kunda demonstrates that a plaintiff can succeed even if the employer has no willful intent to discriminate. The requisite motive can be inferred "from the mere fact of differences in treatment."¹⁶⁸ The fact that the plaintiff was treated differently was enough to establish a prima facie case. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the disparate treatment. The employer does not have to prove absence of discriminatory motive.¹⁶⁹ In *Kunda*, the plaintiff did not have to show that the college engaged in a willful plan to exclude women. Nor did she have to show that the dean was biased against her or against women generally. She merely had to show that she was treated differently. The employer merely had to show that there was a legitimate reason for treating her differently. In this case the plaintiff met her burden while the employer did not.

The theory of disparate treatment raises closely related issues — affirmative action and reverse discrimination. May employers lawfully consider race, sex, religion, or national origin when making hiring and promotion decisions? This question leads to many others and brings into focus the tension inherent in Title VII.

A series of Supreme Court decisions makes it clear that Title VII applies to all people, white or black, male or female. In *Griggs v. Duke Power Co.*,¹⁷⁰ a unanimous Court stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress had proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."¹⁷¹ Five years later the Supreme

¹⁶⁶ *Id.* at 539-40.

¹⁶⁷ *Id.* at 539.

¹⁶⁸ *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 246 (3d Cir. 1973); *see also* *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) ("Proof of discriminatory motive is critical [to a claim of disparate treatment], although it can in some situations be inferred from the mere fact of differences in treatment.").

¹⁶⁹ *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978); *see also* *Furnco Const. Co. v. Waters*, 438 U.S. 567 (1978).

¹⁷⁰ 401 U.S. 424 (1971).

¹⁷¹ *Id.* at 431. Section 703(j) of Title VII provides in pertinent part:

Court in *McDonald v. Santa Fe Trail Transportation Co.*¹⁷² concluded that discrimination against whites was prohibited by Title VII and section 1981 of the Civil Rights Act of 1866.¹⁷³

The issue of reverse discrimination came before the Supreme Court twice¹⁷⁴ before it was addressed under Title VII in *United Steelworkers of America v. Weber*.¹⁷⁵ In that case the majority concluded that although Title VII prevents the federal government from requiring preferential treatment, it was not intended to prohibit voluntary affirmative action. The Court did not draw a discernible line between permissible and impermissible affirmative action. The permissible plan in *Weber* included the following factors: 1) its temporary duration; 2) its remedial purpose of breaking down traditional patterns of racial segregation; 3) its "voluntary nature"; and 4) it did not unnecessarily trammel the interests of white workers because it did not abrogate preexisting rights and did not absolutely bar the advancement of whites.¹⁷⁶

Cramer v. Virginia Commonwealth University,¹⁷⁷ an earlier district court decision involving reverse sex discrimination in a college employment setting, ruled in favor of the plaintiff. Because of affirmative action, the university refused to consider any applications by white males for a teaching position. The court, using an equal protection analysis, ruled that sex cannot serve as the sole factor upon which differential treatment is determined.¹⁷⁸ The court also reviewed Title VII and found that the Act's clear and encompassing language "prohibits employment practices which, *inter alia*, predicate hiring and promotion

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer

42 U.S.C. § 2000e-2j (1982).

¹⁷² 427 U.S. 273 (1976).

¹⁷³ See 42 U.S.C. § 1981 (1982).

¹⁷⁴ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (medical school applicant challenged special admissions program which reserved a set number of seats for minority group members); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (plaintiff contended that the University of Washington Law School's minority admissions policy racially discriminated against him).

¹⁷⁵ 443 U.S. 193 (1979).

¹⁷⁶ B. SCHLEI & P. GROSSMAN, *supra* note 44, at 820.

¹⁷⁷ 415 F. Supp. 673 (E.D. Va. 1976).

