COMMENT

Discovery of Confidential Peer Review Materials in Title VII Actions for Unlawful Denial of Tenure: A Case Against Redaction

INTRODUCTION

Attaining tenure[1] represents a crowning achievement in the

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[1] This Comment refers to "tenure" as the system of lifetime employment that universities award faculty members. *See* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 256 (1973) (defining academic tenure); CHRISTINE M. LICATA, POST-TENURE FACULTY EVALUATION: THREAT OF OPPORTUNITY? 7-14 (1986) (providing overview of history of tenure in United States). *See generally* B.N. SHAW, ACADEMIC TENURE IN HIGHER EDUCATION 31-42 (1971) (reviewing tenure policies of various universities). Some commentators argue that with current constitutional protections of speech, tenure is no longer necessary. *See* JON HUER, TENURE FOR SOCRATES 3-14 (1991) (arguing that professors achieve tenure without merit). Others reject this argument. *See* ROBERT T. BLACKBURN, TENURE: ASPECTS OF JOB SECURITY ON THE CHANGING CAMPUS 31 (1972) (refuting criticism that tenure leads to inadequate teaching and research output). Generally, universities can only dismiss a tenured professor for cause or as a result of financial exigency or changes in the institutional program. *See* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *supra*, at 256 (noting that universities can dismiss tenured professors only for cause).

The influential American Association of University Professors (AAUP) describes tenure as a means to achieving academic freedom and job security. THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ACADEMIC FREEDOM AND TENURE 33-34 (Louis Joughin ed., 1967). As the authoritative voice of the academic profession, the AAUP has influenced many courts addressing the discovery of peer review materials. *See, e.g.*, Gray v. Board of Higher Educ., 692 F.2d 901, 907-09 (2d Cir. 1982) (acknowledging and adopting AAUP's position that universities should provide faculty members, upon request, statement of reasons for decision against tenure or reappointment); Kunda v. Muhlenber College, 621 F.2d

career of a university professor.[2] Unfortunately, the tenure process at most universities can be intimidating for a tenure candidate.[3] Among American universities, confidential deliberations

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532, 544 (3d Cir. 1980) (citing with approval AAUP's 1971 Statement on Procedural Standards for the Renewal or Nonrenewal of Faculty Appointments); Adamian v. Jacobsen, 523 F.2d 929, 934 (9th Cir. 1975) (noting AAUP's position on off-campus speech by professors), *cert. denied*, 446 U.S. 938 (1980); Cusumano v. Ratchford, 507 F.2d 980, 986 (8th Cir. 1974) (noting AAUP's position on notice requirements upon decision of employment nonrenewal), *cert. denied*, 423 U.S. 829 (1975); Bruce v. Board of Regents, 414 F. Supp. 559, 562 (W.D. Mo. 1976) (citing with approval AAUP's 1971 Statement on Procedural Standards for the Renewal or Nonrenewal of Faculty Appointments); Scharf v. Regents of the Univ. of Cal., 286 Cal. Rptr. 227, 231 (Ct. App. 1991) (citing with approval AAUP's standards for disclosing peer review materials).

In its 1940 Statement of Principles on Academic Freedom and Tenure, the AAUP describes the freedom and economic security associated with tenure as indispensable to the success of a university. THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra*, at 33-34. The AAUP also considers academic freedom critical to the success of a university. *Id.* The AAUP describes academic freedom as the protection of a professor's right to teach and research without undue interference. *Id. See generally* John DeWitt Gregory, *Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom*, 16 U.C. DAVIS L. REV. 1023, 1026 (1983) (noting critical contribution of AAUP to development of academic freedom and tenure).

[2] *See* LARRY R. BRASKAMP & JOHN C. ORY, ASSESSING FACULTY WORK 157 (1994) (describing decision to grant tenure as critical milestone for professors); JANE MCCARTHY ET AL., MANAGING FACULTY DISPUTES 3 (1984) (describing tenure as critical since denial usually entails dismissal from university).

This Comment refers to a "professor" as any faculty member already tenured or eligible for tenure consideration in the future. At most American universities, an assistant professor is typically a faculty member who is not yet tenured, but who will be eligible for tenure in the future. *See* Martha S. West, *Gender Bias In Academic Robes: The Law's Failure To Protect Women*, 67 TEMP. L. REV. 67, 69 (1994) (describing various professorial ranks). *See generally* American Association of University Professors, *1982 Recommended Institutional Regulations on Academic Freedom and Tenure*, *in* AAUP POLICY DOCUMENTS & REPORTS 21, 21-22 (1984). In most cases, an "assistant professor" has seven or eight years in which to apply for and receive tenure from the university. *See* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *supra* note 1, at 256 (describing various tenure policies at American universities). In contrast, "associate professor" and "full professor" refer to tenured faculty members. *See* West, *supra*, at 69 (describing various professorial ranks). Other faculty titles, such as lecturer, instructor, or adjunct professor, generally refer to non-tenure track positions. *Id.*

[3] *See* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *supra* note 1, at 256 (describing various tenure policies at American universities). Despite the importance of tenure, few professors familiarize themselves with the tenure process. *See* PETER J. BUKALSKI, GUIDE FOR NONTENURED FACULTY MEMBERS: ANNUAL EVALUATION, PROMOTION, AND TENURE 14 (1993) (describing existence of various systems of tenure). Even professors seeking to learn about the tenure process face difficulties discovering the exact policies and procedures used by their universities. *Id.* Tenure practices and policies vary widely among American universities. *Id.* Even at universities with formal guidelines for awarding tenure, the actual process can differ dramatically from written descriptions. *See* Len Biernat, *Subjective*

and subjective criteria typify most tenure processes.[4] The secrecy of the tenure process makes it difficult for professors to bring suit under Title VII[5] for unlawful denial of tenure.[6] To satisfy

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Criteria in Faculty Employment Decisions Under Title VII: Camouflage for Discrimination and Sexual Harassment, 20 U.C. DAVIS L. REV. 501, 509 (1987) (describing how universities have formal and informal evaluation processes).

[4] *See* PETER SELDIN, CHANGING PRACTICES IN FACULTY EVALUATION 35-74 (1984) [hereinafter CHANGING PRACTICES] (reporting results of survey on criteria universities use to evaluate faculty). Research, teaching, and community service comprise the primary criteria universities consider in evaluating a faculty candidate for tenure. *Id.* Most liberal arts colleges designate teaching effectiveness as the most important factor in achieving tenure. *Id.* at 44. Research universities, in contrast, base tenure decisions primarily on a candidate's research and publication record. *See* JOHN A. CENTRA, DETERMINING FACULTY EFFECTIVENESS 11 (1979) (noting emphasis that universities place on research even though only small minority of faculty ever publish); RICHARD I. MILLER, DEVELOPING PROGRAMS FOR FACULTY EVALUATION 17 (1974) (finding that most large universities feel obliged to uphold academic mystique through emphasis on research); PETER SELDIN, SUCCESSFUL FACULTY EVALUATION PROGRAMS 127-28 (1980) (noting that small liberal arts colleges tend to emphasize quality teaching while larger, older research universities adhere to value of research and publication). Regardless of whether the emphasis is on teaching or research, both criteria are inherently subjective. *See* BUKALSKI, *supra* note 3, at 50 (acknowledging "compatibility" of candidate as factor in virtually every tenure decision); CENTRA, *supra*, at 73 (describing how mutual backscratching and professional jealousy distort peer review); LIONEL S. LEWIS, SCALING THE IVORY TOWER: MERIT AND ITS LIMITS IN ACADEMIC CAREERS 47-76 (1975) (challenging objectivity of peer review); MCCARTHY, *supra* note 2, at 5 (noting that factors such as teaching effectiveness and scholarship require evaluations based on comparisons with others, and therefore are subject to differences of opinion); Biernat, *supra* note 3, at 503 (stating that most universities make faculty employment decisions based on subjective criteria); Gregory, *supra* note 1, at 1040 (finding overwhelming evidence that neither educational excellence nor fair consideration characterizes tenure standards for women and minorities).

Written appraisals, referred to as "peer review" by colleagues, are the most widely utilized method of assessing faculty research. *See* BRASKAMP & ORY, *supra* note 2, at 167-72 (discussing role of written appraisals in tenure process); CENTRA, *supra*, at 14 (describing survey on how universities evaluate research and scholarship). Most universities solicit letters of recommendation for candidates seeking tenure. *Id; see* JOHN A. CENTRA, REFLECTIVE FACULTY EVALUATION 135-57 (1993) (comparing various methods universities use to evaluate faculty research). Generally, universities require three letters from experts in the candidate's field who work outside the candidate's university. *Id.*

[5] 42 U.S.C. §2000e-2000e-17 (1988 & Supp. III 1991) [hereinafter Title VII]; *see infra* notes 23-39 and accompanying text (discussing Title VII).

Both private plaintiffs and the Equal Employment Opportunity Commission (EEOC) can enforce Title VII. 42 U.S.C. §2000e-5(a). Section 2000e-4(g) of Title VII creates the EEOC and empowers it to: 1) cooperate with state and local agencies, 2) pay witnesses who give depositions, 3) furnish technical assistance to employers, 4) attempt conciliation or other remedial actions, 5) make such technical studies as are needed, and 6) intervene in Title VII actions by private persons. *Id.* at §2000e-4(g). Congress also granted the EEOC subpoena powers. *Id.* at §2000e-8(a) (giving EEOC power to copy employer records that relate to unlawful employment practices charged by plaintiff). To effectuate §2000e-8(a),

the elements of a Title VII case, a professor must prove discriminatory intent on the part of the decision makers.[7] However, redaction[8] of peer review materials[9] often serves to hide any evidence of discriminatory intent that might exist in a candidate's peer review materials.[10]

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the EEOC has the authority to sign and issue subpoenas requiring: 1) the attendance and testimony of witnesses, 2) the production of evidence, including books, records, correspondence, and documents, and 3) access to evidence for the purposes of examination and copying. 29 C.F.R. §1601.16(a) (1994). The EEOC also has the authority to compel enforcement of a subpoena using the procedures of §11(2) of the National Labor Relations Act. 29 C.F.R. §1601.16(c) (1994).