¹⁷⁸ *Id.* at 677-78.

decisions on gender-based criteria."¹⁷⁹ On appeal this case was vacated and remanded.¹⁸⁰

Cramer's affirmative action plan clearly would not have withstood the guidelines set later in *Weber*. Any plan that expressly excludes all members of one sex cannot stand. Neither Title VII nor the fourteenth amendment requires an employer to institute an affirmative action program.¹⁸¹ Nevertheless, once the institution establishes a legitimate plan, evidence that the employer has failed to live up to the plan is relevant to the question of discriminatory intent.¹⁸² An example of this is found in *Craik v. Minnesota State University Board*.¹⁸³ The court found, in view of the plan's plain language, that the defendants' explanation of why they failed to set goals and timetables, or why the affirmative action committee met irregularly, was untenable. Moreover, the court found that many faculty and administration members were ignorant about the meaning of affirmative action and that the university made no efforts to remedy this situation through formal training programs.¹⁸⁴ In general, the university was uncommitted to the plan and violated its own system's procedures.

These cases demonstrate that once an institution establishes a system of procedures, it must apply them fairly. Moreover, an institution cannot ignore a legitimate affirmative action system once it is in place. Once a plaintiff shows that she was treated differently in the system because of race, color, religion, sex, or national origin,¹⁸⁵ the plaintiff has established a prima facie case.

The other group of cases in which faculty plaintiffs have succeeded in attacking unfavorable employment decisions are marked by the presence of egregiously discriminatory conduct by the institution.¹⁸⁶ The treatment received by the plaintiff in *Kunda*¹⁸⁷ is one illustration of this. An even more blatant example is set out in *Craig v. Alabama State University*.¹⁸⁸

¹⁷⁹ *Id.* at 678.

¹⁸⁰ *Cramer v. Virginia Commonw. Univ.*, 586 F.2d 297 (4th Cir. 1978).

¹⁸¹ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

¹⁸² *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1135 n.14 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981).

¹⁸³ 731 F.2d 465 (8th Cir. 1984).

¹⁸⁴ *Id.* at 472-73.

¹⁸⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁸⁶ *Yurko*, *supra* note 2, at 488.

¹⁸⁷ 621 F.2d 532.

¹⁸⁸ 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd mem.*, 614 F.2d 1295 (5th Cir. 1980).

Until 1967, Alabama State University was operated as an officially segregated state institution; in that year, a court ordered the desegregation of the state's dual system of higher education.¹⁸⁹ Nevertheless, the president, citing alumni and community resistance, strongly opposed allowing whites to move into administrative positions.¹⁹⁰ In addition, the president gave a list of white faculty members that he wanted fired to the academic vice president and told him to "come up with" negative recommendations.¹⁹¹ Statistics and testimony clearly indicated that the president refused to rehire some of the most promising faculty members because they were white.¹⁹²

*Hill v. Nettleton*¹⁹³ is another case in which the plaintiff prevailed because of her employer's egregious misconduct. During the 1973-74 academic year the plaintiff was directed to allocate her time in equal thirds to teaching, coaching, and administrating. She became a very outspoken advocate for the advancement of women's athletics and for the equalization of the men's and women's athletic budgets. In February 1974 she was advised that her contract would not be renewed, citing a number of deficiencies including failure to make an effort toward the completion of a doctorate degree.¹⁹⁴

The plaintiff challenged the decision and an ad hoc committee was appointed to investigate the matter. The committee unanimously concluded that the reasons for her termination were invalid and that she should be reappointed.¹⁹⁵ She was allowed to continue for one more year provided that she complete a certain number of credits toward the degree. Because of her multiple duties she was unable to complete the schedule and, accordingly, her contract was not renewed.

The court found that the employer had retaliated against her because of her sex, finding that the degree requirement came only after she had antagonized her superiors.¹⁹⁶ The court also noted that the men who coached male teams were under no pressure to obtain advanced degrees and that the men's athletic director had no teaching responsibilities.¹⁹⁷

The cases in which faculty members prevail because of their em-

¹⁸⁹ *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.), *aff'd mem. sub. nom.*, *Wallace v. United States*, 389 U.S. 215 (1967).

¹⁹⁰ *Craig*, 451 F. Supp. at 1209.

¹⁹¹ *Id.* at 1213.

¹⁹² *Id.* at 1209-12.

¹⁹³ 455 F. Supp. 514 (D. Colo. 1978).

¹⁹⁴ *Id.* at 517.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 519.

¹⁹⁷ *Id.*

ployer's blatant misconduct are, indeed, exceptional. One can speculate that much discrimination took place prior to Title VII's enactment because of arbitrary decisionmaking processes dominated by white males and because there was no remedy beyond the institution.¹⁹⁸ One commentator has offered several reasons for the constant success of the university defendant:

One is the possibility of an elusive bias on the part of the judges who try these cases. Granting that the current judiciary is undoubtedly free of overt racial, sexual, or class prejudice, there may be a more subtle form of bias operating here. The deans and professors who are attacked by the plaintiff as discriminators share with the judge the status of membership in one of the "intellectual professions" . . . he may find it difficult to believe that his professional peers acted out of the benighted motives alleged by the plaintiff.¹⁹⁹

Plaintiffs may feel that they cannot get relief from the judiciary or from their institution because both sets of decisionmakers are dominated by white males. However, that may beg the question. The key must be to determine if discrimination exists²⁰⁰ and how to prevent it.

VI. GUIDELINES FOR COLLEGES AND UNIVERSITIES

The cases discussed above demonstrate the difficulty that Title VII plaintiffs have in proving their cases. Some commentators blame the legal system for the lack of plaintiff success because of the general judicial policy of deference to college decisions, the current method of establishing the burden of proof, and the use of subjective criteria. Others blame the colleges themselves for not eliminating discrimination and for allowing subtle forms of discrimination to enter into the process. This section examines proposed legal and institutional solutions.

A. Legal Solutions

Several commentators have suggested that legislative reform is the necessary antidote, but that reform is unlikely.²⁰¹ Therefore, the courts may have to change the process to put plaintiffs on an equal basis with

¹⁹⁸ See generally T. CAPLOW & R. MCGEE, *THE ACADEMIC MARKETPLACE* (1958). The authors noted that "[w]omen scholars are not taken seriously and cannot look forward to a normal professional career." *Id.* at 226.

¹⁹⁹ Yurko, *supra* note 2, at 491.

²⁰⁰ For a documented study of the discrimination against women in universities, see Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975 (1983).

²⁰¹ See *id.* at 1011.

defendants.

One approach is to alter the burden of proof in disparate treatment cases.²⁰² Presently the plaintiff has the initial burden to establish a prima facie case, which raises an inference of discrimination because the defendant's acts, if otherwise unexplained, are more likely than not to be based on impermissible factors. As one court explained, "we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."²⁰³ In turn, to defeat the plaintiff's claim, the defendant merely has to articulate some legitimate nondiscriminatory reason for the decision.²⁰⁴ Thus, the plaintiff has to prove a prima facie case while the defendant only has to articulate reasons.

Requiring the employer to prove, not merely articulate, nondiscriminatory reasons for the adverse decision could put the parties on a more equitable footing and might facilitate relief to plaintiffs unable to prove pretext.²⁰⁵ Moreover, the "articulation" standard can be interpreted "either as a rule on the burden that shifts to a defendant after the plaintiff establishes a prima facie case, or as a test for the quantum of proof that defendant must present."²⁰⁶ If the standard merely shifts the burden, the defendant must meet the same evidentiary standard that the plaintiff must meet. Yet, as generally interpreted,²⁰⁷ the "articulation" standard does more than this. It sets out a standard that requires far less than a preponderance of the evidence. Requiring the employer to prove the existence of, and its reliance on, a legitimate reason puts the disparate treatment theory on a basis similar to the disparate impact theory in that it would impose in either case a strenuous burden upon the defendant.²⁰⁸

Another proposal would go even further and require a uniform stan-

²⁰² See Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981) (examines the traditional approach used by courts to allocate burdens and proposes coherent approach to allocation of burdens of pleading and proof in discrimination cases).

²⁰³ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); see Belton, *supra* note 202, at 1264.

²⁰⁴ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²⁰⁵ See Cooper, *supra* note 200, at 1011.

²⁰⁶ Belton, *supra* note 202, at 1272.

²⁰⁷ See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (holding that when plaintiff in Title VII case has proved prima facie case of employment discrimination, defendant bears only burden of explaining clearly nondiscriminatory reasons for its action).