[6] *See* James H. Brooks, *Confidentiality of Tenure Review and Discovery of Peer Review Materials*, 1988 B.Y.U. L. REV. 705, 711-13 (1988) (stating that secrecy of tenure process prevents plaintiff from determining basis for tenure denial).

[7] McDonnell Douglas Corp. v Green, 411 U.S. 792, 802 (1973) (holding that plaintiff must prove discriminatory intent). A Title VII action involves three stages. *Id.* at 802-03 (setting forth three stages in Title VII action challenging employment discrimination). In the first stage, the plaintiff must establish a prima facie case of discrimination. *Id.* at 802. In order to establish a prima facie case of discrimination under Title VII a plaintiff must show: 1) that the plaintiff belongs to a protected group under Title VII, 2) that she submitted herself for tenure and was qualified, 3) that, despite being qualified, the university rejected her, and 4) that other professors with similar qualifications received tenure during the same relevant time period. *Id.* If she is successful in showing these elements, a presumption of discrimination arises against the employer. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1973) (discussing presumption that arises after plaintiff establishes prima facie case of discrimination). In the second stage, the employer can rebut the presumption of discrimination by presenting a legitimate reason for taking the adverse action against the plaintiff. *McDonnell Douglas Corp.*, 411 U.S. at 802. In the final stage, the plaintiff has the opportunity to prove that the employer's legitimate reason is pretextual and that the employer's real reason for the adverse action was discrimination. *Id.* at 804 (providing plaintiff opportunity to show that employer's stated reason was pretextual).

[8] This Comment refers to "redaction" as the process by which universities remove all information that could identify a document's author. *See, e.g.*, EEOC v. Notre Dame Du Lac, 715 F.2d 331, 337-38 (7th Cir. 1983) (describing redaction procedures court imposed on university). Redaction usually involves removal of the name and institution of the author and any geographical, personal, or anecdotal information that could reveal the author's identity. *Id.* After redacting materials, universities must provide the court with copies of the redacted materials, along with the originals. *Id.* The court may then compare the two sets of materials to determine whether the redactions are reasonably necessary to protect the identities of the authors. *Id.*

[9] This Comment uses the term "peer review materials" to refer to all materials universities use to decide whether to grant or deny tenure to a professor. *See* CHANGING PRACTICES, *supra* note 4, at 30-31 (providing checklist for faculty evaluation programs). Peer review materials include written letters of evaluation by faculty peers, student evaluations, departmental and chair evaluations, and the tally sheets detailing the departmental vote. *Id.*

[10] *See infra* notes 163-78 and accompanying text (describing possibility that universities might improperly redact information).

Redaction becomes an issue only after a professor obtains a discovery order for her peer review materials.[11] Prior to the Supreme Court's decision in *University of Pennsylvania v. Equal Employment Opportunity Commission*,[12] the issue of redaction seldom arose because many courts made it difficult to discover peer review materials.[13] During the pre-*Pennsylvania* years, some circuits even recognized a qualified privilege of academic freedom preventing a Title VII plaintiff from obtaining peer review materials.[14] In *Pennsylvania*, the Supreme Court rejected the qualified privilege.[15]

The Supreme Court's decision in *Pennsylvania* seemed to make it easier for plaintiffs to obtain full discovery of peer review materials.[16] However, post-*Pennsylvania* decisions suggest that courts continue to be reluctant to grant discovery of peer review materials.[17] These post-*Pennsylvania* decisions utilize balancing tests characteristic of the qualified privilege approach the Court rejected in *Pennsylvania*.[18] Although these decisions are within the letter of *Pennsylvania*, they nevertheless violate its spirit.[19]

This Comment examines the use of redaction to remove the identities of authors of peer review materials. Part I provides an overview of Title VII and discusses the positions of the circuit courts before *Pennsylvania*.[20] Part II discusses the state of the

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[11] *Compare* Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir. 1977) (making redaction moot by denying plaintiff's request for discovery of peer review materials) *with Notre Dame Du Lac*, 715 F.2d at 337-38 (addressing redaction after granting discovery of peer review materials). Universities have no need to redact peer review materials unless a court grants the plaintiff access to those materials through discovery.

[12] University of Pennslyvania v. EEOC, 493 U.S. 182 (1990).

[13] *See, e.g., Keyes*, 552 F.2d at 581 (denying plaintiff's request for discovery of peer review materials).

[14] *See infra* notes 43-62 and accompanying text (discussing cases taking qualified privilege approach).

[15] *See infra* notes 75-88 and accompanying text (analyzing *Pennsylvania*).

[16] *See infra* notes 90-93 and accompanying text (discussing impact of *Pennsylvania* on discovery of peer review materials).

[17] *See infra* notes 94-126 and accompanying text (discussing treatment of discovery in *Torres* and *Schneider*).

[18] *See infra* notes 127-42 and accompanying text (arguing that *Torres* and *Schneider* resemble pre-*Pennsylvania* decisions using qualified privilege approach).

[19] *See infra* notes 143-53 and accompanying text (arguing that *Pennsylvania* intended easier access to peer review materials for plaintiffs).

[20] *See infra* notes 24-74 and accompanying text (describing framework of Title VII and

law under *Pennsylvania* and examines post-*Pennsylvania* cases involving discovery and redaction.[21] Finally, Part III proposes a model solution and analyzes the arguments for and against the redaction of peer review materials.[22] This Comment concludes that in unlawful denial of tenure cases, the spirit of *Pennsylvania* requires that courts deny requests to redact peer review materials.[23]

I. BACKGROUND

A. Title VII

Under Title VII, universities cannot award or deny tenure based on improper criteria. Specifically, Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin with respect to the compensation, terms, conditions, or privileges of employment.[24] Before 1972, Title VII statutorily exempted educational institutions from its coverage.[25] In 1972, Congress eliminated this exemption partly to address the widespread problem of discrimination in the field of higher education.[26] As a result of this amendment, the employment deci-

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pre-*Pennsylvania* cases).

[21] *See infra* notes 75-142 and accompanying text (discussing *Pennsylvania* and recent post-*Pennsylvania* decisions).

[22] *See infra* notes 143-98 and accompanying text (proposing model solution and analyzing arguments for and against use of redaction).

[23] *See infra* notes 199-203 and accompanying text (stating that *Pennsylvania* requires courts to deny redaction requests).

[24] 42 U.S.C. §2000e-2(a). Section 2000e-2(a) makes it unlawful for an employer to base an employment decision on the individual's race, color, religion, sex, or national origin. *Id.*

[25] Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 1964 U.S.C.C.A.N. (78 Stat.) 287, 304 (excluding educational institutions from definition of employer).

[26] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 702, 1972 U.S.C.C.A.N. (86 Stat.) 121, 123-4 (codified as amended at 42 U.S.C. §2000e-1 (1988 & Supp. III 1991)) (adding higher education institutions to coverage of Title VII). The legislative history of the 1972 amendments to Title VII indicates a congressional desire to address discrimination in higher education. *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19-20 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155 (recognizing that discrimination against minorities and women in higher education remains pervasive); *see also* University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) (finding that Congress extended Title VII to cover educational institutions in response to widespread and compelling problem of invidious discrimination in these institutions); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1091 (6th Cir. 1974) (reciting legislative history of Title VII amendments).

sions of institutions of higher education finally became subject to judicial scrutiny.[27]

Despite this amendment to Title VII, many courts remained deferential to the employment decisions of universities, particularly towards decisions regarding tenure.[28] Some of these courts even recognized a qualified privilege of academic freedom, making it more difficult for a plaintiff to discover peer review materials.[29] Without access to these materials, a plaintiff lost a valuable source of evidence.[30]

Access to peer review materials is crucial to a plaintiff's case.[31] Under Title VII, the plaintiff carries the burden of proving intentional discrimination at all times.[32] A professor unlaw-

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[27] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 702, 1972 U.S.C.C.A.N. (86 Stat.) 121, 123-24 (codified as amended at 42 U.S.C. §2000e-1) (adding higher education institutions to coverage of Title VII).

[28] *See, e.g.*, Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) (recognizing long tradition of deference to universities on basis that universities should determine for themselves who may teach); *see also* Harry F. Tepker, Jr., *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047, 1047-48 (1983) (describing initial hesitation of court to enforce Title VII against universities).

[29] *See infra* notes 43-62 and accompanying text (discussing qualified privilege).

[30] *See infra* notes 154-62 (discussing peer review materials as valuable source of evidence of discrimination).

[31] *See infra* notes 32-35 and accompanying text (discussing importance of peer review materials to plaintiff's action).

[32] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (holding that *McDonnell-Douglas* framework requires plaintiff to make showing of intentional discrimination). *Burdine* held that during the second stage of a Title VII action, the employer has the "burden of production," not "persuasion." *Id.* at 254. The employer's burden of production only requires that it produce evidence that the adverse action against plaintiff resulted from a legitimate, nondiscriminatory reason. *Id.* at 255. In contrast, a burden of persuasion requires that the employer prove that a legitimate, nondiscriminatory reason actually motivated the employment decision. *Id.* at 258. The *Burdine* Court explained that an employer need not prove that a legitimate business reason actually existed for the plaintiff's rejection. *Id.* at 258-59. The employer can merely articulate such a reason before the court. *Id.* at 260.