²⁰⁸ Cooper, *supra* note 200, at 1011-12.

dard for all Title VII claimants, both lower level and upper level employees.²⁰⁹ According to Professor Elizabeth Bartholet, the emerging distinction between upper and lower level jobs is indefensible as a matter of either law or policy. All criteria, including subjective upper level criteria, should be examined under the disparate impact analysis. Under the disparate impact theory, employment policies that have a disparate impact on any protected class are unlawful unless the employer can show that those policies are job related and justified by "business necessity."²¹⁰

Professor Bartholet sees little need to have separate theories for disparate treatment and disparate impact. She would use disparate impact analysis in all Title VII claims because it places an equal burden of proof on both the plaintiff and the defendant. Under the disparate treatment doctrine, the employer need only articulate a legitimate reason for the differential treatment, and unless the employee can show that this explanation is a pretext masking intentional discrimination, the employee loses. By contrast, under the disparate impact theory the employer must prove the job relatedness and business necessity of her selection devices.²¹¹

This approach has some merit because it recognizes the need to use objective as well as subjective criteria. This combats the suggestion that employment decisions should become more objective in higher education. Faculty members should not be hired, promoted, or granted tenure solely on the basis of the number of hours taught or pages published.²¹² Clearly, subjective factors are important. The Bartholet analysis allows a plaintiff to challenge the validity of the standards used to measure faculty effectiveness in teaching, scholarship, and service to the university. Moreover, the plaintiff could also challenge the procedural process in a subjective system to determine its validity in terms of evaluating what it is supposed to evaluate.

A third approach, advanced by Professor Christine Cooper,²¹³ would use the pattern and practices formulation of *International Brotherhood of Teamsters v. United States*²¹⁴ and apply it to individual claims as

²⁰⁹ See Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

²¹⁰ *Id.* at 1004; see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

²¹¹ See Bartholet, *supra* note 209, at 1004 ("Under the disparate impact theory, by contrast, the employer must prove the job-relatedness and business necessity of his selection devices.").

²¹² See *id.* at 1007.

²¹³ Cooper, *supra* note 200, at 1016.

²¹⁴ 432 U.S. 324, 335-36 n.15 (1977).

well as to class actions.²¹⁵ This approach recognizes that the plaintiff's initial burden in a disparate treatment case should not be "onerous," and argues that the plaintiff should be allowed to use statistics in a less refined manner than interpreted after *Hazelwood School District v. United States*.²¹⁶ Professor Cooper notes that post-*Hazelwood* courts have refused to accord much weight to the plaintiff's statistical analysis during the initial phase.²¹⁷ This interpretation has collapsed the three-stage process into one stage.²¹⁸

By using the pattern and practice approach, however, the trial can be bifurcated into liability and damages stages.²¹⁹ Once it has been determined that the defendant had engaged in a standard operating procedure, proved by glaring statistical disparities, the court can treat each employment decision as infected by that practice.²²⁰ With liability established, the plaintiff is entitled to relief in the damages phase, absent proof by the employer that the individual was unqualified for the position.²²¹ Cooper also suggests the use of special masters in academic cases.²²²

B. Institutional Solutions

The proposed changes in the legal system would allow the courts to delve more deeply into the procedural process and the use of subjective criteria while, at the same time, placing the plaintiff and the defendant on a more equal basis in terms of evidentiary burden. Yet, these proposals still acknowledge that the court's role is not to make employment decisions but to insure fair employment practices in institutions of higher learning. Thus, the institution should take guidance from the legal system to insure that all employment decisions are fair and legal.

Developing appropriate guidelines for institutions to follow is no easy task. The institution's very nature, its governing structure, its decisionmaking process, and the unique employment characteristics of faculty members, make any comparison with an industrial counterpart somewhat problematic. Nevertheless, the cases previously discussed, in

²¹⁵ Justice Marshall suggested this approach in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 581-82 (1978) (Marshall, J., concurring in part).

²¹⁶ 433 U.S. 299 (1977).

²¹⁷ Cooper, *supra* note 200, at 1014.

²¹⁸ *Id.* at 1015.

²¹⁹ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

²²⁰ See Cooper, *supra* note 200, at 1017.

²²¹ *Id.*

²²² *Id.* at 1019.

both academic and industrial settings, provide some guidance in determining if an institution is following fair employment practices.

A basic approach is for the institution to commit itself to ending discrimination and to take whatever steps are necessary to achieve that end. This approach might entail a complete restructuring of the decisionmaking process, including a reexamination of the use of subjective criteria. If the institution makes such a commitment and does not follow through, however, that might itself constitute evidence of discrimination.²²³ Obviously, this commitment is a starting step.