Prior to the *Burdine* decision, most commentators and courts believed that the employer's burden during the second stage was one of persuasion, not mere production. *See* West, *supra* note 2, at 97 (discussing *McDonnell Douglas* framework before *Burdine*). After *Burdine*, these commentators interpreted the decision as requiring, for the first time, a plaintiff to show intentional discrimination by the employer. *Id.*

To satisfy the burden of production, the employer must prove that legitimate reasons existed for taking adverse action against the plaintiff. *Id.* Failure to meet the burden resulted in an inference of discriminatory intent on the part of the employer. *Id.*; *see* Gray v. Board of Higher Educ., 692 F.2d 901, 905 (2d Cir. 1982) (holding that Title VII suits do

fully denied tenure will likely find evidence of discrimination, if any, in her peer review materials.[33] Without access to these materials, proving intentional discrimination often becomes impossible.[34] Thus, the decision to grant or deny discovery of peer review materials can determine the outcome of a plaintiff's case.[35]

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not require direct proof of discriminatory intent); Lieberman v. Gant, 630 F.2d 60, 65-68 (2d Cir. 1980) (providing example of successful rebuttal by employer).

Twenty years after *Burdine*, the Supreme Court reviewed the three-stage *McDonnell-Douglas* framework once again. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993). In *St. Mary's*, the Court held that the plaintiff must prove that the employer discriminated against her during the final stage of a Title VII action. *Id.* at 2749; *see supra* note 7 and accompanying text (discussing final stage of *McDonnell-Douglas* framework). Prior to *St. Mary's*, some courts awarded judgment to the plaintiff if she could prove that the employer's legitimate reason was pretextual. *St. Mary's*, 113 S. Ct. at 2749. The Court in *St. Mary's* held that rejection of the employer's proffered legitimate, nondiscriminatory reasons alone does not entitle a plaintiff to judgment. *Id.* at 2749. To prevail, the plaintiff must prove that the employer's true reason was a discriminatory one. *Id.* at 2752. Thus, the Supreme Court imposed upon the plaintiff the dual tasks of proving that the employer's reason was a pretext and that the employer intentionally discriminated against her. *Id.* at 2753.

[33] *See infra* notes 154-62 and accompanying text (discussing importance of peer review materials).

[34] 42 U.S.C. §§ 2000e-1 - 2000e-17. The statutory language of Title VII does not require intentional discrimination for a finding of liability. *Id.* Prior to the 1991 amendments, Section 2000e-5(g) was the only provision of Title VII where the word "intent" appeared. *Id.* Section 2000e-5(g) provided the remedies of reinstatement, backpay, and other equitable relief only in cases of intentional discrimination, as opposed to liability founded upon disparate impact theory. *Id.* at §2000e-5(g).

Although the statutory language does not require finding of intentional discrimination, the Supreme Court has required such a finding in Title VII cases. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The Supreme Court also recognized that direct evidence of intentional discrimination seldom exists. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (recognizing difficulty of determining intentional discrimination because plaintiff will seldom have eyewitness testimony as to employer's mental processes).

Clark v. Claremont University Center provides a rare example of a plaintiff acquiring direct proof of intentional discrimination. Clark v. Claremont Univ. Ctr., 8 Cal. Rptr. 2d 151 (Ct. App. 1992). In *Clark*, the plaintiff overheard the tenure committee's discussion of his qualifications, including a committee member's statement that "us white people have rights, too." *Id.* at 157. At trial, the committee member admitted to making the statement while another member admitted to having trouble with black women. *Id.* at 168. The *Clark* court, in affirming the trial court's finding of liability under Title VII, noted that its research of tenure denial cases revealed no cases involving university professors who made remarks as blatant as in *Clark*. *Id.* at 170.

[35] *See infra* notes 154-62 (discussing importance of peer review materials to plaintiff's case).

Federal Rule of Civil Procedure 26 governs discovery in civil actions.[36] Generally, a party may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the action.[37] Courts often refer to Rule 26 as the "mere relevance standard."[38] In a Title VII discrimination case, evidence that the employer used racially offensive language would be relevant.[39] Racially offensive language contained in peer review materials could indicate that the employer took race into account in making an employment decision.[40] This would

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[36] FED. R. CIV. P. 26. Rule 26 entitles plaintiffs to discovery in Title VII actions. *Id.* In contrast, Title VII grants discovery powers directly to the EEOC. 42 U.S.C. §2000e-4(g). Although most of the cases discussed in this Comment involve the EEOC, the same results hold true for private plaintiffs. *See* David McMillin, University of Pennsylvania v. EEOC *and* Dixon v. Rutgers: *Two Supreme Courts Speak on the Academic Freedom Privilege*, 42 RUTGERS L. REV. 1089, 1127 (1990) (interpreting Title VII plaintiff as private attorney general whose role in enforcing Title VII parallels that of EEOC); *see, e.g.*, Schneider v. Northwestern Univ., 151 F.R.D. 319, 321 (1993) (applying rules governing discovery of peer review materials by EEOC to private litigation). When investigating charges of discrimination, the EEOC has the right to copy any evidence relevant to the charge. *See supra* note 11 and accompanying text (discussing powers of EEOC). Courts interpret the relevance requirement for the EEOC as similar to the relevance requirement of Rule 401. *See* EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984) (observing that since enactment of Title VII, courts have generously construed term "relevant" and have allowed EEOC access to virtually all material that might aid its investigation); EEOC v. Ford Motor Credit Co., 26 F.3d 44, 47 (6th Cir. 1994) (interpreting broadly term "relevant" in addressing EEOC investigations).

Despite the generous interpretation of relevance by the courts, the Supreme Court clearly requires that courts not construe relevance in a fashion that renders it a nullity. *Shell Oil*, 466 U.S. at 69. The test for relevance involves balancing the importance of the requested materials to the EEOC's investigation with the burden on the employer in producing the materials. *Ford Motor*, 26 F.3d at 47. In weighing the importance of the material to the EEOC's investigation, a district court may not attempt to determine the validity of the charge of discrimination. *Shell Oil*, 466 U.S. at 72. A district court must determine only the relevancy of requested materials. *Id.* at 72; *Ford Motor*, 26 F.3d at 47.

[37] FED. R. CIV. P. 26(b)(1). Under Rule 26, if the plaintiff can obtain the requested materials by more convenient means or if the requests are unduly burdensome or expensive, the court can limit the plaintiff's right to discovery. *Id.* The Federal Rules of Evidence define "relevant evidence" as anything that aids in determining the existence of any fact. FED. R. EVID. 401.

[38] *See, e.g.*, University of Pennsylvania v. EEOC, 493 U.S. 182, 188 (1990) (using term "mere relevance" to describe plaintiff's burden during discovery).

[39] *See* Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1133 (4th Cir. 1988) (acknowledging well-established principle of admitting prior acts and statements if necessary to show state of mind); Miles v. M.N.C. Corp., 750 F.2d 867, 870 (11th Cir. 1985) (holding that trial court erred by excluding evidence of racial slurs by supervisor).

[40] *See Mullen*, 853 F.2d at 1133 (noting that racially offensive language symbolizes very attitudes that Title VII attempts to eradicate); Wilson v. City of Aliceville, 799 F.2d 631, 634 (11th Cir. 1986) (stating that racial slurs by Mayor are direct evidence of discrimination);

violate Title VII.[41] However, despite the broad scope of Rule 26, courts protected even relevant peer review materials from discovery.[42]

*B. Pre-*Pennsylvania *Decisions*

1. Qualified Privilege Approach

To protect peer review materials from discovery, universities have long urged the recognition of a qualified privilege based on academic freedom.[43] On this basis, courts have historically accorded special deference to the employment decisions of universities.[44] The Second Circuit continued this historical trend in

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Abasiekong v. City of Shelby, 744 F.2d 1055, 1058 (4th Cir. 1984) (holding that evidence of racially motivated language can support jury's finding of intentional discrimination).

[41] *See* 42 U.S.C. §§ 2000e-2(a) (1988 & Supp. III 1991) (prohibiting employer from basing employment decisions on race).

[42] *See, e.g.*, Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (1977) (denying discovery of relevant evidence in Title VII action against university where plaintiff sought to compel discovery of peer review materials).

Federal Rule of Civil Procedure 26 explicitly excludes privileged materials from discovery. FED. R. CIV. P. 26(b)(1). A privilege is the right not to give testimony or provide materials. *See In re* Dinnan, 661 F.2d 426, 428-29 (5th Cir. 1981) (discussing history of common law privileges). Federal evidentiary privileges include the attorney-client privilege, the privilege of one spouse not to testify against the other, the physician-patient privilege, and the work-product privilege. *Id. See also* Brooks, *supra* note 6, at 713-14 (discussing federal evidentiary privileges in light of *In re Dinnan*).

The Federal Rules of Evidence authorize federal courts to recognize new evidentiary privileges. FED. R. EVID. 501 (stating that common law principles as interpreted by federal courts shall govern federal evidentiary privileges). Rule 501 provides courts the flexibility to develop new privileges when the need arises. *See* Trammel v. United States, 445 U.S. 40, 47 (1980) (acknowledging Congress' intent not to freeze law of privilege). In deciding whether to recognize a new privilege, courts should weigh the need for truth against the importance of the proposed privileged relationship. *See* Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981) (setting forth factors for recognizing new common law privileges).

[43] *See, e.g.*, Gray v. Board of Higher Educ., 692 F.2d 901, 907-08 (2d Cir. 1982) (adopting AAUP's qualified privilege approach protecting peer review materials from disclosure at universities' request); *see* Brief for Petitioner at 15, University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) (No. 88-493) (recognizing peer review materials as most sensitive documents universities hold).

[44] *See, e.g.*, Zahorik v. Cornell Univ., 729 F.2d 85, 92 (2d Cir. 1984) (listing differences between tenure decisions and other employment decisions); Jackson v. Harvard Univ., 721 F. Supp. 1397, 1404 (D. Mass. 1989) (justifying more subjectivity in tenure decisions because universities have right to seek distinction beyond minimum qualifications), *cert. denied*, 498 U.S. 848 (1990). *See generally* Brooks, *supra* note 6, at 713-32 (detailing courts' special treatment of universities); West, *supra* note 2, at 130-31 (discussing judicial policy of

1982 by creating a qualified privilege to protect peer review materials from discovery.[45] The Fourth,[46] Seventh,[47] and Ninth[48] Circuits later adopted similar approaches.

The Second Circuit's qualified privilege approach balanced the plaintiff's interest in receiving a full and fair trial with the university's interest in confidentiality.[49] For a plaintiff to obtain discovery under this approach, she had to satisfy a higher burden than the mere relevance standard of Rule 26.[50] If a plaintiff failed to meet this higher burden, she could not obtain her peer review materials and the issue of redaction did not arise.[51]

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deference to university employment decisions).

[45] *Gray*, 692 F.2d at 907. In *Gray*, the Second Circuit adopted the AAUP's recommmended qualified privilege approach. *Id.* The *Gray* court held that the qualified privilege approach strikes the appropriate balance among the various interests. *Id.* The *Gray* court believed that rejecting a qualified privilege would recklessly ignore the confidentiality interests of universities. *Id.* at 908.

[46] Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977). In *Keyes*, the Fourth Circuit approved the trial judge's balancing test weighing the university's interest in keeping faculty evaluations confidential against the plaintiff's need for such material. *Id.* at 581. The *Keyes* court rejected the plaintiff's contention that denying discovery of the faculty evaluations would preclude her from showing that the university's legitimate nondiscriminatory reason was a pretext. *Id.*

[47] EEOC v. Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983). In *Notre Dame*, the Seventh Circuit recognized a qualified privilege protecting universities against the disclosure of the identities of persons participating in the tenure process. *Id.* at 337. The *Notre Dame* court responded that confidentiality was essential to the functioning of the tenure process. *Id.* at 336-37. However, the court refused to recognize an absolute privilege to prevent universities from using the process as a shield to hide discrimination. *Id.* at 337.

[48] Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). In *Lynn*, the Ninth Circuit used a balancing test to weigh the plaintiff's interest in determining whether her peer review materials contained evidence of discrimination against the university's interest in preserving confidentiality. *Id.* at 1347. Although the balancing approach of the Ninth Circuit favors the plaintiff more than the tests of the other circuits, the Ninth Circuit approach is treated as a qualified privilege approach. *See* Zaustinsky v. University of Cal., 96 F.R.D. 622 (N.D. Cal. 1983) (rejecting claim of absolute privilege by university, but recognizing need to include university's confidentiality interests in deciding whether to grant plaintiff's discovery request), *aff'd*, 782 F.2d 1055 (9th Cir. 1985); McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270, 1275 (N.D. Cal. 1975) (rejecting university's claim of absolute privilege, but recognizing university's confidentiality interests in balancing test).

[49] *Gray*, 692 F.2d at 901; *Zaustinsky*, 96 F.R.D. at 624; *see* Brooks, *supra* note 6, at 715-16 (describing various approaches of circuits before *Pennsylvania*).

[50] *Gray*, 692 F.2d at 902. *See also* FED. R. CIV. P. 26 (requiring only that evidence be relevant, unless privilege exists). A qualified privilege of academic freedom places a higher burden on the plaintiff to demonstrate a need for the requested materials. *See supra* note 50 and accompanying text (discussing qualified privilege in *Gray*).

[51] *See supra* note 11 and accompanying text (comparing *Keyes* to *Notre Dame*).

However, in 1983, the opportunity arose for the Seventh Circuit to address the use of redaction in *EEOC v. Notre Dame Du Lac*.[52]

In *Notre Dame*, the Seventh Circuit followed the Second Circuit and recognized a qualified privilege protecting peer review materials from discovery.[53] The Seventh Circuit's qualified privilege approach required a balancing test similar to the Second Circuit's.[54] However, unlike the Second Circuit, the Seventh Circuit granted the plaintiff's discovery request for peer review materials.[55] To protect the university's confidentiality interests, the court permitted the university to redact the materials before turning them over to the plaintiff.[56] Specifically, the court allowed the university to redact the name, address, institutional affiliation, and any other features that could identify the document's author.[57]

The court then imposed several procedural requirements on the university's use of redaction.[58] The court required the university to turn over the redacted versions, along with the originals, to the district court.[59] The district court would then compare the originals with the redacted versions to ensure that the redactions were reasonably necessary to prevent disclosure of the identity of the author.[60] After receiving the redacted versions, the plaintiff could attempt to obtain the redacted information if she believed it necessary.[61] To obtain the redacted information, the plaintiff had to make a particularized showing of need before the court.[62]

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[52] 715 F.2d 331 (7th Cir. 1983).

[53] *Id.* at 337 (joining Second Circuit's qualified privilege approach).

[54] *Id.* at 338 (holding that balancing test should weigh plaintiff's need against adverse effect on policies underlying qualified privilege).

[55] *Id.* at 337-38 (balancing various interests in plaintiff's favor and granting discovery). Although the *Gray* court did grant plaintiff's discovery request for the votes of committee members, the court did not consider the discovery of peer review materials. Gray v. Board of Higher Educ., 692 F.2d 901, 902 (2d Cir. 1982).

[56] *Notre Dame*, 715 F.2d at 337-38.

[57] *Id.* at 338.

[58] *See infra* notes 59-62 and accompanying text (discussing procedural requirements for use of redaction).

[59] *Notre Dame*, 715 F.2d at 338.

[60] *Id.*

[61] *Id.*

[62] *Id.* To show a "particularized need," a plaintiff must first demonstrate that she has conducted a thorough and exhaustive discovery to exploit each and every possible source

2. No Qualified Privilege Approach

Refusing to defer to university employment decisions, the Third[63] and Fifth[64] Circuits rejected the qualified privilege approach. When confronted with the universities' arguments about academic freedom, these circuits examined the policy of Title VII.[65] These circuits concluded that recognizing a qualified privilege of academic freedom would frustrate Title VII's public policy prohibiting discrimination.[66]

The Fifth Circuit's 1981 decision in *In re Dinnan* exemplifies this no privilege approach.[67] In *In re Dinnan*, the plaintiff brought an unlawful denial of tenure action against the University of Georgia.[68] During discovery, the plaintiff requested the individual votes of the tenure committee members.[69] The court granted the request and all the committee members revealed their votes except one member, Professor Dinnan.[70] The court then held Professor Dinnan in contempt.[71]

Professor Dinnan appealed his contempt conviction, arguing that a qualified privilege is necessary to protect the tenure process.[72] The Fifth Circuit rejected Professor Dinnan's argument and stated that if he had acted lawfully in his tenure decision, he had nothing to fear in revealing his vote.[73] This decision

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of information. *Id.* The court emphasized that the mere fact that the redacted information may be relevant or useful does not establish a particularized need. *Id.*

[63] *See* EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985) (rejecting qualified privilege protecting peer review materials because Congress expressed no intent to create such privilege when passing Title VII), *cert. denied*, 476 U.S. 1163 (1986).

[64] *See In re* Dinnan, 661 F.2d 426, 432 (5th Cir. 1981) (finding no compelling justification for establishing qualified privilege protecting peer review materials).

[65] *Franklin & Marshall College*, 775 F.2d at 112; *Dinnan*, 661 F.2d at 432.

[66] *Franklin & Marshall College*, 775 F.2d at 115 (stating that recognizing qualified privilege would defeat purpose of Title VII); *Dinnan*, 661 F.2d at 432 (holding that universities are not above public policy prohibiting discrimination).

[67] *Dinnan*, 661 F.2d at 427 (holding that no privilege existed enabling professor to withhold information).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* (discussing professor's conviction on contempt charges).

[72] *Id.* (discussing professor's arguments for recognition of qualified privilege).

[73] *Id.* at 432. The *Dinnan* court held that a peer evaluator occupies a position of public trust. *Id.* As a consequence, occasionally the peer evaluator must explain her actions. *Id.* When called upon to do so, the peer evaluator must have the courage to stand up and publicly account for her decision. *Id.*

created a split in authority among the circuit courts over whether universities enjoy a qualified privilege of academic freedom protecting peer review materials.[74]

II. STATE OF THE LAW

A. University of Pennsylvania v. EEOC

In 1990, the Supreme Court addressed the qualified privilege issue in order to resolve the split among the circuits.[75] In *University of Pennsylvania v. EEOC*, the Court held that a university does not enjoy a qualified privilege protecting peer review materials from discovery.[76] In *Pennsylvania*, the plaintiff issued a subpoena to the University of Pennsylvania seeking her own peer review materials and and those of five other male faculty members.[77] The university refused to produce the files, forcing the plaintiff to initiate judicial proceedings.[78]

The university made two arguments before the district court.[79] First, the university claimed that universities have a common law qualified privilege against disclosure of confidential peer review materials.[80] Second, the university asserted a First Amendment right of "academic freedom" against wholesale disclosure of contested materials.[81] The district court rejected the university's arguments and issued an order enforcing the subpoena.[82] On appeal, the Third Circuit affirmed, reasoning that the necessary evidence of discrimination would likely exist in peer review files.[83]

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[74] *See* Brooks, *supra* note 6, at 713 (discussing how *In re* Dinnan opened split among circuits).