Another approach might be to abandon the use of subjective criteria and to make the decisionmaking process more objective. Yet, as demonstrated earlier, the use of subjective criteria is a necessary and integral part of the decisionmaking process. Fairness to both the employee and the institution warrants its use. Thus, institutions can expect that the courts will continue to recognize the use of subjective criteria in upper level jobs.

At the same time, the institution can expect courts to scrutinize the criteria carefully. The period of automatic judicial deference is over. Colleges and universities must be able to defend their employment practices. The best defense is an early defense — eliminating employment discrimination.

Institutions must also anticipate that they may have to defend against both disparate treatment and disparate impact theories. Thus, they should be prepared to defend their practices against the higher standard — disparate impact — and to meet that standard by demonstrating that their policies are job-related and justified by “business necessity.”²²⁴ Finally, institutions should be aware of and prepared to comply with the various reforms to change the legal system in Title VII cases.²²⁵ In other words, they may be held to a much higher standard than merely “articulating” some legitimate, nondiscriminatory reason. The “business necessity” doctrine may become the standard for disparate treatment as well as disparate impact cases. Thus, institutions may have to prove that they did not discriminate by justifying the policies they are using.

In order to prevail in Title VII suits in the future, institutions must be able to meet this higher standard. At the same time, by taking the necessary steps to meet this higher standard, the institution will reduce the risk that discrimination exists in the decisionmaking process.

²²³ See *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 472 (8th Cir. 1984).

²²⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

²²⁵ See *supra* text accompanying notes 201-22.

In 1971, the Supreme Court announced the principle that employer practices which have an adverse impact on minorities and are not justified by business necessity constitute illegal discrimination under Title VII.²²⁶ Congress confirmed this interpretation in the 1972 amendment to Title VII.²²⁷ In 1978, the Equal Employment Opportunity Commission established the Uniform Guidelines on Employee Selection Procedures.²²⁸ The fundamental principle underlying the Guidelines is that employer policies or practices which have an adverse impact on employment opportunities of any race, sex, or ethnic group are illegal under Title VII unless justified by business necessity.²²⁹ Normally, this means that selective criteria must be validated through a process that demonstrates the relation between the selection procedure and job performance.²³⁰

Although the validation procedures in the Guidelines are only applicable to disparate impact cases, the concept of validating evaluation procedures is desirable in all settings because it allows the employer to make better employment decisions and reduces the possibility of discrimination. Yet the question remains: Can the subjective criteria used by colleges and universities be validated?

In the past, especially during the expansion years of the 1960's, institutions of higher education could get by with poorly defined evaluation procedures.²³¹ Colleges were expanding and were concerned primarily with recruiting and keeping competent faculty members. Tenure and promotion were almost automatic unless the faculty member was obviously incompetent.²³² Clearly, the situation is now changing. Enrollments have stabilized and are declining at many colleges. Fewer teaching positions are available, and some staff are being cut. In addition, many institutions are now at or near the prescribed limits in the percentage of tenured faculty.²³³ These factors, along with a concern about discrimination suits, create a need to validate the hiring criteria and procedures so that institutions are able to make fine distinctions be-

²²⁶ *Griggs*, 401 U.S. 424.

²²⁷ See 42 U.S.C. § 2000e (Supp. II 1972).

²²⁸ 29 U.S.C. § 1607 (1978).

²²⁹ 43 Fed. Reg. 38,290 (1978).

²³⁰ *Id.* at 38,291.

²³¹ See J. CENTRA, DETERMINING FACULTY EFFECTIVENESS 2 (1980).

²³² *Id.*

²³³ Sixty-two percent of all faculty members had tenure in 1977. AAUP BULLETIN, REPORT ON THE ANNUAL SURVEY OF FACULTY COMPENSATION, 193-266 (1978). The AAUP opposes tenure quotas. AAUP BULLETIN, ON THE IMPOSITION OF TENURE QUOTAS (1978).

tween generally competent faculty members.