[75] University of Pennsylvania. v. EEOC, 493 U.S. 182, 188 (1990) (granting certiorari to address apparent conflict among circuits).

[76] *Id.* at 188-202. Specifically, the Supreme Court held that a plaintiff does not have to demonstrate a particularized need. *Id.* Rather, the plaintiff only has to show the materials were relevant. *Id.*

[77] *Id.* at 186.

[78] *Id.* at 187.

[79] *Id.* at 188 (noting that University made same two arguments before EEOC, District Court, and Court of Appeals).

[80] *Id.*

[81] *Id.*

[82] EEOC v. University of Pennsylvania, 850 F.2d 969, 974 (3d Cir. 1988).

[83] *Id.* at 975 (noting that evidence of discriminatory intent and pretext may lie in peer review materials).

The Supreme Court affirmed the Third Circuit decision, refusing to recognize a qualified privilege for peer review materials.[84] The *Pennsylvania* Court found that recognizing a qualified privilege would create a significant obstacle for plaintiffs in Title VII tenure cases.[85] Further, the Court referred to the university's academic freedom[86] claim as remote, attenuated, and speculative.[87] The *Pennsylvania* Court declined to address the issue of redaction because the university had not raised the issue before the Court of Appeals.[88]

*B. Post-*Pennsylvania *Decisions*

Prior to *Pennsylvania*, the qualified privilege approach allowed universities to block virtually all initial discovery requests, thereby making the issue of redaction moot.[89] By rejecting the qualified privilege approach, the *Pennsylvania* decision gave life to the use of redaction.[90] Many courts interpreted *Pennsylvania* as sanctioning the discovery of peer review materials under the mere relevance standard of Rule 26.[91] Under this standard, a plaintiff will almost always obtain discovery of her peer review materials.[92] This led universities to turn to redaction to maintain the confidentiality of peer review materials.[93]

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[84] *Pennsylvania*, 493 U.S. at 202 (affirming judgment of Court of Appeals).

[85] *Id.* at 194.

[86] *See* Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1320 (1992) (discussing academic freedom and tenure). Academic freedom in a university context generally describes a professor's freedom from political, ecclesiastical, or administrative interference with investigation, discussion, and publication in her field of study. *Id. See generally* BARDWELL L. SMITH, ACADEMIC FREEDOM, TENURE, AND COUNTERVAILING FORCES IN THE TENURE DEBATE 200-22 (1973) (arguing that tenure does not protect academic freedom); Blackburn, *supra* note 1, at 32-34 (relating historical development of tenure and academic freedom).

[87] *See Pennsylvania*, 493 U.S. at 200-01 (speculating that although some evaluators may become less candid in response to possibility of disclosure, not all evaluators will hesitate to defend their peer reviews).

[88] *Id.* at 202 n.9 (leaving unaddressed question of whether universities can redact peer review materials before turning them over to plaintiff).

[89] *Id.*

[90] *See infra* notes 121-26 and accompanying text (discussing redaction in *Schneider*).

[91] *See infra* notes 97-108 and accompanying text (discussing *Torres*).

[92] *See, e.g.*, Rubin v. Regents of the Univ. of Cal., 114 F.R.D. 1, 4 (N.D. Cal. 1986) (granting initial discovery to plaintiff on relevance standard), *aff'd*, 493 U.S. 182 (1990).

[93] *See, e.g.*, Paul v. Leland Stanford Univ., 46 Empl. Prac. Dec. (CCH) ¶35,918, at 41,374-75 (N.D. Cal. 1986) (discussing university's request to redact peer review materials).

Some post-*Pennsylvania* courts did not adopt the mere relevance standard for Title VII discovery.[94] These courts continue to adhere to a policy of deference to universities by either applying a balancing test or allowing redaction.[95] Thus, even after *Pennsylvania*, plaintiffs still face difficulties in obtaining complete peer review materials during discovery.[96]

1. General Discovery: *Torres v. City University of New York*

The United States District Court for the Southern District of New York was one of the first courts to consider a discovery request for peer review materials after *Pennsylvania*.[97] In *Torres v. City University of New York*,[98] the plaintiff alleged unlawful discrimination after the City University of New York (CUNY) denied him tenure.[99] The district court granted plaintiff's request for discovery of both plaintiff's peer review file and the files of other professors at CUNY.[100] The district court interpreted *Pennsylvania* as rejecting both the Second Circuit's qualified privilege approach and any approach utilizing the same balanc-

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As an alternative to redaction, some courts issue protective orders to maintain a university's confidentiality. *See, e.g.*, EEOC v. Notre Dame Du Lac, 715 F.2d 331, 339 (7th Cir. 1983) (holding that protective order may serve to protect unredacted peer review materials). Other courts conduct in camera reviews of peer review materials for incriminating evidence. *See, e.g.*, Goodship v. University of Richmond, 860 F. Supp. 1110, 1113 (E.D. Va. 1994) (concluding after in camera review that materials contain no incriminating evidence).

[94] *See infra* notes 97-126 and accompanying text (discussing *Torres* and *Schneider* decisions).

[95] *See infra* notes 127-42 and accompanying text (analyzing *Torres* and *Schneider* decisions).

[96] *See infra* notes 139-42 and accompanying text (arguing that discovery of peer review materials remains as difficult after *Pennsylvania* as before).

[97] *See infra* notes 98-108 and accompanying text (discussing *Torres*).

[98] Torres v. City Univ. of N.Y. 66 Empl. Prac. Dec. (CCH) ¶43,452 (S.D.N.Y. Sept. 14, 1994).

[99] *Id.* at 82,217. The John Jay College Department of Law, Political Science, and Criminal Justice of the City University of New York denied tenure to the plaintiff. *Id.* The university claimed that the plaintiff lacked the original, analytical scholarship the university required for tenure. *Id.*

[100] *Id.*

ing test.[101] The district court therefore granted plaintiff's discovery request under the mere relevance standard of Rule 26.[102]

On appeal, the Second Circuit rejected the district court's use of the mere relevance standard of Rule 26.[103] The Second Circuit held that the standards for discovery which it promulgated prior to *Pennsylvania* remained valid.[104] Prior to *Pennsylvania*, the Second Circuit had applied a balancing test to consider discovery requests for peer review materials.[105] The test weighed the same interests as the Seventh Circuit's qualified privilege approach rejected by the Supreme Court in *Pennsylvania*.[106] The Second Circuit directed the district court to continue to balance the plaintiff's need for the discovery material against the university's confidentiality interest in those materials.[107] On remand, the trial court applied the Second Circuit's balancing test and denied plaintiff's discovery request.[108]

2. Redaction: *Schneider v. Northwestern University*

The *Torres* court never considered the use of redaction because it denied plaintiff's discovery request.[109] However, the

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[101] *See id.* (rejecting balancing test requiring showing of particularized need for academic peer review materials).

[102] *Id.*

[103] *Id.*

[104] *Torres*, 66 Empl. Prac. Dec. (CCH) at 82,217-18. The Second Circuit rejected the district court's approach to considering the plaintiff's discovery request. *Id.* Instead, the Second Circuit adhered to its own balancing approach used prior to *Pennsylvania*. *Id.*

[105] *See supra* note 45 and accompanying text (discussing *Gray* decision).

[106] *See supra* notes 45, 75-96 and accompanying text (discussing *Gray* and *Pennsylvania* decisions). Both of the balancing tests in *Gray* and *Notre Dame* compare the plaintiff's need for peer review materials to bring forward her case with the confidentiality interests of the university. *Id.*

[107] *Torres*, 66 Empl. Prac. Dec. (CCH) at 82,218 (stating that balancing test should weigh plaintiff's need for peer review materials against university's confidentiality interests).

[108] *Id.* at 82,218-19. The fact that the university provided the plaintiff with three detailed statements of reasons for his denial of tenure weighed heavily in the district court's decision. *Id.* at 82,218. Thus, the district court decision indicates that when universities provide legitimate nondiscriminatory reasons for the tenure denial, a plaintiff must show more than that the peer review materials are relevant. *See id.* at 82,220 (holding that plaintiff must demonstrate particularized need to obtain redacted information). The district court did add that a plaintiff may attempt to show a particularized need to obtain her peer review materials. *Id.*

[109] *Id.* at 82,218.

District Court for the Northern District of Illinois addressed the use of redaction in *Schneider v. Northwestern University*.[110] In *Schneider*, the plaintiff brought an action for unlawful denial of tenure against Northwestern University (Northwestern).[111] During discovery, Northwestern produced the peer review files of the plaintiff and five other professors it had considered for tenure during the relevant time period.[112] However, Northwestern redacted all information identifying the individual reviewers and members of the committee who participated in the tenure decision.[113]

The plaintiff moved to compel disclosure of all the redacted information.[114] Northwestern opposed the motion, claiming the Seventh Circuit's decision in *Notre Dame* required a showing of particularized need before the university must disclose the redacted information.[115] The plaintiff argued that *Notre Dame* was no longer good law in light of the Supreme Court's decision in *Pennsylvania*.[116]

The *Schneider* court first addressed the discovery issue.[117] The district court interpreted *Pennsylvania* as providing a plaintiff access to her peer review materials upon a showing of relevance under Rule 26.[118] The district court also found that the Su-

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[110] 151 F.R.D. 319 (N.D. Ill. 1993).

[111] *Id.* at 319. In *Schneider*, the School of Education at Northwestern University twice rejected the plaintiff's tenure application. *Id.* In her suit, the plaintiff alleged that she was subject to an early tenure review, while male colleagues were not. *Id.* The plaintiff also contended that the Dean orchestrated her negative review by accepting peer reviews over the phone. *Id.* at 320.

[112] *Id.* at 320.

[113] *Id.*

[114] *Id.*

[115] *Id.* Northwestern also argued that the plaintiff failed to show the particularized need for the redacted information that the Seventh Circuit required in *Notre Dame*. *Id.*

[116] *Id.* at 320-21. The effect of *Pennsylvania* on *Notre Dame* remains unclear. *Id.* at 320. As the plaintiff recognized, *Pennsylvania* did not explicitly overrule *Notre Dame*. *Id.* at 321. The Supreme Court in *Pennsylvania* granted certiorari on the limited question of compelled disclosure because of what appeared to be a conflict among the circuits. *Pennsylvania*, 493 U.S. at 188. However, the *Pennsylvania* Court never reached the issue of redaction. *See supra* note 89 and accompanying text (explaining that *Pennsylvania* never reached redaction issue).

[117] *Schneider*, 151 F.R.D. at 321-23.

[118] *Id.* at 321. Before ruling on the plaintiff's motion to compel discovery of the redacted information, the district court analyzed the holdings of *Pennsylvania* and *Notre Dame*. The district court concluded that the strong language of *Pennsylvania* casted doubt on the importance of confidentiality recognized by *Notre Dame*. *Id.* at 323.

preme Court's strong language in rejecting a qualified privilege of academic freedom seriously undermined Northwestern's confidentiality claims.[119] After accepting the plaintiff's contention that the peer review materials were relevant to her claim of discrimination, the district court granted the discovery requests.[120]

Next, the district court addressed Northwestern's use of redaction to remove identifying features from the peer review materials.[121] After noting that the *Pennsylvania* decision left the redaction issue unresolved, the district court decided to allow redaction if Northwestern's confidentiality interests outweighed the plaintiff's need for the materials.[122] After balancing these interests, the district court concluded that the plaintiff should receive unredacted copies of his own peer review materials.[123]

However, the district court allowed Northwestern to redact the materials of the five other candidates.[124] The district court noted that the reviewers evaluated the other five candidates at a time when Seventh Circuit precedent provided an expectation that such materials would remain confidential.[125] Thus, although the district court rejected Northwestern's confidentiality claims when considering whether to grant discovery, it did consider those claims when deciding whether to allow redaction.[126]

The *Torres* and *Schneider* decisions demonstrate the limited effect of *Pennsylvania* on courts considering discovery requests for peer review materials.[127] Both the *Torres* and *Schneider*

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[119] *See id.* at 323 (holding that strong language of *Pennsylvania* weakened Northwestern's assertion of confidentiality interests).

[120] *Id.*

[121] *Id.*

[122] *Id.* at 323-24. In deciding to allow redaction, the district court cited both *Notre Dame* and *Franklin & Marshall College* as decisions approving the use of redaction. *Id.* at 323; *see supra* notes 54-59, 64 and accompanying text (discussing *Notre Dame* and *Franklin & Marshall College* decisions).

[123] *Id.* at 323. In granting the plaintiff's motion to compel disclosure, the district court considered the absence of objections from the plaintiff's peer reviewers. *Id.*

[124] *Id.* The district court concluded that the plaintiff had not demonstrated a need for the identities of the peer reviewers of the five other candidates. *Id.* at 324. If the plaintiff could show such a need, the district court would reconsider plaintiff's request. *Id.*

[125] *Id.*

[126] *Id.*

[127] *See infra* notes 128-42 and accompanying text (arguing that *Pennsylvania* did not affect *Torres* and *Schneider* decisions).

courts utilized balancing tests characteristic of the pre-*Pennsylvania* qualified privilege approach.[128] In *Torres*, the district court applied the balancing test when considering the initial request for discovery.[129] Indeed, in *Torres*, the court essentially adhered to the qualified privilege approach rejected by the Supreme Court in *Pennsylvania*.[130] In *Schneider*, the district court rejected the balancing test when considering the initial discovery request, but applied it when deciding whether to allow redaction.[131] Thus, at least in these early cases, the *Pennsylvania* decision has not made it easier for a plaintiff to obtain unredacted copies of her peer review materials.[132]

Ironically, the Supreme Court itself left the door open for decisions like *Torres* and *Schneider*.[133] In *Pennsylvania*, the university urged the Court to recognize a qualified privilege against disclosure of peer review materials.[134] In rejecting a qualified privilege approach, the Court specifically declined to address the university's assertion that a proper functioning of the tenure process requires confidentiality.[135] The Court also declined to

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[128] *See supra* notes 97-126 and accompanying text (discussing *Torres* and *Schneider* decisions).

[129] *See supra* notes 97-108 and accompanying text (analyzing *Torres* decision).

[130] *See supra* notes 103-108 and accompanying text (describing approach of *Torres* court). In *Torres*, the trial court originally used a relevance test to grant the plaintiff's request for discovery. Torres v. City Univ. of New York, 66 Empl. Prac. Dec. (CCH) ¶43,452, 82,217 (S.D.N.Y. Sept. 14, 1994). On remand, the court denied plaintiff's request using the *Gray* balancing test. *Id.* at 82,218-19. The *Gray* balancing test weighs essentially the same interests as the qualified privilege approach rejected in *Pennsylvania*. *See Pennsylvania*, 493 U.S. at 188 (urging court to adopt balancing test of qualified privilege approach).

[131] *See supra* notes 121-26 accompanying text (describing redaction in *Schneider*).

[132] *See supra* notes 98-126 and accompanying text (discussing *Torres* and *Schneider* decisions). Although the plaintiff in *Schneider* received unredacted copies of her own peer review materials, the court still applied a balancing test characteristic of the qualified privilege approach. Under the qualified privilege approach, a plaintiff is not completely barred from discovery of her own peer review materials as *Schneider* demonstrates. However, the *Schneider* court's balancing test still makes discovery of peer review materials more difficult than a mere relevance standard.

[133] *See infra* notes 134-38 and accompanying text (arguing that *Pennsylvania*'s failure to address redaction invited circuit split).

[134] *Pennsylvania*, 493 U.S. at 188. The university also advanced a First Amendment right to academic freedom preventing wholesale disclosure of peer review materials. *Id.* Addressing this argument, the Court concluded that the EEOC subpoena process does not infringe any of the university's First Amendment rights. *Id.* at 201.

[135] *Id.* at 193 (accepting contention that universities play significant role in American society but declining to address whether tenure process requires confidentiality).

address the use of redaction.[136] Without guidance from the Supreme Court on these issues, the *Torres* and *Schneider* courts relied on their circuits' precedents to reach their decisions.[137] As a result, both courts utilized balancing tests similar to the qualified privilege approach the *Pennsylvania* Court rejected.[138]

Under the *Torres* approach, discovery of peer review materials will remain as difficult as it was before *Pennsylvania*.[139] Hence, redaction will seldom be an issue.[140] Courts following the *Schneider* approach will use a relevance standard for granting or denying discovery of peer review materials.[141] Since most plaintiffs will meet this standard, universities will turn to redaction to maintain the confidentiality of peer review materials.[142]

III. Analysis and Proposed Solution

In *Pennsylvania*, the Supreme Court sought to resolve a circuit split regarding the discovery of peer review materials in unlawful denial of tenure actions.[143] The Court strongly rejected the qualified privilege approach universities had advanced.[144] However, the *Torres* and *Schneider* decisions illustrate *Pennsylvania*'s failure to make discovery of peer review materials any easier for plaintiffs.[145] By failing to address the use of redaction, *Pennsylvania* left the issue open for the *Schneider* court.[146]

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[136] *See supra* note 88 (noting that *Pennsylvania* never reached redaction issue).

[137] *See supra* notes 133-36 and accompanying text (discussing rationale of *Torres* and *Schneider* decisions).

[138] *See supra* notes 127-32 and accompanying text (discussing rationale of *Torres* and *Schneider* decisions).

[139] *See supra* notes 127-38 and accompanying text (arguing that *Pennsylvania* did not affect *Torres* and *Schneider* decisions).

[140] *See, e.g.*, Torres v. City Univ. of N.Y., 66 Empl. Prac. Dec. (CCH) ¶43,452, 82,218-19 (S.D.N.Y. Sept. 14, 1994) (denying plaintiff's discovery request, thereby making redaction moot).

[141] *See* Schneider v. Northwestern Univ., 151 F.R.D. 319, 323-24 (N.D. Ill. 1993) (discussing application of relevance standard to granting discovery).

[142] *See supra* notes 124-26 and accompanying text (discussing *Schneider* court's protection of university's confidentiality interests through use of redaction).

[143] *See Pennsylvania*, 493 U.S. at 188 (granting certiorari because of importance of Title VII discovery and apparent conflict in approach among circuits).

[144] *See supra* notes 84-88 and accompanying text (discussing *Pennsylvania*'s rejection of qualified privilege approach).

[145] *See supra* notes 97-126 and accompanying text (discussing *Torres* and *Schneider* decisions).