VII. A PROPOSAL FOR REDUCING DISCRIMINATION IN THE UNIVERSITY DECISIONMAKING PROCESS

There is no single foolproof way to evaluate the effectiveness of a faculty member. As one court stated, "each source of information or approach has its limitations; each can be biased or contaminated."²³⁴ Moreover, the fact that each institution has its own unique problems and needs might necessitate tailor-made systems. Nevertheless, two common themes are essential to a fair process. First, fair personnel decisions are best made by combining information from a number of sources so that one approach's limitations may be balanced by the strength of another.²³⁵ This creates a system of checks and balances that, if applied properly, can improve the decisions and reduce discrimination. Second, decisionmaking criteria must be validated to the extent possible. Using these two principles, and based on an analysis of the current state of the law, this Article makes the following specific recommendations to colleges and universities to reduce discrimination in the decisionmaking process:

1. The institution must make a firm, unqualified commitment to end and to prevent employment discrimination, including sexual harassment, and must translate the commitment into a definitive plan with appropriate procedures, which might include specific education and sensitivity training. The Board of Trustees must articulate that it will not tolerate discrimination at any level.

2. The institution should not allow openly biased individuals or individuals who have previously sexually harassed students or faculty to participate in employment decisions. One individual can taint the entire process and may cause the institution to lose in a lawsuit.²³⁶ Individuals who are suspected of bias should go through some type of formal process to determine if these allegations are well founded.

This proposal may cause biased individuals to become subtle to conceal their true feelings. As a result, discrimination in the process may become more difficult to detect. Yet, by having a system of checks and balances, and by using validated criteria, one individual has a less significant impact.

3. Individuals who participate in the decisionmaking process should

²³⁴ J. CENTRA, *supra* note 231, at 3.

²³⁵ *Id.*

²³⁶ EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152 (D. Mass. 1975).

act on the basis of firsthand information. This is especially critical during the initial stage of the process when the candidate's actual performance is evaluated. As an example, a committee member charged with evaluating the candidate's teaching ability should observe the candidate teaching. In the decentralized professional system, it is the faculty who have the requisite level of expertise to evaluate teaching. Yet, the faculty members must have firsthand knowledge and not base an evaluation on information coming through others.

Courts have been critical of evaluations made on the basis of second-hand information in an industrial setting because they are not based on quality of work, and thus cannot be validated.²³⁷

4. Procedural reforms of subjective systems might be necessary at some institutions. Some courts have noted that unlawful systems could be cured by the development of specific guidelines to control the exercise of discretion, by requirements that job openings be advertised, and by the addition of new decisionmakers and layers of review.²³⁸

Procedural reform may help to control the bias of individual decisionmakers, or at least to diminish the impact that they have on the decision. However, procedural reform has limitations because discretionary judgment should not and cannot entirely be eliminated in making employment decisions about faculty members. Moreover, the addition of new decisionmakers and additional layers of review make the process too cumbersome to be workable. At some point in the process it still may be up to one individual to make the ultimate decision. Finally, procedural reform is not an adequate substitution for validating the criteria used. Improved procedures have little value when the criteria used for evaluation have no relationship to job performance.

5. Colleges and universities must have written guidelines on all employment practices, including guidelines for the evaluators at the lower level to follow. The procedures and criteria that most institutions publish as guidelines in making employment decisions are generally considered part of the legal contract between the institution and the faculty

²³⁷ Courts have severely criticized indirect evaluation resulting in a disproportionate number of minorities being retained. *See, e.g.*, *Brits v. Zia Co.*, 478 F.2d 1200, 1206 (10th Cir. 1973) (court held employer's employee evaluation test, which was based primarily on subjective observations of evaluators, two out of three of whom did not observe workers on daily basis, was invalid and resulted in discriminatory employment practice); *United States v. City of Chicago*, 385 F. Supp. 543, 560 (N.D. Ill. 1974) (court disapproved of city police department's employee evaluation procedure in which desk sergeants who have no knowledge of what a given patrolman has done in the field are asked to rate the patrolmen), *aff'd in relevant part*, 549 F.2d 415 (7th Cir. 1977).

²³⁸ Bartholet, *supra* note 209, at 1007.

member.²³⁹ Specificity of the terms of the contract is important because disputes over interpretation may result in litigation.²⁴⁰

6. The institution should eliminate informal procedures that cannot be validated as a necessary part of the process. Although the use of subjective criteria is an important part of the decisionmaking process, these criteria should be used formally rather than informally. Decisions made in an informal manner may be difficult to defend. This may require keeping minutes of committee meetings and a record of all committee votes. Academic freedom does not create a privilege that would enable a faculty member to withhold information from a court about how she voted in a committee decision.²⁴¹

7. The institution should design its system to eliminate absolute discretion on the part of a single evaluator or even a single committee. When making subjective judgments, it is best to rely on a composite of several persons' judgment.²⁴² Special attention should be given when the evaluator is of a different sex or race than that of the person being evaluated.

In certain situations, the university should seek the assistance of faculty members from other colleges and universities to evaluate teaching ability, scholarship, or service. To some extent outside opinions on subjective criteria can be made more objectively and further opens the decisionmaking process. Survey results suggest that peers at other institutions are increasingly called upon to assist in evaluations.²⁴³

8. A negative decision at one step should not end the process. Clearly, a system in which only favorable recommendations move forward may give one set of decisionmakers too much control.

Because the departmental faculty is generally the group most familiar with the candidate and course of study, and because tenure results in a collegial relationship within that department that may last for decades, negative decisions should be given some deference.²⁴⁴ Nevertheless, fairness to both the candidate and the institution necessitates a

²³⁹ See generally W. KAPLIN, *THE LAW OF HIGHER EDUCATION* 91-93 (2d ed. 1980) for an overview on how courts interpret faculty contracts.

²⁴⁰ *Id.*

²⁴¹ See *Dinnan v. Board of Regents*, 661 F.2d 426 (5th Cir. 1981); see also *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980).

²⁴² See B. SCHLEI & P. GROSSMAN, *supra* note 44, at 204.

²⁴³ J. CENTRA, *supra* note 231, at 121.

²⁴⁴ For a recent example of deference to the department, see *Zahorik v. Cornell Univ.*, 729 F.2d 85, 89 (1984) (court found plaintiff's claim of denial of tenure because of gender insufficient in light of the university's reasonable tenure policies and its superior knowledge of the individual candidate's academic field and work).

careful review of the reasons for a negative decision along with an analysis of departmental and university-wide employment statistics to determine whether there should be some concern based on statistical patterns.

9. The dissatisfied faculty member should have an opportunity to review, comment upon, and sign the evaluation before it goes to the next level of review.²⁴⁵ In this manner, the faculty member can question the decision and the evaluation criteria, and may state any allegation of discrimination. This will allow the institution to conduct an immediate investigation and cause the faculty member to lose some credibility if a charge of discrimination is made later.

10. Finally, universities must attempt to validate the process used in making employment decisions. Obviously, evaluators need to know the kind of performance they are looking for before they can begin rationally to design systems that select people capable of that performance.²⁴⁶ Job analysis is the first critical step in this process.²⁴⁷

Admittedly, a meaningful job analysis of faculty performance is difficult. Nevertheless, it may be possible to examine all factors that are currently part of the decisionmaking process in order to eliminate those factors that clearly have no relevance to job performance. At the same time, some specific validation techniques might be applicable to measuring faculty performance.²⁴⁸ Universities should examine these techniques to determine whether or not they might be appropriate.

CONCLUSION

Fairness to both faculty members and institutions of higher education requires using subjective criteria in the employment decisionmaking process. Courts have recognized this as an important element. Nevertheless, the days of automatic judicial deference to university employment decisions are over. Courts have a statutory responsibility to ensure fair employment practices in institutions of higher learning.

²⁴⁵ See *Pouncy v. Prudential Ins. Co.*, 499 F. Supp. 427, 448 (S.D. Tex. 1980), *aff'd*, 668 F.2d 795 (5th Cir. 1982). The court noted that one safeguard in the evaluation process designed to avert discriminatory practices is to give an employee the opportunity to review and discuss an evaluation with her supervisor and to add her own comments to the records before being forwarded to a higher level of management.

²⁴⁶ See Barholet, *supra* note 209, at 1009.

²⁴⁷ *United States v. City of Chicago*, 549 F.2d 415, 429 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

²⁴⁸ Barholet, *supra* note 209, at 1016-19 (applying methods of content validation and empirical validation to employee selection systems).

Colleges and universities have a corollary responsibility of ensuring that employment practices meet current legal standards. Each institution, in order to meet these standards, must make a commitment to rid itself of any existing discrimination and must develop appropriate institutional guidelines to minimize potential problems. Nevertheless, guidelines that are not validated may be difficult to defend based on business necessity. For colleges and universities to meet current legal standards, procedures must be fair and the guidelines must be valid.