[146] *See supra* notes 121-26 and accompanying text (discussing *Schneider* court's consider-

In *Schneider*, the court allowed the use of redaction to protect the university's confidentiality interests.[147] By allowing redaction, the *Schneider* court failed to recognize that the arguments in favor of redaction are similar to the arguments in favor of a qualified privilege for peer review materials.[148] Because *Pennsylvania* rejected the qualified privilege arguments, the spirit of *Pennsylvania* requires a similar rejection of the arguments favoring redaction.[149] *Schneider*, however, did not follow this line of reasoning.[150]

To be consistent with *Pennsylvania*, courts should decide discovery requests for peer review materials using the relevance standard of Rule 26.[151] After allowing discovery of peer review materials, courts should deny requests for redaction because allowing redaction effectively negates the discovery originally granted.[152] Thus, the spirit of *Pennsylvania* requires courts to permit discovery of complete, unredacted peer review materials.[153]

The primary argument against the use of redaction is that identifying information is relevant to a showing of discriminatory intent.[154] Because the plaintiff has the burden of proving intentional discrimination, the identity of peer reviewers will always be relevant.[155] The plaintiff seldom has direct evidence of intentional discrimination because employers are unlikely to pro-

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ation of redaction).

[147] *See supra* note 125 and accompanying text (noting *Schneider* court's protection of third party confidentiality interests).

[148] *See supra* notes 127-42 and accompanying text (comparing post-*Pennsylvania* decisions with spirit of *Pennsylvania*).

[149] *See infra* notes 151-53 and accompanying text (arguing that spirit of *Pennsylvania* rejects use of redaction).

[150] *See supra* notes 109-26 and accompanying text (discussing *Schneider*).

[151] *See, e.g.*, Schneider v. Northwestern Univ., 151 F.R.D. 319, 323 (N.D. Ill. 1993) (agreeing with plaintiff that peer review materials are relevant and granting discovery).

[152] *See infra* notes 154-78 and accompanying text (discussing arguments against redaction).

[153] *See infra* notes 154-98 and accompanying text (arguing that *Pennsylvania* requires courts not to allow redaction).

[154] *See infra* notes 155-62 and accompanying text (discussing importance of peer review materials to plaintiff).

[155] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1973) (holding that plaintiff has ultimate burden of proving intentional discrimination); *see supra* note 35 and accompanying text (discussing Title VII framework).

vide explicitly discriminatory reasons for the denial of tenure.[156]

Without direct evidence of discriminatory intent, a plaintiff must look for circumstantial evidence.[157] In these circumstances, ascertaining the identity of peer reviewers is necessary.[158] For example, a plaintiff might show that a peer reviewer has

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[156] *Pennsylvania*, 493 U.S. at 193. In *Pennsylvania*, the Supreme Court recognized that disclosure of peer review materials is often necessary for the plaintiff to show that discrimination has occurred. *Id.* The Court postulated that evidence of discrimination, if any, will likely exist in peer review materials. *Id.*; *see supra* note 35 and accompanying text (discussing *Clark* decision).

[157] *See supra* note 34 (discussing difficulty in obtaining direct evidence of discrimination). Without direct evidence of intentional discrimination, a plaintiff must rely on circumstantial evidence. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983) (holding that district court erred by requiring direct evidence of discriminatory intent). For example, a plaintiff may compare her qualifications against other professors to whom the university granted or denied tenure during the same relevant time period. *See, e.g.*, Gibson v. American Broadcasting Cos., Inc., 892 F.2d 1128 (2d Cir. 1989) (holding that in light of Title VII's strong remedial purposes, comparative proof is generally admissible in Title VII discrimination suit). A plaintiff may use as evidence of discriminatory intent any substantial differences in the treatment of similar candidates. *Id.*

Comparing the treatment of similar tenure candidates necessarily forces courts to second-guess universities. *See* Lieberman v. Gant, 630 F.2d 60, 67-69 (2d Cir. 1980) (declining plaintiff's request to second-guess university decision makers). In *Lieberman*, an early Title VII case involving a university, the Second Circuit refused to scrutinize various tenure decisions to determine if similar candidates were treated similarly. *Id.* The *Lieberman* court held that when enacting Title VII, Congress could not have envisioned that courts would review the tenure decisions of universities. *Id.* at 67. Under *Lieberman*, comparative evidence could only be used when a plaintiff claimed her qualifications were clearly and demonstrably superior to others receiving tenure or independent evidence of discrimination existed. *Id.* at 68. However, later Second Circuit decisions rejected such an extreme position. *See* Fisher v. Vassar College, No. 94-7737, 1995 U.S. App. LEXIS 25266, at *31 (2d Cir. Sept. 7, 1995) (affirming Congressional intent to examine university tenure decisions); Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984) (holding that tenure decisions are not exempt from Title VII). Today, all courts subject tenure decisions to judicial review as they would any other employment decision. *See Pennsylvania*, 493 U.S. at 202 (holding that universities do not have qualified privilege preventing disclosure of confidential peer review materials).

A plaintiff may also use statistics to establish discriminatory intent. *See Fisher*, 1995 U.S. App. LEXIS 25266 at *56 (upholding use of statistics to establish discrimination under disparate treatment theory). *See generally* WALTER B. CONNOLLY & DAVID W. PETERSON, USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION §1.02 (1980) (discussing general use of statistics in Title VII cases). However, statistics must offer more than anecdotal evidence of discrimination. *Fisher*, 1995 U.S. App. LEXIS 25266 at *56-72 (rejecting plaintiff's statistical model as merely anecdotal). Courts will scrutinize statistical models for faulty assumptions and spurious correlations. *Id.*

[158] *See supra* note 157 and accompanying text (discussing need for indirect evidence of discrimination).

consistently evaluated male faculty candidates more favorably than female candidates.[159] However, a plaintiff cannot make this showing unless she knows the identity of the reviewer.[160] In another hypothetical situation, the plaintiff might show that the peer reviewer has a history of using racially or sexually offensive language.[161] Again, the identity of the peer reviewer is necessary to make this showing.[162]

The possibility that a university might remove incriminating evidence presents another argument against the use of redaction.[163] When courts allow redaction, they generally permit the university to select the redacted information.[164] Even though courts compare the redacted copies with the originals, the courts' ability to police the universities remains in doubt.[165] In *Notre Dame*, the court recognized its reliance on the integrity

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[159] *See* McMillin, *supra* note 36, at 1125-26. McMillin notes that in many cases the identities of peer reviewers will be relevant to the plaintiff's claim. *Id.* at 1125-26. For example, "old-boy networks" function to deny women strong recommendations from some key men. *Id.* Substantiating the existence of an "old-boy network" requires comparing the recommendations of women against those of men. *Id.* This comparison requires the identities of the reviewers. *Id.*; Rubin v. Regents of the Univ. of Cal., 114 F.R.D. 1, 4 (N.D. Cal. 1986) (holding that plaintiff is entitled to identities of her peer reviewers in order to prove discriminatory effects of "old-boy network"). *See generally* Vladeck & Young, *Sex Discrimination in Higher Education: It's Not Academic*, 4 WOMEN'S RTS. L. REP. 59, 65 (1978) (describing effect of "old-boy network" on hiring of women and minorities in academia).

[160] *See* Fisher v. Vassar College, 852 F. Supp. 1193, 1222 (S.D.N.Y. 1994) (allowing comparison of peer review files to establish intentional discrimination) *overruled on other grounds by* Fisher v. Vassar College, No. 94-7737, 1995 U.S. App. Lexis 25266 (2d Cir. Sept. 7, 1995). To show that a peer reviewer has consistently discriminated against a protected group requires comparison of several evaluations. *Fisher*, 852 F. Supp. at 1222. To obtain other evaluations by a particular peer reviewer requires his identity. *Id.*

[161] *See, e.g.*, Clark v. Claremont Univ. Ctr., 8 Cal. Rptr. 2d 151 (Ct. App. 1992). In *Clark*, the plaintiff discovered that the university president who made the ultimate decision to deny him tenure was the former president of an east coast college. *Id.* at 162-63. During that time, some twenty civil rights organizations accused the college of racism. *Id.* Students at that college went on strike demanding the president's resignation. *Id.* Subsequently, the entire faculty voted fifty-seven to four to censure the president and fifty-three to seven to dismiss him. *Id.*

[162] *See supra* note 161 and accompanying text (discussing need for peer reviewer identities to undertake comparative analyses).

[163] *See supra* notes 164-78 and accompanying text (discussing possibility of improper redaction).

[164] *See, e.g.*, EEOC v. Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983) (allowing university to make initial redactions).

[165] *See* McMillin, *supra* note 36, at 1125-26 (arguing that when judges review redactions, they have no basis upon which to assert the relevancy of redacted information, even when that information is highly germane to plaintiff's case).

of the university to redact only information identifying the author of the materials.[166] The court also noted its limited remedies against a university redacting non-identifying information.[167]

Allowing universities to select the redacted information results in inherent unfairness to the plaintiff.[168] First, redaction necessarily involves judgment calls by universities as to what constitutes identifying material.[169] Since universities wish to present evidence in the best possible light, they are likely to make judgment calls in their favor.[170] Thus, universities have an incentive to redact any information that might even remotely identify the author in order to deny a plaintiff as much information as possible.[171]

Allowing universities to select the redacted information may also result in the removal of critical information regarding discriminatory intent.[172] For example, a peer review letter from a former professor might state that the professor thought the plaintiff, a former research assistant, was too aggressive and needed to act more feminine. If the plaintiff had only assisted one or two professors in her career, the university could redact the statement on the basis that it is identifying.[173] However, the statement about the plaintiff being "too aggressive" and the suggestion to act more "feminine" provide precisely the type of

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[166] *See Notre Dame*, 715 F.2d at 338 (noting that court must rely on integrity of universities to redact only identifying information).

[167] *See id.* (stating that court's only remedy against university redacting non-identifying incriminating evidence is to be skeptical of future representations).

[168] *See infra* notes 170-75 and accompanying text (discussing unfairness in allowing universities to remove information from peer review materials).

[169] *See infra* note 174 and accompanying text (providing example of university judgment call).

[170] University of Pennsylvania v. EEOC, 493 U.S. 182, 194 (1990). In *Pennsylvania*, the Supreme Court recognized that universities have no interest in complying with discovery orders and usually wish to delay compliance as long as possible. *Id.* Through the use of redaction, universities can achieve these goals. *See, e.g.*, Paul v. Leland Stanford Univ., 39 Empl. Prac Dec. (CCH) ¶35,918 at 41,374 (N.D. Cal. 1986) (finding university's redactions unacceptable because university removed comments favorable to plaintiff).

[171] *See, e.g., Paul*, 46 Empl. Prac. Dec. (CCH) at 41,374-75.

[172] *See infra* note 174 and accompanying text (providing example of university judgment call).

[173] A university would argue that the description of the candidate as a former research assistant of the evaluator identifies the evaluator. *See* McMillin, *supra* note 36, at 1127 (discussing redaction).

subtle sex stereotyping that the plaintiff needs to establish discriminatory intent.[174] Allowing redaction of the statement therefore prejudices the plaintiff.[175]

Redaction additionally prejudices the plaintiff when universities purposefully redact non-identifying incriminating evidence.[176] Although universities would face sanctions for such action, if they had discriminated against a plaintiff, they might see the potential consequences of excessive or improper redaction as relatively insignificant.[177] Further, universities may consider the risk of receiving sanctions slight.[178]

A possible objection to denying the use of redaction is the claim that allowing plaintiffs access to the identities of peer reviewers inhibits the tenure process.[179] This argument finds support among many commentators.[180] These commentators

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[174] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In *Price Waterhouse*, the Supreme Court allowed evidence of sexual stereotyping to support an inference of unlawful discrimination. *Id.* at 237. The employer in *Price Waterhouse* unlawfully discriminated against the plaintiff on the basis of sex by consciously giving credence and effect to evaluators' comments that resulted from sex stereotyping. *Id.* The evaluators' comments included: 1) descriptions of the plaintiff as "macho," 2) a comment that plaintiff "[h]ad matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady partner candidate," and 3) a suggestion that plaintiff "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

[175] *Id.* at 237 (finding that removal of statements was prejudicial to plaintiff).

[176] *See, e.g.*, Paul v. Leland Stanford Univ., 39 Empl. Prac. Dec. (CCH) ¶35,918, at 41,374 (N.D. Cal. 1986) (describing university's redaction as improper).

[177] Scott Shuger, *The Academic Side-Step; Academic Freedom is Supposed To Foster Debate. So Why Do College Presidents Use It To Avoid Though Issues?*, WASHINGTON MONTHLY, April, 1990, at 33. In a particularly egregious case, after a court ordered Harvard University to provide a plaintiff access to some of her peer review materials, Harvard revealed that it had destroyed the materials in question. *Id.* Harvard's claim that it destroyed the materials because of a "space problem" was clearly facetious. *Id.* Yet Harvard obviously felt that the costs of turning over the materials outweighed the costs of destroying them.

[178] *See, e.g., Paul*, 39 Empl. Prac. Dec. (CCH) at 41,325 (describing university's redaction of peer review materials as inadequate yet imposing no sanctions).

[179] *See infra* note 181 and accompanying text (citing authority for argument that tenure process requires confidentiality).

[180] *See* MILTON FISK ET AL., THE CONCEPT OF ACADEMIC FREEDOM (Edmund L. Pincoffs ed., 1972) (arguing that tenure is necessary for protection of academic freedom); Sidney Hook, *Epilogue: What Is To Be Done? in* IN DEFENSE OF ACADEMIC FREEDOM 260 (Sidney Hook ed., 1971) (admitting abuses with tenure but defending tenure against critics); RUSSELL KIRK, ACADEMIC FREEDOM: AN ESSAY IN DEFINITION 2 (1955) (calling academic freedom incalculably precious to civilization); Walter P. Metzger, *Academic Freedom in Delocalized Academic Institutions*, in DIMENSIONS OF ACADEMIC FREEDOM 1 (1969) (arguing that academic freedom is essential to universities' identity); MCCARTHY, *supra* note 2, at 7 (detailing

argue that outside scrutiny has a chilling effect on tenure decisions.[181] Further, they argue that achieving academic excellence requires the autonomy provided by confidentiality.[182]

Several courts have also recognized the importance of confidentiality in the tenure process.[183] In *Notre Dame*, the court considered confidentiality an essential element of the tenure process.[184] The Supreme Court also recognized in *Pennsylvania* that confidentiality might be an important element of the functioning tenure process.[185] However, the *Pennsylvania* Court emphasized that confidentiality interests comprise only one side of the balance.[186] On the other side lies the clear mandate from Congress to combat discrimination in higher education.[187] The Third Circuit recognized the congressional mandate to combat discrimination in *EEOC v. Franklin & Marshall College*.[188] In *Franklin & Marshall College*, the court stated that given the mandate from Congress to combat discrimination, peer reviewers must overcome their feelings of discomfort at knowing that their reviews might come under judicial scrutiny.[189]

Some courts have stated that injury to the tenure process as a result of compelling disclosure of peer review materials remains remote, speculative, and attenuated.[190] Other courts had previously noted that since peer reviewers already have tenure, they have far less to fear from disclosure than those making compara-

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tradition of confidentiality in tenure process).

[181] *See* Brooks, *supra* note 6, at 711-13 (describing tradition of confidentiality in tenure process).

[182] *Id.*

[183] *See, e.g.*, EEOC v. Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983) (stating that confidentiality is absolutely essential to proper functioning of tenure process).

[184] *Id.* The *Notre Dame* court considered confidentiality a prerequisite to receiving candid, critical, objective, and thorough peer evaluations. *Id.*

[185] *Pennsylvania*, 493 U.S. at 193. The Supreme Court agreed that universities play significant roles in American society. *Id.* The Court, however, carefully avoided directly addressing the importance of confidentiality to the tenure process. *Id.*

[186] *Id.*

[187] *Id.* The Supreme Court called the congressional mandate to fight discrimination a great, if not compelling, governmental interest. *Id.*

[188] 775 F.2d 110, 114 (3d Cir. 1986); *see supra* note 64 (discussing *Franklin & Marshall College*).

[189] *See Franklin & Marshall College*, 775 F.2d at 115 (holding that mandate from Congress to fight discrimination superseded confidentiality interests of peer reviewers).

[190] *Pennsylvania*, 493 U.S. at 200 (dismissing universities' argument that confidentiality is essential to tenure process).

ble decisions in private business.[191] Indeed, as long as the evaluator bases her review on the candidate's scholarly record, little harm can befall her.[192] Only evaluators who base their assessments on improper criteria need fear judicial scrutiny.[193]

The existence of non-confidential tenure systems further weakens the argument that the tenure process requires confidentiality.[194] Some universities utilize non-confidential tenure systems that allow a candidate complete access to her peer review materials.[195] In addition, outside of academia, employers cannot claim confidentiality interests to prevent the disclosure of relevant evidence.[196] Since the Supreme Court considers combating discrimination a great, if not compelling, governmental interest,[197] few policy arguments exist for granting universities preferential treatment.[198]

CONCLUSION

Redaction prevents a plaintiff from obtaining information relevant to her charge of discrimination.[199] Redaction also invites universities to hide incriminating evidence and renders it difficult for a plaintiff to prove intentional discrimination.[200]

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[191] *See* Jackson v. Harvard Univ., 721 F. Supp. 1397, 1407 (D. Mass. 1989) (rejecting contention that disclosure of peer review materials will chill frankness of evaluators).

[192] *Id.* (stating that evaluators who support their critique of candidate with scholarly analysis have nothing to fear).

[193] *Id.*

[194] *Pennsylvania*, 493 U.S. at 200 (recognizing existence of tenure systems that do not use peer review, citing G. BEDNASH, THE RELATIONSHIP BETWEEN ACCESS AND SELECTIVITY IN TENURE REVIEW OUTCOMES (1989) (unpublished Ph.D. dissertation, University of Maryland)).

[195] *See* RICHARD MILLER, EVALUATING FACULTY FOR PROMOTION AND TENURE 107-10 (1987) (discussing tenure systems that do not use peer review).

[196] *See, e.g.*, EEOC v. Shell Oil Co., 466 U.S. 54 (1984) (ordering compliance by non-university employer with EEOC subpoena for records regarding employment of African-Americans and women); *see also Pennsylvania*, 493 U.S. at 194 (speculating that acceptance of university's qualified privilege claim would lead to similar privilege claims by other employers); Jackson v. Harvard Univ., 721 F. Supp. 1397, 1407 (D. Mass 1989) (questioning why universities should be entitled to privilege to which other employers are not).

[197] *Pennsylvania*, 493 U.S. at 193 (noting that few would deny that ferreting discrimination is compelling governmental interest).

[198] *Id.* at 193-94 (rejecting qualified privilege as contrary to policy of Title VII).

[199] *See supra* notes 154-62 and accompanying text (discussing plaintiff's need for peer review materials to prove intentional discrimination).

[200] *See supra* notes 163-78 and accompanying text (discussing redaction of relevant, non-

The strong language of *Pennsylvania* rejecting the qualified privilege approach indicates that the Supreme Court did not intend to give universities special treatment.[201] Thus, courts should decide discovery requests for peer review under the relevance standard of Rule 26.[202] To be consistent with the spirit of *Pennsylvania*, once the court grants discovery of peer review materials, the court should not allow redaction of the materials.[203]

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identifying information).

[201] *See supra* notes 75-96 and accompanying text (analyzing *Pennsylvania* decision).

[202] *See supra* note 151 and accompanying text (discussing proposal).

[203] *See supra* notes 152-53 and accompanying text (discussing proposal).